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The Settlement of Interstate Economic Disputes:
Interests at Stake and Relevance under International Economic Law

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ANNO ACCADEMICO 2020/2021

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Introduction

The topic of international adjudication has a certain relevance under international law because adjudication is not only linked to the concept of dispute settlement function, but it also acquires importance in relation to fact-finding, law-making and international governance ones. Additionally, the choice of this topic was incentivized by a recent trend to investigate international adjudication with an interdisciplinary approach. In this case, the *fil rouge* between the various disciplines mentioned below is international economic law, as it defines the material scope of the substance addressed. In this sense, it is important to mention that the theme is not strictly related to one specific court or tribunal, but it corresponds to the reality of inter-State economic adjudication, with the perspective thinking across many adjudicative systems.

For the development of this topic, the dissertation will follow three stages by answering three questions, in respective chapters.

In the first chapter, the question regards the definition and the nature of inter-State economic disputes. Thus, the goal is to give a proper definition of the term “economic disputes”, which currently lacks a formal recognition, and to elucidate its scope and nature. Considering the width of such concept, we need to focus our attention on a specific category of economic disputes, which are the inter-State disputes. Indeed, the fact that the disputing parties are both sovereign States tremendously influences the reality of the dispute and consequently the settlement. For this reason, a proper theoretical framework of the discussion requires an analysis of the peculiarities of inter-State

disputes in international law to introduce those that are applicable to economic controversies too.

In the second chapter, the question focuses on the *fora* before which the abovementioned disputes can be brought. In doing so, the analysis considers the specific international adjudicative bodies as parts of the visible reality of international adjudication on economic matters. This assessment will be guided by a critical approach toward the existence and the effectiveness of these courts and tribunals, by focusing on three main aspects: jurisdiction, applicable law and effectiveness of decisions. Furthermore, this evaluation would not be complete and effective if we considered the legal frameworks in isolation, and that is why, the study of these legal institutions is supported by expansive considerations with political and economic insights, underlining State parties' interests in settling disputes through these specific bodies.

In the third chapter, the question seeks to establish that the relevance of inter-State dispute settlement is not limited only *inter partes* but it extends further to following doctrine and case law. Therefore, concentration is shifted on relevant inter-State disputes that have shaped international economic law, as they have created law or have interpreted legal institutes which are today considered pillars of this subject. The aim is to demonstrate that despite the decreasing trend of inter-State disputes, their determinations are relied on in current disputes due to their contribution to this specific area of International Law. As a result, we have three questions and three approaches to constitute this investigation in international economic adjudication.

Chapter I Inter-State disputes in International Law

This first chapter will consider the question of the existence of disputes between states in the background of international law and then, more specifically, of international economic law.

With the phenomenon of globalization a trend has been perceived in considering international economy and economic relations less state-centric,[1] in the sense that States are commonly thought to have lost control on the economy and to have their state sovereign authority undermined,[2] due to the activity of International Organizations, multinational and transnational corporations and financial systems.[3] This progressive privatization of international economic relations can be demonstrated by the increasing importance of the discipline of international investment and the consequent regime of investment arbitration where the investor, a non state actor, gains importance as such, reducing the influence of only States disputes.[4] Although it is true that international personality is something that is formally recognized to Sovereign States and other few exceptions, in the words of Francisco Orrego-Vicuna, the international legal order is shifting toward a system where privatization infringes the law-making process of treaties.[5] Nevertheless, these new actors demand new rules for their specific sectors, without just restructuring approaches to international economic relations.[6]

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[1] Y. TANAKA, *The peaceful Settlement of international Disputes,* Cambridge, 2018, 17.

[2] H. KELSEN, *Das Problem der Souveranitat und die Theorie des Volkerrechts,* Tubingen 1960, 274; A. CARRINO (trad. it). *Il problema della sovranità e la teoria del diritto internazionale*, Milano, 1989, 402

[3] A. DEL VECCHIO, *I tribunali internazionali tra globalizzazione e localismi*, Bari, 2015, 30 citing A. HURREL, *I Explaining the Resurgence of regionalism in World Politics*, Review of International Studies, 1995 Vol. 21(4) 345.

[4] Particularly nowadays it is easier for a multinational or transnational company to influence a sovereign state in its economic decisions than the opposite. See V.J. MIKLER, *Global Companies as Actors in Global Policy and Governance,* in J. MIKLER (ed), *The Handbook of Global Companies,* 1st edn, New Jersey, 2013, 4s.

[5] F. ORREGO VICUNA, *Of Contracts and Treaties in the Global Market*, Max Planch Yearbook of United Nations Law, 2004 Vol. 8, 357.

[6] M.R. FERRARESE, *Le istituzioni della globalizzazione*, 1st edn, Bologna, 2000, 60.

[7] Y. TANAKA, SEE 1.

The first paragraph will address the legal definition of "inter-state dispute" under international law as assessed by the International Court of Justice. The second one will explore the idea of "dispute" in International Economic Law, approaching elements from the disciplines of Economics, Political Theory and the works of international legal scholars. After investigating such idea, the thesis will argue why it is proper to consider economic disputes more like legal disputes on economic matters, laying the bases for the subsequent picture of historical and current reality of international economic adjudication.

In the last paragraph the analysis will be carried on the peculiarities of adjudicative settlement systems when both parties are sovereign states and on the various principles framing the development of the topic.

Hence, the objective of this chapter is to demonstrate that International law can no longer be appreciated without its judicial dimension, although adjudication - as the function of independent judges apply the law in order to settle specific disputes before them by issuing legally binding decisions in accordance to pre-determined set of rules of procedures[8] - may not be states' first choice among international dispute settlement mechanisms.[9]

1 Legal Definition of Disputes under International Law

The first element required to set up the appropriate framework for the discussion is the legal definition of inter-state disputes under Public International Law. Its relevance is countersigned by the fact that the "lack of dispute" is used more recurrently today as ground over which single claims and entire cases are dismissed before international courts.[10] Therefore, the function of the defined concept would be to express, in a legally discrete term, the substance related to the International Court of Justice in its empowerment to make a judicial decision. Various adjudicative bodies in the international scenario have shared a common

[8] B KINGSBURY, *International Courts: Uneven Judicialization in Global order* in J. CRAWFORD and M. KOSKENNIEMI (eds.) *The Cambridge Companion to International Law*, Cambridge, 2012, 7s.

[9] S. BESSON, *Legal Philosophical Issues of International Adjudication: getting over the amour impossible between international law and adjudication*, in C.P.R. ROMANO, K.J. ALTER AND Y. SHANY (ed.), *Oxford Handbook of International Adjudication* (1st ed.), Oxford, 2013, 415.

[10] C. SCHREUER, *What is a legal Dispute*, in I. BUFFARD, J. CRAWFORD, A. PELLET AND S. WITTICH (eds.) *International Law between Universalism and Fragmentation*, Leiden, 2008, 979

view over a well-established concept,[11] but to better comprehend this shared idea it is desirable to consider the environment where this concept was developed and its consequent evolution process. Therefore, we will consider the rules and jurisprudence of the International Court of Justice (ICJ).

Primarily, the existence of an "inter-state dispute" recalls firstly the presence of two or more states, and that between them a controversy rises, thus a partial analysis of these two elements must be addressed in advance.

A State is a sovereign and independent person of international law, whose qualifications, as enlisted in the 1933 Montevideo Convention,[12] are: a permanent population, a defined territory, a government [stable political community], and the capacity to enter international relations with other States.[13] Together with these conditions, other developed criteria need to be satisfied to accomplish the definition of States: the independence [formal and actual] and the effectiveness of the government; a certain degree of permanence, although it may be superfluous considered together with the abovementioned political stability; and the willingness respect of international law.[14] Once this aspect has been explained, we can open the discussion about when two states can be recognized to be in a dispute can be addressed profoundly.

Article 36 ICJ Statute states that the International Court of Justice (ICJ) has a specific jurisdiction, described as "contentious", whose scope is to settle cases States refer to it, according to the rules of the statute. The same article enlists four subjects of possible legal disputes where the jurisdiction can be recognized and

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[11] P. PALCHETTI, *Dispute* in *Max Planck Encyclopedias of International Law*, Oxford, 2018, para. 9.

[12] The Montevideo Declaration, despite being signed in 1933 only by 20 American States [and ratified at different times], it is recognized to be part of customary international law, thus applying extensively to all States of the international community. Indeed, it has been recognized as the codification of the so called "declarative Theory of Statehood". See H. LAUTERPACHT, *Recognition in International Law*, Cambridge, 2012, 419; D.J. HARRIS, *Cases and Materials on International Law*, 6th edn, London, 2004, 99; J. Crawford, Creation and incidence of statehood, in J. Crawford (ed.) Brownlie's Principles of Public International Law, 9th edn, Oxford, 2019, 117s.

[13] Article 1 Montevideo Convention on the Rights and Duties of States

[14] Surely, we could also consider other criteria proposed by scholars, like Crawford, who stresses also the importance of the recognition and of the existence of a legal order. See J.R. CRAWFORD, *Creation and incidence of statehood*, in J.R. CRAWFORD (ed.) *Brownlie's Principles of Public International Law*, 9th edn, Oxford, 2019, 119-124; and J.R. CRAWFORD, *The Creation of States in International Law*, 2nd edn, Oxford, 2007, 38s.

accepted as compulsory by Member States (MSs) through according declarations.[15] Additionally, under Article 38 of the statue of the International Court of Justice (ICJ Statute) the adjudicative function of the Court is recalled as to "*decide in accordance with international law*", whose sources are enlisted in the first comma of the same article, the disputes that States decide to submit before the same Court.[16] Conclusively, States reassert the positive contentious jurisdiction as a compulsory method of dispute settlement, whose effectiveness is given by the existence itself of the disputes and their submission before the Court chancellery.[17] As a consequence, whenever two or more states submit an application before the ICJ, the existence of a legal dispute between them is one of the conditions parties need to satisfy for the establishment of the jurisdiction of the Court. This means that the existence of the dispute is a preliminary condition to the exercise of the judicial function of the ICJ, as it was explicitly mentioned in *Nuclear Tests case,* where it was defined as "primary".[18] Due to its nature and importance, the Court is also entitled to analyse this point on its own initiative, even though the parties decided not to question it specifically in their submissions, with the purpose of confirming its jurisdiction.[19]

Considering the necessity to establish the concept of "dispute", it is mandatory to say that neither the ICJ Statute nor its Rules of Court are valuable to this end, as both lack such a definition. For this reason, the analysis will cover the wider ICJ jurisprudence and will consider additional references to the activity of the Permanent Court of International Justice, hereafter PCIJ, which was its predecessor.

In *Mavrommatis Palestine Concessions case* 1924, the PCIJ decreed that a dispute between two parties is "*a disagreement on a point of law, or fact, or a*

[15] Article 36(1-2) Statute of the International Court of Justice.
[16] Article 38(1) Statute of the International Court of Justice.
[17] The jurisdiction of the International Court of Justice must be understood as compulsory only when the State parties affirm so, indeed, as we will see in Chapter II, the only time we ca conclude that the ICJ has ex-ante jurisdiction is when the disputing parties have either agreed to a compromissory clause, or both have submitted to the chancellery two optional clauses with equivalent scope.
[18] *Nuclear Tests (Australia v France, New Zealand v France)* Judgment of 20 December 1974, [1974], ICJ Rep 253, para 55. Available at < https://www.icj-cij.org/en/list-of-all-cases >.
[19] *South West Africa Cases, Ethiopia v South Africa; Liberia v South Africa*, Preliminary Objections, Judgment of 21 December 1962, [1962] ICJ Rep 319, 328. Available at < https://www.icj-cij.org/en/list-of-all-cases >.

conflict of legal views or of interests between two persons".[20] In the famous obiter dicta, the definition is very broad and under some aspects extremely general, and examples of this assertion are the use of the terms "*persons*" instead of "States", which were the only subjects entitled to bring a claim before the PCIJ at that time, and "*disagreement"*, summarily compared to "dispute" but not distinguished from this latter.[21] In two following cases, namely *The Chorzow Factory 1927* and *Certain German Interests in Polish Upper Silesia 1928*, the judges specified that a difference of opinion would arise after a government explicates that its views are conflictual with the attitude of another equal,[22] and established that diplomatic negotiations are a necessary mean to define the subject matter of a dispute, before this latter can become subject of an application by the claimant before the tribunal.[23] Subsequently, the ICJ confirmed and developed the notion of "dispute" under a procedural outlook, establishing that an existing dispute requires the "*claim of one party to be positively opposed by the other*",[24] and that both must "*hold clearly opposite views concerning the question…of certain international obligations*".[25] Generally, the ICJ has considered the assessment of this preliminary condition a matter of substance, or an "*objective determination*", as it asserted in 1950 *Advisory Opinion on Interpretation of Peace Treaties*.[26] In other words, the Court recognized that it shall neither take into consideration the procedural elements of a case, despite their relevance,[27] nor the subjective perspective of one party, respectively the

[20] *Mavrommatis Palestine Concessions*, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2, p. 11. Available at < https://www.icj-cij.org/en/pcij-series-a >.
[21] *Ibidem.*
[22] *Certain German Interests in Polish Upper Silesia (Germany v Poland)* (Preliminary Objections), Judgment of 25 August 1925, PCIJ Series A No 6, para. 35. Available at < https://www.icj-cij.org/en/pcij-series-a >.
[23] *Interpretation of Judgements Nos. 7 and 8 (Chorzòw Factory), Germany v Poland*, Judgement of 16 December 1927, PCIJ Series A No 13, ICGJ 251 (PCIJ 1927), 10s. Available at < https://www.icj-cij.org/en/pcij-series-a >.
[24] *South West Africa cit.*, Preliminary Objections, I.C.J. Reports 1962, 328.
[25] *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea* (Nicaragua v. Colombia), Preliminary Objections, Judgment of 17 March 2016, I.C.J. Reports 2016 (I), p. 26, para. 50. Available at < https://www.icj-cij.org/en/list-of-all-cases >.
[26] *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, First Phase, Advisory Opinion, Judgment of 30 march 1950, I.C.J. Reports 1950, 74. Available at < https://www.icj-cij.org/en/list-of-all-cases >.
[27] *Ivi, para. 38, citing Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I), p. 84, para. 30.

assertions of the applicant or the defences of the respondent.[28] Adversely, it shall examine the facts of the case and the evidence submitted by the parties, presented with the specific intent to demonstrate the existence of a genuine conflict between opposing attitudes and legal interests, such as statements and documents.[29]

The judges may decide to consider eventual previous consultations and diplomatic cables, where the parties communicated opposite positions, as it happened in *Certain Property Case 2005.*[30] Still, even if this type of communication lacked, a dispute may still exist, as the Court declared in two decisions: the Advisory Opinion on *Headquarter Agreement case 1947* and *Teheran Hostages case 1980, where after* its scrutiny, the ICJ recognized the existence of a dispute, and consequently, its jurisdiction. In the first decision, the Court considered the facts and based the existence of a dispute on the conflicting attitudes of the parties, despite the absence of a formal opposition by the respondent to the claims.[31] In the second, the Court confirmed its approach dismissing Iran non response to US claims as an obstacle to the establishment of a dispute and to the consequent determination of jurisdiction, due to the respondent's actions in breach of international conventions.[32]

In *Marshall Islands v. United Kingdom 2016* the ICJ took an historical position, because it dismissed the application by adopting the inexistence of the dispute as legal ground after a long-time, and because it incremented the prerequisites for the assessment on the subject, expanding the aforementioned views.

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[28] *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom, Marshall Islands v India, Marshall Islands v Pakistan)*, (Preliminary Objections) ICJ Judgment 5 October 2016, paras. 38s. Available at < https://www.icj-cij.org/en/list-of-all-cases >.

[29] *Ivi*, para 44.

[30] *Certain Property (Liechtenstein v. Germany)*, Preliminary Objections, Judgment of 10 February 2005, 2005 ICJ Rep. 6, paras. 23ss. Available at < https://www.icj-cij.org/en/list-of-all-cases >.

[31] In This Case the United Nations, in person of the Secretary General, requested an advisory opinion on the the question whether the US were bund by the obligation to enter into arbitration in accordance with Section 21 of the Agreement, when the US passed a law that did not permit the mission of the Palestinian Liberation organization to seat on its territory. While the US did not formal accept the dispute settlement procedure, they demonstrating an opposing attitude. See *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, Advisory Opinion of 26 April 1988, 1988 ICJ Rep. 12, paras. 38s. Available at < https://www.icj-cij.org/en/list-of-all-cases >.

[32] *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, Judgment of 24 May 1980, 1980 ICJ Rep. 3, 24. Available at < https://www.icj-cij.org/en/list-of-all-cases >.

In that case, the Court took into account the notification of the claim, already considered a precondition to the existence of a dispute under customary international law, further requiring two elements: the awareness of the respondent on the existence of the dispute itself, plus its actual existence at the time of filing the application.[33] As a result the Court declined the existence of the dispute and subsequently its jurisdiction, departing from its precedent approach which focused on the parties' relevant conduct. In actual fact, both arguments were easily sustained on a substantial level, but the applicant, the Marshall Islands, was "defeated" by the arguments presented by the respondent, the UK, in a dispute where the ICJ seek to reject jurisdiction from the beginning,[34] in order to avoid deliberating on a politically pressured decision, where all the nuclear weapons possessors, among which all the P5,[35] were involved.[36]

Nonetheless, these two elements require a separate discussion, because, while the awareness prerequisite was considered only vaguely, the existence of a dispute at the moment of the application was not new to the system.

The condition of awareness was not given any specification regarding its content, nevertheless the tribunal used two dissenting opinions of two important judges as references for its consideration. The first was the dissenting opinion of Judge Morelli *in South West Africa case 1962,* where he asserted that a dispute needed to be in a certain relationship with the conflict of interests, resulting from opposing manifestations of will either as prior or subsequent protest to the

[33] *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament case cit. 2016,* paras. 27 e 41.

[34] This assertion can be easily assumed by the words of Judge Tomka in its dissenting opinion, where he stated: *"for the first time in almost a century of adjudication of inter-State disputes, the World Court has dismissed a case on the ground that no dispute existed between the Applicant and the Respondent prior to the filing of the Application instituting proceedings*". See *Ivi*, Dissenting Opinion of Judge Tomka, p.1, para. 1.

[35] 5 Permanent members of the UN Security Council (French Republic, People's Republic of China, Russian Federation, United Kingdom of Great Britain and Northern Ireland, United States of America)

[36] Similarly to the previous *Nuclear Test case,* The Court had the possibility to decide on the question of nuclear disarmament, but instead avoided taking the word and made only more difficult to determine the existence of a dispute instead. It is not a case that the judges that voted for the dismissing of the case were majorly nationals of nuclear weapons possessors. See N. KRISCH, *Capitulation in The Hague: The Marshall Islands Cases,* EJIL:Talk, 10 October 2016, accessed on 5th August 2021 < https://www.ejiltalk.org/capitulation-in-the-hague-the-marshall-islands-cases/ >.

application.[37] The second was the opinion of Judge Oda in *Lagrand case 2001*, where he stated that the dispute arose only when the court was seized and the respondent consented to it, because before that moment none of the parties considered there to be a disagreement nor negotiated over it.[38] Therefore, what seems to be required is awareness regardless of the form, to be considered in relation to the circumstances of each case, with the intention of introducing a protection against surprise applications and constituting an efficient incentive toward the pre-emptive acceptance of compulsory adjudication of the international court.[39] Moreover, awareness should be considered in relation to the existence of a dispute and not to the applicant's intent to file an application, which would additionally increase the predictability and foreseeability of the Court's function.[40]

Recalling that the existence of a dispute is considered at the moment of the submission date of the application, we need to address briefly the problem of the initiation of the proceedings by surprise, which persisted also in *Lagrand case*, because the Court historically evolved its consideration over the attitudes and behaviours of the parties in relation to the adjudicative procedure. Initially, the ICJ considered relevant only the behaviours after the submission of the claims, as it did in *Timor Est 1995*[41] and *Genocide 1996*[42] *cases*, while in a second moment it started considering only the behaviours previous to the initiation of the application, as it happened in *Electricity Company of Sofia and Bulgaria*,[43] *Belgium v Senegal*

[37] *South West Africa case cit.*, Preliminary Objections, Judgment, I.C.J. Reports 1962 - Dissenting Opinion of Judge Morelli, 568.
[38] *LaGrand case (Germany v United States of America)* (Merits) ICJ GL No 104, [2001] ICJ Rep 466, ICGJ 51 (ICJ 2001) - Dissenting Opinion of Judge Oda, 526s.
[39] *See* P. PALCHETTI at 9, para 38.
[40] B.I. BONAFÉ, *Establishing the existence of a dispute before the International Court of Justice: Drawbacks and implications*, Questions of International Law, Zoom out, 2017 Vol. 45, 30.
[41] *East Timor (Portugal v. Australia)*, Judgment of 30 June 1995, I.C.J. Reports 1995, para. 22. Available at < https://www.icj-cij.org/en/list-of-all-cases >.
[42] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Preliminary Objections, Judgment of 11 July 1996, I.C.J. Reports 1996, paras. 27s. Available at < https://www.icj-cij.org/en/list-of-all-cases >.
[43] *The Electricity Company of Sofia and Bulgaria (Belgium v Bulgaria)* (Preliminary Objection) PCIJ Rep Series A/B No 77, 83.

2011,[44] and *Georgia v Russian Federation 2012*.[45] This approach permitted the Court to partially upheld jurisdiction in disputes where opposite opinions were found only on certain claims, over which the applicants' proves of incipient disputes gave ground for the prosecution of the trial. In any case, considering its decision in *Cessation of Nuclear Arms Race and to Nuclear Disarmament 2016*, the ICJ *maintained its position by* declining its jurisdiction, which could have alternatively been accepted but restricted, if the ICJ had addressed more profoundly the conduct of the United Kingdom.

Generally, what seems to be problematic is the distinction between the determination of the existence of a dispute and the recognition of subject-matter jurisdiction, because answering the questions simultaneously leads to a less predictable approach, whose uncertainty may be what the Court has looked for in *Marshall Island case* not to bind itself, facilitating settlement in future disputes. The ICJ may consider more easily the conducts of the parties if the jurisdiction itself was attributed by a specific clause recognizing judicial process as the residual method of dispute settlement, since that would automatically imply parties' try-out to settle a current controversy elsewhere and differently.[46] Nonetheless, this aspect will not be further discussed in this dissertation, because such considerations should be assessed separately from the application, as they are considered its precondition, but practice has disproved such methodology frequently attributing determinacy in the evaluation of the existence of a dispute.[47]

Moreover, especially after *Marshall Islands* judgement in 2016, the threshold for the recognition of a dispute has been set very high, with problematic consequences

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[44] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, (Merits) Judgment of 20 July 2012, I.C.J. Reports 2012, p. 445, paras. 54s. Available at < https://www.icj-cij.org/en/list-of-all-cases >.

[45] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation)*, Preliminary Objections, Judgment of 1 April 2011, [2011] ICJ Rep 70, para. 30. Available at < https://www.icj-cij.org/en/list-of-all-cases >.

[46] See B.I. BONAFÉ at 33, 17.

[47] As briefly referenced before, the ICJ has cleared that negotiation should be a precondition to adjudication, thus it should be assessed separately and independently, however both the ICJ and the PCIJ have interpreted it attributing a relevant role precisely in the pre-Adjudicative stage of a dispute. Example of these are *The Georgia/Russia case* and *Mavrommatis case*, where negotiations demonstrated the existence of the dispute and additionally delineated its subject-matter. See *Mavrommatis Palestine Concessions case cit.* 1924, PCIJ, Series A, No. 2, p. 15; and *Case concerning Application of the International Convention on the Elimination of All forms of Racial Discrimination case cit*. 2011, 124, para. 131.

over the likeliness of applicant countries to satisfy the burden of proof.[48] The only exception would be Article 60 ICJ Statue, that voluntarily stretches the scope of the term "dispute", lowering the threshold in the request for interpretation of a rendered judgement, where "*a difference of opinion as to the meaning or scope of the judgment*" is sufficient.[49]

Without any further consideration on the negative results of the aforementioned decision on the case law, there are two last elements to assess to ultimate the background of State-State disputes, namely: i) the practical relevance of the dispute before the judges and ii) the consequent political infringement in these type of legal disputes.

With regard to the first issue, the ICJ has characterized itself for its view over the practical relevance of the disputes it decides. Indeed, differently from other international tribunals, the ICJ has not demonstrated the need to address an actual or concrete damage, despite of course going beyond general grievances. In *Headquarter Agreement case* and *Arrest Warrant case*, the Court specified that the implementation of a decision was irrelevant to the existence of a dispute, as the opposing attitudes had already been established, which in the cases respectively were the enactment of American legislation against PLO mission to UN,[50] and the issue of a Belgian arrest warrant against the foreign minister of Congo.[51] As matter of fact, there have been also cases where the states parties have addressed the court with a question regarding the abstract interpretation of the disposition of a treaty without presenting an actual controversy with conflictual interests between the

[48] The new formalistic requirement interpreted by the Court actually worsens judicial economy and restricts the access to international adjudication before the Court. Firstly, because it requires the applicant to file a new case once the respondent has been demonstrated to be certainly aware of the dispute, and secondly, demonstrates an abandonment of a flexible approach toward applicants. This latter is a concrete problem because the ICJ does not provide as the WTO DSS a centre to support developing countries with less economical resources on the access and on the development of the proceedings. See *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament case cit. 2016*, Dissenting Opinion of Judge Cancado Trindade Crawford, p. 10-83, paras. 28s-308; and < https://harvardilj.org/2016/11/decision-of-the-international-court-of-justice-in-the-nuclear-arms-race-case/ >.

[49] *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning* the Temple of Preah Vihear *(Cambodia v. Thailand),* Provisional Measures, Order of 18 July 2011, I.C.J. Reports 2011, p. 537, para. 22.

[50] Advisory Opinion on *Applicability of the Obligation to Arbitrate* 1988 cit., at paras. 42s.

[51] *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium),* Judgment of 14 February 2002, 2002 ICJ Rep. 3, at 29, paras 70s.

parties.[52]

Secondly, legal disputes between sovereign states are hardly seen solely as legal. The distinction between legal and non-legal disputes is important to be understood for the purpose of the dissertation, because while international disputes are intrinsically hybrid,[53] only legal disputes will be assessed below. Moreover, defining the scope of legal disputes is relevant in the study of dispute settlement due to the very likely infringement of politics, with the consequence of differentiating and keeping separate legal disputes and political ones. In this assessment, there is no distinctive element in the importance of a dispute,[54] or in the existence of relevant rules of international law,[55] The ICJ in *Diplomatic staff in Teheran case* explained that "*legal disputes between sovereign States by their very nature are likely to occur in political contexts, and often form only one element in a wider and longstanding political dispute between the States concerned*".[56] But, before that decision, the first expression of the distinguishing feature can be found in Hague convention 1899[57] and in the Covenant of the League of Nations[58], where both anticipate the link between legal disputes and their judicial settlement, retaken in the PCIJ and ICJ statues in relation to their jurisdiction.[59] That clears out the reasons for which the ICJ never stepped down from a case just because it had political implications,[60] nonetheless it has always reaffirmed that the eventual

[52] Other than *Headquarters Agreement Case* and *Arrest Warrant Case*, the ICJ maintained such approach in *Northern Cameroon case* and the *Obligation to Prosecute or Extradite case*. See namely *Northern Cameroons (*Cameroon v. United Kingdom), Preliminary Objections, Judgment of 2 December 1963, ICJ Reports 1962, 33-34; and *Questions relating to the Obligation to Prosecute or Extradite case cit.* 2012, 442, para. 46. Available both at < https://www.icj-cij.org/en/list-of-all-cases >.

[53] They are not exclusively legal or exclusively non-legal, principally political or economical.

[54] H. LAUTERPACHT, *The Function of Law in International Community*, 1st ed, Oxford, 2011, 159-161.

[55] See Y. TANAKA at 1, 15.

[56] *United States Diplomatic and Consular Staff in Tehran cit.* 1980, ICJ Rep. 3, para. 37.

[57] Article 16 Hague Convention 1899 states: "*In questions of legal nature, […] arbitration is recognized as the most effective […] and equitable mean of settling disputes, which diplomacy has failed to settle*".

[58] Article 13(2) Covenant of League of Nations states "*Disputes to the interpretation of a treaty, as to any question of international law, […] are declared to be among those which are generally suitable for submission to arbitration and judicial settlement."*

[59] Article 36 PCIJ Statute and Article 36 ICJ Statute both enlist a certain number of disputes that are considered to fall within the jurisdiction of the courts, such as the interpretation of a treaty or any fact that could constitute a breach of international obligations.

[60] *The Corfu Channel Case (United Kingdom of Great Britain and Northern Ireland v. Albania)* (Merits), Judgement of 9 April 1949, I.C.J. 1959 Rep p.4, 31.

repercussions of a legal questions[61] are not sufficient to deprive the Court from its jurisdiction.[62] Indeed, when there are political issues at stake, it is more likely that States will object the admissibility of a case before the ICJ, and indeed, the Court will have to assess the question before addressing the merits, keeping in mind that although States tend to submit political conflicts to international adjudication, the ICJ shall not open the way for a "government by judges".[63] Such position found further confirm when the Court analysed its jurisdiction to issue advisory opinions on questions dealing with situations where political concerns were conspicuous in the *Israeli Wall* Advisory Opinion. There, the International Court of Justice held that the essential judicial task over the legality of the conduct of embodied States could not be discharged due to political aspects, which are undoubtedly consequent to certain obligations under international law.[64]

Overall, for the reasons mentioned above the theoretical connection between the nature of the dispute and the claims raised by the applicant has not succeeded in case law, whereas in doctrine a dual approach has elevated.[65] Some scholars questioned the justiciability of certain issues, that they affirmed to belong to the "domain reservé", over which international tribunals could not decide.[66] Other

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[61] The ICJ itself recognized that its judicial function is inherently limited in these cases. *Northern Cameroons case cit.*, Preliminary Objections, ICJ Reports 1963, p. 29.

[62] This happened in the *Military and Paramilitary Activities in and against Nicaragua* (Merits) *(Nicaragua v. United States)*, Judgment, 26 June 1986, *ICJ Report, 1986*, p 437, para. 101; and in *United States Diplomatic and Consular Staff in Tehran cit.* 1980, p.20, para. 37.

[63] *Nuclear Tests case cit.*, Separate Opinion of judge Gros, ICJ Report 1974, p. 297. This view was sustained also by Judge Oda in *Nicaragua case*, when he was convinced or a more prudent approach to the discussion of the case precisely due to its sensitive political consequences on the relationship between the two disputing States. See *Dissenting Opinion of Judge Oda in the Nicaragua case cit. 1986,* (Merits), ICJ Reports 1986, p. 220, para. 17.

[64] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, 2004 ICJ Rep. 136, para. 41. In this paragraph the court cited many precedent decisions in order to assert that in situations where political considerations are prominent, the request for an advisory opinion would be necessary to clear the legal principles applicable to the merits. See on *Interpretation of the Agreement of 25 March 1951 between WHO and Egypt,* Advisory Opinion, ICJ reports 1980, p. 87, para.33;

[65] N. RONZITTI, *Introduzione al Diritto Internazionale*, (5st Edn), Torino, 2016, 281.

[66] T.J. BODIE AND D.C. PIPER, *Politics and the Emergence of an Activist International Court of Justice*, Westport, 1995, 7*;* J.A.R. NAZFIGER, *Political Dispute Resolution by the World Court, with Reference to the United States Courts,* Denver Journal of International Law and Policy, 2020 Vol. 26(5), 784. On the issue a dictum of the Advisory opinion on *Tunis-Morocco Nationality Decrees* is cited, where the Court asserted that "*Whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends on the development of international relations." See Nationality Decrees Issued in Tunis and Morocco on Nov. 8th, 1921*, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 4 (Feb. 7), at 24. Furthermore, the decision of the Court not to address unsettled economic issues between the litigants in *Free Zones case* is interpreted

scholars considered the organization of the claims as the defining moment where intertwined political issues could constitute an obstacle to the exercise of jurisdiction.[67] Yet, in *Nicaragua case* the Court explicitly rejected both defences of the respondent, declining political exceptions to justiciability and disregarding the presence of political obstacles to the exercise of jurisdiction.[68] Unquestionably, this is a prerogative of the cases brought before the ICJ, that differently from other newer courts and systems, does not seek the de-politicization of disputes and, consequently, is more likely to decide not to set back because of political inference. Indeed, particularly in relation to the World Court's case law, *the turmoil on the international political scene seems to be reflected in the disputes brought before the International Court*",[69] thus it would not be convenient to avoid the exercise of such an incisive judicial function.

In conclusion, we could consider a definition of dispute within the reality of the International Court of Justice, without taking into account the specific claims made out with all the peculiarities.[70] The result would be described as the objective determination of the presence of a disagreement on a point of law, or fact or legal views relevant to certain international obligations, where the claim of one party is positively opposed by the other, and of which both parties are aware at the time of the filing of the application.

This mentioned idea is a unitary concept, in other words the fact that other international adjudicative bodies have abstained from the development of a new

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accordingly. *See Free Zones of Upper Savoy and the District of Gex (France v Switzerland)*, 1929 P.C.I.J. (ser. A) No. 22 (Order of August 19th 1929), para. 127.

[67] See H. LAUTERPACHT AT 55, 171s; and L. CAFLISCH, *Cens ans de règlement pacifique des différends interétatiques,* Recueils des Cours de l'Académie de Droit International, 2001, 266. They argued that the sole justiciability test should be carried on the willingness of the parties to bring a dispute before the arbitrament of law. Indeed, Lauterpacht's words are "*the non-justiciability of this serious controversy far from being inherent in the dispute itself, was an external factor resulting from the unwillingness of a Government to have the controversy settled judicially, […] indeed it is the refusal of the State to submit the dispute to judicial settlement, and not the intrinsic nature of the controversy, which makes it political*".

[68] *Nicaragua case*, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984, paras. 33ss, 52, 99.

[69] J.H.W. VERZIJL, *The Jurisprudence of the World Court,* Leiden, 1965 Vol. I, 7. In the case, the author referred to the reality of political struggles at the end of World War I, that echoed before the PCIJ, among which rights of nationals, minorities that were flared up, but the discussion is pretty actual.

[70] *Eurotunnel Arbitration, Channel Tunnel Group Limited and France-Manche SA v United Kingdom and France*, Partial Award, 30 January 2007, (2007) 132 ILR 1, para. 142.

definition of dispute strengthens the authority of the definition composed by case law before the ICJ.

This stresses the idea that regardless the function, the features and the scope or jurisdiction of a specific dispute settlement body, this definition is what we should rely on, when talking about state-to-state legal disputes in International Law.

In relation to the topic, further analyses of the content of the disputes and of the various constitutive instruments of the existing institutions will be considered in the next chapters with a specific focus on economic interests, although any deepening is deferred as they will be subject matter at the core of this dissertation. Nevertheless, this conceptual framework of state-state disputes before the International Court of Justice will be the lighthouse in the more specific sector we are going to analyse, especially because of the clarity of description of both the definition of "disputes" and its composing elements.

2 Distinctiveness of disputes on economic affairs

After this brief introduction to the inter-state disputes before the International Court of Justice, the analysis will focus on a particular branch of International Law, because the specific substance of international disputes has consequences on the development of dispute settlement itself, and in this case it is extremely relevant. More precisely, this dissertation aims at understanding the dispute settlement systems within the branch of International Economic Law, where economic interests and affairs are at stake.

Initially, the paragraph will present the reason why this sector should be treated differently and why actors behave in a dissimilar way in relation to this subject-matter. Then, the focus will shift on the existence of a dispute and a possible definition under economic categories though merging Economics, Political Theory and International Economic Law. Within this last field, the idea of legal disputes on economic affairs will be addressed.

Within the first 50 years after its foundation, the ICJ has addressed few decisions that involved directly economic conflicts. However it has demonstrated to be a key actor in the assessment of technical disputes, rather than structural

issues, that may rise within the field of international economic relations.[71] Indeed, deciding on structural questions was extremely uncomfortable so that both France and the United States, two of the P5 in the security Council, have withdrawn from the compulsory jurisdiction of the Court in order to avoid such unpleasant decisions. It is here necessary to outline that both the legal framework and the dispute settlement system within the United Nations are based on the Westphalian doctrine of international law which is based on the two principles of member States sovereignty,[72] and the consequent recognition of "sovereign equality of all its members".[73] Consequently, MSs are free to decide to submit to the compulsory jurisdiction of the Court, and can also choose to restrict the scope of their acceptance and to proceed with their withdrawal.

As previously mentioned, the ICJ is not the most efficient solution for dispute settlement and it is not the most effective forum among legal means. Its inadequacy must be considered in terms of its reliance on legal certainty, the involvement of a third party taking a binding decision on sovereign states, the length of the processes and the fact that only states are entitled to stand before the Court, which today seems to decrease the utility of the institution.[74] Consequently, the Court cannot ensure the rule of law in all the fields in which disputes may rise since, despite the intensifying interest in both international negotiation and adjudication for the settlement of economic disputes, States prefer to conduct the second before Ad hoc Arbitral Tribunals or more specifically competent bodies, such as the WTO DSB.[75] It is remarkable that while less than 50 UN MSs have accepted compulsory jurisdiction of the ICJ, only fewer have accepted to sign a compromissory clause in

[71] Structural disputes differ from technical ones because they concentrate on the interpretation of statutes and constitutional provisions of the Systems where States belong. Technical Disputes are intended those disputes where a question of law is raised on a technical issue. See MARTTI KOSKENNIEMI, *The Politics of International Law – 20 Years Later*, European Journal of International Law, 2009 Vol 20, 11.

[72] E-U. PETERSMAN, *Dispute Settlement in International Economic Law - lessons for strengthening international dispute settlement in non economic areas,* Journal of International Economic Law, 1999 Vol. 2(2), 190.

[73] Article 2(1) United Nations, *Charter of the Untied Nations,* 24 October 1945, 1 UNTS XVI.

[74] E.A. POSNER, *The Decline of the International Court of Justice,* John M. Olin Program in Law and Economics Working Paper No. 233, 2004, 24.

[75] This assertion is argued and discussed in Paragraph 2 of the Chapter II of this dissertation, dealing with Universal Courts.

case of economic disputes.[76] This is surprising because in international economic law, more than other fields, States tend to seek legal security, as a guarantee resulted from the interpretation and application of precise rules.[77] However, this consideration must not be misinterpreted, because states are willing to consider a reliable source of law as much as they are unwilling to file applications before the ICJ or any other third and independent subject's judgement. The reason behind this ambiguity is that any binding decision is ensured to produce effects in the development and the enforcement of economic policies, of which States are extremely jealous, especially in the current situation where it is one of the few leverages on non-state actors. Moreover, the length of the proceedings and the rise of forums where also non-state actors can file applications or stand in trial are further elements that make a forthcoming active role of the ICJ on the topic unlikely, because governmental and non-governmental economic players tend to consider the remedies offered by the ICJ less appropriate compared with other dispute settlement procedures before different institutions such as WTO DSS, Regional Courts, and Arbitral Tribunals.[78] However, the ICJ remains the only court with general jurisdiction over questions of international law, whose decisions are considered and relied on by the other existing panels with more specific and sectorial competence.

One practical example is the decision about the existence of a legal interest for the claimant to request the settlement of a dispute by a Panel within the WTO Dispute Settlement System. Precisely, in *EC – Bananas 1997*, the Appellate Body (AB) referred to some ICJ precedents and affirmed that there was not a general rule in international litigation that required a claimant to have a legal interest to file a

[76] *See at* 44, 202.

[77] In international economic law, there has always been the risk of the use of national sovereignty to re-orient the international order, therefore it has always existed a common interest in the establishment of a normative benchmark that is unlikely to be cleared by political interventions. However, only currently this risk has reached a concrete nature, as States have lost the focus on the global and globalized order, that has existed till the beginning of the new century, and have restarted to adopt national exceptional measures in favour of their single national interests. See A. ARCURI, *International Economic Law and Disintegration: beware the Schmittean Moment*, Journal OF international Economic Law, 2020 Vol 23, 324ss.

[78] E-U PETERSMANN, *New Philosophy of International Economic Law and Adjudication*, Journal of International Economic Law, 2014 Vol. 17(3), 665.

claim.[79] Conversely, it stated that an eventual applicant shall refer to a legal basis for its claim because the respondent must be aware of the legal dispositions over which the claims are based. Consequently, at least within the WTO system, parties are not required to have a strictly legal interest in the submission of an application, but they need to present it under WTO law and the specific agreements.[80]

So, if we did not consider interests in a dispute to be solely legal, would it be possible to frame economic interests in a dispute, and as a consequence could we consider disputes differently, as they originate in International Economic Law. The next subparagraphs will answer these questions.

2.1 Economic definition of disputes

Such an analysis is extremely important because nowadays we lack a specific economic study on the subject, although it is undoubted that conflicts both are shaped and shape economic issues.

The starting point of this assessment is a passage from the report of the Economic Committee to the Council of the League of Nation that led the same Council to the adoption of the resolution on January 28th1932 on the procedure for the friendly settlement of economic disputes. It was claimed that bodies composed solely by judges could not have been thoroughly accustomed with all the details of economic life, and therefore would have been rather inclined to rely on criteria of pure law in deciding cases with technical considerations, and that did not result in a satisfactory outcome.[81] The idea of inefficient handling of cases by judicial panels has persisted in the works of more modern scholars, such as James Fawcett, who affirmed that economic disputes may be better dealt with by specialist experts, who have experience and competence in the field.[82]

Today, this theoretical position must be considered in a considerably different way, because of the existence of multilateral agreements deferring questions of law to

[79] Appellate Body Report, *EC – Regime for the Importation, Sale and Distribution of Bananas,* WTO Doc. WT/DS27/AB/R (adopted 9th September 1997), para. 133.
[80] *Ibidem,* paras. 132
[81] League of Nations: *Report on procedure of Friendly Settlement of Economic Disputes* C57M32 (1932) II.B.2.
[82] J. FAWCETT, *International Economic Conflicts. Prevention and Resolution*, London, 1977, 80

specific dispute settlement systems.[83] This apparent oxymoron lays its basis on the fact that states are reluctant toward judicial settlement, but in the new millennium they have comprehended the need to take into consideration private stakeholders and extremely beneficial positive sum game of trade liberalization. Indeed, while the first are non-state actors interested in legal certainty and security of economic transactions [investments, resources, currencies], the second is maximised when cross-border conflicts are either inexistent or handled by a third authoritative party.[84]

Despite the importance of a judicial review in international economic relations, which may work as a proper check and balance system, it is important to adopt an economic approach to the question and investigate the implications of this choice. Economic theory must study the "State" and the "Conflict", therefore, contrarily to the theory of Adam Smith, the specific sector called Conflict Economics has taken step.[85]

A preliminary consideration needs to be done, "conflicts" shall not be considered synonym of "disputes", since a dispute always arises from a conflict, but a conflict not always leads to a dispute. An auspicious interpretation would consider this latter only as the legal aspect of the conflict that goes under the examination of the court,[86] consequently restraining economics to the use of just the word "conflicts".

The reason for which we can use Conflicts Economics to interpret conflicts is because these latter can be described as choices of wealth acquisition that are affected by economic variables and that affect economic outcomes.[87] On the one side conflicts are assumed to be more or less violent alternatives in the relations between two or more States with economic consequences in term of trade and foreign investments, which are correspondently affecting the length and the scale

[83] The WTO has its own Dispute Settlement System, NAFTA provide for bilateral panels, the European Union to the European Court of Justice. These are just examples that will be addressed deeper in the next chapter.

[84] E-U PETERSMAN, *National Constitutions and International Economic Law*, in M. HILF AND E-U. PETERSMANN (eds.), *National Constitutions and International Economic Law*, Deventer, 1993, 46.

[85] C.H. ANDERTON AND J.R. CARTER, *Principles of Conflict Economics: The Political Economy of War, Terrorism, Genocide and Peace*, Cambridge, 2019, 5ss.

[86] See Y. TANAKA AT 1, 9.

[87] C.H. ANDERTON and J.R. CARTER, *Introduction: definition and scope of Conflict Economics*. In C ANDERTON AND J.R. CARTER, *Principles of Conflict Economics: A primer for Social scientists* (2nd edn), Cambridge, 2009, 4s.

of the conflict itself.[88] Since last century, it has always been very likely to start a conflict in order to obtain either the acquisition and allocation of new resources, or the conquest of the existing ones owned by other States.[89]

On the other side, economics involves the study of choices made in condition of scarcity of resources that have direct relevance over the development of production and trade. Additionally, it provides us with the patterns to measure the strategy of conflicts, and to evaluate their outcomes in relation to economic activities.[90]

So, established that we can consider Conflict Economics not only as the application of economics to conflict, but also as the study of conflict using the concepts, principles, and methods of economics, a focus must be established. Indeed, this dissertation aims to address the disputes that fall within the category of "Macro Conflicts", which comprehend Extra-State, Intra-State and Inter-State conflicts.[91]

As mentioned above, the principal reason for a dispute to rise is the scarcity of resources, because the supply - represented by resources present in nature - is lower than the demand, represented by the necessary amount needed and wanted by the actors.[92] When resources are contested between two or more parties, we can say that a conflictual situation arises. In approaching the notion, it would be convenient to consider Schelling's theory of conflict, which asserts that "*most conflict situations are essentially bargaining situations".*[93] In its opinion, a systemic economic approach to conflict should consider a set of elements such as the expected income distribution, based on either fighting or peaceful settling alternatives and the interpersonal preferences of the players. Assuming that there is an economic incentive in avoiding the contested resource to be destroyed, reducing consequently the basket from which the gain is obtained, we derive that a dispute under economics can be seen as the presence of opposing positions on the

[88] See at 66, 157s.
[89] It is called the Theory of Appropriation Possibilities, and bases its idea on the fact that appropriation stands coequal with production and trade as a fundamental category of economic activity. *Ivi*, 150s.
[90] *See* at 68, 10s.
[91] *Ivi, 2s.*
[92] P. LE BILLON, *Economic and Resource Causes of* Conflicts, in J. BERCOVITCH, V. KREMENYUK AND I.W. ZARTMAN (EDS.*) The SAGE Handbook of Conflict Resolution*, Newbury Park, 2009, 213.
[93] T.C. SCHELLING, *The Strategy of Conflict*, Cambridge, 1960, 5s.

distribution of certain resources.[94]

Surely, the economic approach cannot abstain from taking into consideration all the elements that are not naturally economic and that fall within the scope of political theory. Indeed, the State-parties in our context may demonstrate an explicit interest in more resources, although recognizing by widening their own outcome at the expense of their adversaries and of the eventual post-conflict strategic advantages.[95] This explains why armed conflicts are considered to be extremely inefficient for international trade, as they are excessively disruptive, resulting in fewer alternative resources and in the decrease of GDP due to the distress of economic activities.[96] Pertinently, bilateral trade openness reduces the risk of conflicts on account of the advantageous opportunity of forgone gains that make less likely for two trading partners to struggle against each other.[97]

2.2 Political Theory and Economy of disputes

A brief consideration of Political Theory is valuable for the discussion on the infringement of political aspects in the existence of an economic dispute, which may be only superficially touched through Conflict Economics. Usually, the reality of conflict has a tripartite reality, whose pattern is designed over conflicting interests, behaviours and actions.[98]

The first of these three elements, conflicting interests, makes a valuable contribution to the discussion, because it is intrinsically acknowledged precisely because of the scarcity of resources, similarly as it was theorized in Economics. Furthermore, various interests have gained cumulative importance due to the theory of Comparative Advantage in International Economic Law and Policy, for which - in an environment characterized by scarce resources - a country should engage in

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[94] M. VAHABI, *Political Economy of Conflict Foreword*, Revue d'économie politique, 2012 Vol. 122(2).

[95] C.H. ANDERTON and J.R. CARTER, *A Bargaining Model of conflict*. In C.H. ANDERTON and J.R. CARTER, *Principles of Conflict Economics: A primer for Social scientists* (2nd edn), Cambridge, 2009, 72 and 77.

[96] *Ivi*, 100s.

[97] P. MARTIN, T. MAYER, and M. THOENIG, *Make Trade not War?*, Review of Economic Studies, 2008 Vol. 75(3), 865. Citing Montesquieu, *De l'esprit des Lois*, 1758

[98] *See 74*, 155.

trade specialization.[99] States opting for such an approach on the production and exportation of goods or services would seek the greatest advantage or the least disadvantage compared to other players, consequently reducing the scope of conflictual interests.[100] Theoretically, in situations of perfect competition, this would lead to the free-trade optimum, maximising welfare and eliminating the issue of economic conflicts. Unfortunately, no player in the global chessboard is willing to sectorialize its own production and rely entirely on foreign producers for the majority of its needs, mostly because of a shared ideology of improving one nation's welfare to the detriment of others'.[101]

As this political view seems to detach from the economic perspective, specifically because it is not ensured that conflictual interests evolving in conflicting behaviours lead to conflicting actions, Abba Lerner's studies could support an opposing trend. He started from the consideration that "*with or without a fight there is a settlement where the rights are defined*", to reach his thesis for which the resolution to a conflict stays in its transformation from political problem to economic transaction,[102] or for taking his words, "*an economic transaction is a solved political problem".*[103] The reasoning behind his argument is that as long as the total loss related to the costs of conflict does not overcome the total benefits, the solution to the conflict stands on a simple redistribution of wealth [reallocation of resources], which is something theoretically and mathematically distributive, that is not incompatible with the existence of conflicting interests.[104] Such approach to conflicts, however, avoids two important shortcomings of a pure economical consideration, which focuses on the costs of conflict and on the rule-producing function of disputes.[105]

So far, we have considered that there is no such a possibility to describe entirely a dispute only under economic terms or only under political theory. Indeed,

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[99] M.P. TIMMER, S. MIROUDOT, AND G.J. DE VRIES, *Functional Specialization in Trade*, Journal of Economic Geography, 2019 Vol 19(1), 13.
[100] R.M. STERN, *Conflict and Cooperation In International Economic Policy And Law*, University of Pennsylvania Journal of International Economic Law, 1996 Vol. 17(2), 540.
[101] *Ibidem*
[102] *See* M. VAHABI at 94.
[103] *Ivi*, 156. Citing A.P. LERNER, *The Economics and Politics of Consumer Sovereignty* (1972), 259.
[104] *Ivi*, 159
[105] T. SANDLER, *Economic Analysis of Conflict*, The Journal of Conflict Resolution, 2000 Vol 44(6), 725s.

International Economic Conflicts cannot be considered separately neither from politics nor from economics, because they are always going to be generated by commercial or financial policies implemented in economic sectors or by measures aimed at securing or maintaining a strategic position.[106] Yet, an effective approach could be the isolation of the economic factors influencing the conflict.

International economic conflicts arise in the field of International Economic Law, that covers a wide interested scope such as international trade law, monetary law, investment law, law of commercial transactions, and agreements on the exploitation of resources. Within all these fields international economic conflicts can be said to arise between two states, among parties belonging to the same international organization or among members of integration arrangements.[107] Usually, the interests are defended in relation to rules of the various relevant agreements, and the final settlement of the dispute regularly involves the creation of new rules or a new interpretation of existing ones. This rule producing function of the dispute settlement systems in economic sectors is particularly problematic, because when the conflict is settled through a judicial system rather than a diplomatic one, the international community not only worries about the legitimacy and the effectiveness of the specific body adhered but also about the potential judicial activism, that leads to potential issues concerning social policies.

The World Trade Organization is directly experiencing such difficulty, where the current crisis of its jewel, the Appellate Body, is mainly based on the accuses of extensive judicial activism that is alleged to violate the competence of the specific legislative body within the organization.[108] This particular question of Judicial Activism rises a sovereignty issue among the others, because it seems irrational that a state had consented to be bound by a treaty and its disposition, but later has issues on panels deciding whether its actions are or have been in compliance with the same treaty. In fact, governments are interested in flexibility, because they all share the desire to be entitled to restrict duties of compliance in special conditions. This common trend has favoured the practice of "escape clauses" in almost all economic

[106] J. FAWCETT, *International Economic Conflicts. Prevention and Resolution*, London, 1977, 2

[107] C'N. TAYLOR, *International Economic Conflict and Resolution*, Northwestern Journal of International Law & Business, 2002 Vol. 22(3), 313.

[108] J.P. KELLY, *Judicial Activism at the World Trade Organization: Developing Principles of Self-Restraint*, Northwestern Journal of International Law & Business, 2002 Vol. 22(3), 363ss.

treaties, which prescribe legal exceptions based on a solid political ground such as necessity, national security, and public policy.[109]

2.3 Legal disputes on Economic Affairs

After this investigation, having understood the relevance of rule production in international economic conflicts and the abovementioned complications of a pure economic definition of dispute, it seems more plausible to abandon this idea to concentrate more on classification as legal dispute on economic matters, thus taking into account the relevance of legal rules, rather than other economic categories. Surely, it is the type of claim that is put forward and the prescription that is invoked that decides whether a dispute is legal or not,[110] nonetheless, this conception can be sustained from the lawyer's perspective on more grounds.

Firstly, an economic conflict can be viewed as any conflict where there is an economic stake, which however would cover virtually every conflict. Secondly, if a dispute settlement is to be achieved by judicial means, their use is conditioned to the existence of a legal dispute that stands when there are legal issues in relation to a concrete situation affected by the decision of the tribunal.[111] In truth, an international tribunal is not entitled to decide "*controversies which bear no relation to the legal rights and obligations of the parties at the time of the decision*".[112] Thirdly, the parties always face the disputes with a "rule oriented approach", focusing their attention on the application or breach of relevant rules in the economic transactions at stake,[113] and adhering the adjudicator to decide the matter on the ground of law.[114] That usually happens to satisfy the needs for predictability and legal certainty of the economic framework, where it is preferable to avoid the predominance of dispersed diverging understandings.

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[109] See J.H. JACKSON, at 110, 19.

[110] C. SCHREUER, *What is a legal dispute?*. in BUFFARD AND OTHERS (eds), *International Law between Universalism and Fragmentation*: Festschrift in Honour of Gerhard Hafner, Leiden, 2008, 965-966.

[111] *Ibidem.*

[112] P. PALCHETTI, *Dispute* in *Max Planck Encyclopaedias of International Law*, Oxford, 2018, para. 18.

[113] See J.H. JACKSON, at 110, 6.

[114] S. BESSON, *Legal Philosophical Issues of International Adjudication: getting over the Amour Impossible between international law and adjudication*, in C.P.R. ROMANO, K.J. ALTER AND Y. SHANY (ed.), *Oxford Handbook of International Adjudication* (1st edn), Oxford, 2013, 415.

In relation to these arguments, it is essential to recall the universal and autonomous relevance of the legal concept of dispute, as a jurisdictional requirement at the basis of the relevant category over which a tribunal is authorized to exercise its jurisdiction.[115] Then, confining disputes as the category of subjects that can be submitted to a tribunal for the exercise of its contentious function,[116] and interpreting this assessment according to article 36(3) ICJ Statute, it can be supposed that the better suited interpretation is the acknowledgement of economic disputes as legal disputes on economic matters or interests.

As Professor Fawcett outlined in 1977, international economic conflicts have also a more specific definition within the frame of International Economic Law, because they can refer to any conflict arising in the context of international trade, cross-border monetary transactions, access and exploitation of resources [natural and human].[117]

Before deepening into the reality of the conflicts themselves, it is useful to clear the scope of the sectors just mentioned. International Trade involves the movement of goods and services imported and exported across national frontiers, where the World Trade Organization and its numerous agreements regulate and deeply limit governmental action, with due exceptions.[118]

Monetary transactions consist of the movement of money, considered as units of currency, defined and issued by the monetary authority of an individual country,[119] such as the Federal Reserve for the US, or of a set of countries, such as the European Central Bank in the EU. In this sense, they comprise transactions of various nature, from the payments with domestic currency of foreign currency [carried out in turn of goods and services] to foreign investments and bonds generally issued in regards of sovereign debt.

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[115] This can be asserted, due to the discussion made above in relation to the fact that the ICJ consider the existence of a dispute preliminary to the exercise of its jurisdiction.

[116] *See* at 73, para. 3.

[117] See J. FAWCETT AT 106, 4s.

[118] The Agreements are: General Agreement on Tariffs and Trade (GATT), General Agreement on Trade in Services (GATS), Trade Related aspects of Intellectual Property Rights (TRIPS), Agreement on Sanitary and Phyto-Sanitary Measures (SPS), Agreement on Technical Barriers to Trade (TBT).

[119] See the Glossary of the OECD <https://stats.oecd.org/glossary/detail.asp?ID=1679> . Examples of monetary transactions are: making or receiving a payment or incurring a liability or receiving an asset].

Lastly, Resources, are those assets occurring in nature or as a result of human service which can be exploited for economic gain or consumed for meeting local needs.[120] The concept is very wide, as it comprises primary commodities, raw and processed resources, skills and services, whose allocation and access are critical for States, because no country is self-sufficient at all times.

However, not only the adjective "economic" identifies the type of activities States are involved in, but also characterizes the nature of the damage suffered, namely, when a significant part of the economy of one or more countries is put at disadvantage or damaged by foreign practices in one of the abovementioned fields.[121]

The harmful practices can be grouped under the categories of discrimination, unfair competition, inequitable distribution of resources and other disruptive practices in trade and payments that are adjusted in relation to the specific sectors.

Discrimination is the differential treatment of one or more selected countries which creates disadvantages for them, and its peculiarity stands in the fact that it is economic in measures but political in effects.[122] An example was *EC – Bananas III (1997) case*, where Latin American Countries contested the import regime for bananas of the European Communities that distinguished Dollar Bananas [from Latin American countries] and ACP bananas [from European colonies], treating the former less favourably.[123]

Unfair Competition is the distortion of the conditions of competition that can derive from both governmental policies and agreements between enterprises or within cartels. [124] A practical example is given by dumping and subsidies, which constitute the so called "unfair trade" and are both condemned, especially the first in the extent it creates a material injury or a material impairment to a domestic industry,[125] which has consequent political tension, as it is happening with China at the moment, being the biggest target of anti-dumping measures [56 just in the period between July

[120] See J. FAWCETT, AT 106, 5.
[121] *Ibidem.*
[122] *Ibidem.*
[123] Appellate Body Report, *EC – Regime for sale, importation and distribution of Bananas (1997),* WTO doc. WT/DS27/AB/R (adopted on 25 September 1997).
[124] *See at 106,* 6.
[125] Article 2(1) *Anti-Dumping Agreement,* and PETER VAN DEN BOSSCHE AND W. ZDOUC, *The Law and Policy of the World Trade Organization,* (4th edn), Cambridge, 2017, 41.

2015 and June 2016].[126]

Inequitable use of resources is based on the unequal and unfair distribution among developed and developing countries or more and less industrialized countries.[127] This is particularly problematic when the location of the sources is contested, because on the border between two countries, or when it is commonly exploited by both. Relevantly, one of the most controversial voices that were discussed in the Brexit deal were the EU fishing rights in UK waters, over which the English Prime Minister constantly remarked the need to regain control.[128]

When dealing with an international economic conflict, the methods of prevention and resolution are persuasion [negotiation] and decision,[129] which reflect the more general dispositions of article 33(1) UN Charter enlisting categorically the various settlement systems.

The choice among these methods depends on several factors the parties may take into consideration, such as: the magnitude of interests involved, contributing to the scale of the conflict; the eventual participation of third countries interested in one party's, a group's or collective interests; compliance with the regulatory framework, filled with legal and political issues; and the observance of pertinent standards and policies, which may affect potential countermeasures.[130] Additionally, the choice may also be influenced by the international environment, because when there is a shared willingness to proceed with cooperative solutions, and this process is favoured by the creation of institutions, persuasion depicts an internal process of conflict avoidance where all governments try to take part.[131]

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[126] *Ivi*, 703.

[127] *Ibidem* at 80.

[128] Article FISH.8, Heading 5, Part TWO, Annex 1 COM(2020) 857 Final, (Brussels 25 December 2020), 270.

[129] Negotiation refers to the diplomatic means, while decision is linked to adjudicative ones due to the strategy pursued to reach a solution to the dispute. See L. REED, *Observation on the relationship between diplomatic and judicial means of dispute settlement,* in L. BOISSON DE CHAZOURNES, M. KOHEN AND J.E. VINUALES (eds) *Diplomatic and Judicial Means of Dispute Settlement*, Leiden, 2012, 280ss.

[130] See J. FAWCETT, at 106, 9.

[131] As we will see in the next chapter, the deep integration reality of European States, differently from other regions, permitted the acceptance and the functioning of a compulsory dispute settlement system, with high level of compliance and effectiveness. See C.P.R. ROMANO, *The Shadow Zones of International Judicialization,* in C.P.R. ROMANO, K.J. ALTER, AND Y. SHANY (eds), *The Oxford Handbook of International Adjudication*, Oxford, 2014, 96s. One opposite example was the GATT1947 system where the consensus requirement for dispute settlement implied that disputes were managed on persuasion by the most influential party.

On the contrary, decisional method requires a delegation of authority, whose exercise can be within the system established, as in International Monetary Fund (IMF) and GATT/WTO system today, or outside it, with the intervention of specific institutions such as ICJ or ECJ. Generally, within international law, and particularly in international economic law, the possibility to adhere to adjudicative bodies has its relevant consequences, although they may be rarely used. Indeed, States may rely also on the mere threat of adjudication, to leverage excessive unilateral interpretations of provisions [power plays] to prevent disputes,[132] and may in this case exploit the preference to avoid compulsory rulings of judicial bodies to resolve the dispute consensually.[133][134] Notwithstanding its deterrent effect, the presence of an adjudicatory system has the secondary function of making transactions more predictable, in the sense that state parties can "generally" foresee how a body is going to process a case and how it is going to address the specific legal questions.[135] Then, it is not strange that within the GATT1947 System[136] there has been a shift from the "negotiation oriented" approach toward a more "judicialized" and rule-oriented one in the WTO, increasing the success of further multilateral negotiation, such as the Uruguay Round itself.[137]

2.4 Real Experience of State-to-State Legal disputes on Economic Affairs

Historically, States brought claims against other equals before conciliatory or

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[132] S.D. MURPHY, *International Bodies for Resolving Disputes between States*, in C.P.R. ROMANO, SEE AT 131, 196.
[133] R. CHURCHILL, *Some Reflections on the Operation of the Dispute Settlement System of the UN Convention of the Law of the Sea during its First Decade* in D. FREESTON, R. BARNES and D.M. ONG (eds.), *The Law of the Sea*, Oxford, 2006, 414.
[134] M.L. BUSCH and E. REINHARDT, *Bargaining in the Shadow of the Law: Early settlement in GATT/WTO Disputes*, Fordham International Law Journal, 2000 Vol. 24(1), 58.
[135] P. MAVROIDIS, *Licence to Adjudicate: A critical Evaluation of the Work of the WTO Appellate body so far*, in J.C. HARTIGAN (ed.) *Trade Disputes and Dispute Settlement Understanding of the WTO: An interdisciplinary Assessment*, Bingley, 2009, 81.
[136] The General Agreement on Tariffs and Trade 1947 was an agreement, expected to regulate international trade while the project of the International Trade Organization was discussed and developed, however this last project failed and the GATT1947 kept on regulating international trade till 1994, when States, after the famous Uruguay round in 1990s, agreed to constitute the World Trade Organization (WTO) and to agree on a new GATT, the GATT1994, that is important to mention is a different document than GATT1947. See G. SACERDOTI, *La trasformazione del GATT nell'Organizzazione Mondiale del Commercio,* in Diritto del Commercio Internazionale, 1995, 73s.
[137] P.L. CHANG, *The Evolution and Utilization of GATT/WTO Dispute Settlement Mechanism* in J.C. HARTIGAN (ed.), at 135, 92.

jurisdictional bodies not only for complaining about a wrongful act or a breach of international law causing a direct harm to public interests, but also in case the harm was sustained by their natural or legal persons (nationals) through the institute of Diplomatic Protection.[138] The institute was applied in disputes over economic matters such as *Mavromantis 1924* and *Barcelona Traction 1970,* where the Court recognized such entitlement to sovereign actors, because individuals had no access to international courts.[139] Over time, new institutions were established and individuals were recognized direct protection - under some circumstances - before specific established centres. As matter of fact, nowadays, interstate disputes are less likely to occur, because most of international economic interests are carried out by enterprises and cartels and not by public agents or States, who rarely bring their direct interests at the negotiating table, as it may happen within the European Union and in other integration organizations, or in the Organization of Petrol Exporting Countries (OPEC) and the Group of 77.[140] Nevertheless, adjudication occurs differently also in relation to the subject where states' interests are conflictual, thus a brief picture of the likeliness for specific adjudication in the abovementioned areas shall follow before considering in the next chapters the exact bodies and issues.

In international financial law, instead, there has been no interest in international scrutiny, which resulted from the absence of an international law framework establishing binding financial regulations,[141] except for GATS Annex on Financial Services which is anyhow subjected to "curve-out" clauses in FTAs.[142] Such legal vacuum leads to the impossibility to proceed toward international adjudication, since a competent international court has never been established.[143]

Adding to this element, it is important to recall that International Finance does not only regulate State-to-State relations, but mostly regulators-private parties [private

[138] Article 1 Draft Articles on Diplomatic Protection 2006
[139] N. RONZITTI, *Introduzione al Diritto Internazionale*, 5st Edn, Torino, 2016, 376ss.
[140] *Ibidem at* 85, 4.
[141] K.W. ABBOTT, R.O. KEOHANE, A. MORAVCSIK, A-M. SLAUGHTER, D. SNIDAL *The concept of legalization*, International Organization, 2000 Vol. 54(3), 416ss.
[142] ANDREW D. MITCHELL, JENNIFER K. HAWKINS AND NEHA MISHRA, *Dear Prudence: Allowances under International Trade and Investment Law for Prudential Regulation in the Financial Services Sector,* Journal of International Economic Law, 2016 Vol. 19(4), 795 and 807.
[143] F. LUPO-PASINI, *Financial Disputes in International Courts*, Journal of International Economic Law, 2018 Vol. 21(1), 2.

institutions and investors] who share a lack of trust into international institutions and authorities.[144] The result of this precedent habit is that a judicial review is confined to a purely domestic exercise. This is comprehensible if we considered that most of financial disputes involve bankruptcy of insolvent banks and supervisory fines, and only a very small part considers the violation of sovereign debt contracts and emergency legislations affecting financial services.[145] Nevertheless, whenever these latter involve parties with different nationalities, the dispute is more likely to be settled through arbitration processes, especially considering the existence of International Centre for the Settlement of Investment Disputes (ICSID), rather than through longer and more complex trials before the ICJ or equivalent, as it happened in the 1917 with *Brazilian Loans*[146] *and Serbian Loans cases*[147] and in 1970 with *Barcelona Traction case*.[148]

Considering the example of Argentinian Default at the beginning of the new millennium [2001], the majority of cases involving the restructure of Argentinian sovereign debt in relation to the sovereign bonds such as *Abalcat 2011*[149], *Ambiente Ufficio S.p.A 2013*[150], and *Allemanni 2014*[151] were settled through investment arbitration,[152] which is an Investor-State Dispute Settlement system. This was

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[144] Private Financial Companies do not consider their interests to be defended and taken into consideration as much as the ones of public entities, such as sovereign States, before international mechanisms where there is a strong influence by some countries on the composition of the bench and on the possible outcome. *Ivi 10ss.*

[145] For scholars discussing about the lack of financial disputes before international Courts See F. LUPO-PASINI, *The Logic of Financial Nationalism: The Challenges of Cooperation and the Role of International Law*, New York, 2017; and C. PROCTOR, Chapter 22 *International Rules of Monetary Conduct, in* C. PROCTOR (ED.) *Mann on the Legal Aspects of Money*, Oxford, 2010; and A.D. MITCHELL, J.K. HAWKINS AND N. MISHRA, *Dear Prudence: Allowances under International Trade and Investment Law for Prudential Regulation in the Financial Services Sector*, Journal of International Economic Law, 2016 Vol. 19, 78.

[146] Payment in Gold of Brazilian Federal Loans Contracted in France (France v Brazil), 1929 P.C.I.J. (ser. A) No. 21 (July 12). Available at < https://www.icj-cij.org/en/pcij-series-a >.

[147] Payment of Various Serbian Loans Issued in France (France v. Kingdom of Yugoslavia), 1929 P.C.I.J. (ser. A) No. 20 (July 12). Available at < https://www.icj-cij.org/en/pcij-series-a >.

[148] *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Preliminary Objections, Judgment. I.C. J. Reports 1964, p. 6. Available at < https://www.icj-cij.org/en/list-of-all-cases >.

[149] *Abaclat and others v Argentine Republic* (ICSID Case No ARB/07/5), Decision on Jurisdiction and Admissibility (4 August 2011). Available at < https://www.italaw.com/ >.

[150] *Ambiente Ufficio S.p.A. and others v Argentine Republic* (ICSID Case No ARB/08/9), Decision on Jurisdiction and Admissibility (8 February 2013). Available at < https://www.italaw.com/ >.

[151] *Giovanni Alemanni and others v Argentine Republic* (ICSID Case No ARB/07/8), Decision on Jurisdiction and Admissibility (17 November 2014). Available at < https://www.italaw.com/ >.

[152] M.R. MAURO, *Diritto Internazionale dell'Economia Teoria e Prassi delle relazioni economiche internazionali*,1st edn, Napoli, 2019, 479.

facilitated by the decision that established that sovereign obligations were comprehended within the concept of investment.[153] Conversely, only one dispute was brought by Panama in relation to measures adopted in Financial services by Argentina before the WTO DSB, and this resulted in *Argentina – Financial Services 2016*[154]. However, this demonstrates how financial disputes among States do not occur as much as in the past, and that States try to discuss them separately from the more frequent trade cases, where tribunals seem less hesitant function as keepers of the regulatory system, issuing binding judgements.[155]

The settlement of interstate disputes however, is not destined to cease, as it may seem approaching other subject-matters. Indeed, this affirmation is supported by the existence of the WTO DSM and WTO body of law, that despite being quite recent, has provided a high number of cases, building up a real network of rulings.[156]

It is reasonable to say that differently from international financial law, trade law has experienced an opposite trend, since inter-State litigation has increased by time, especially after the GATT system was transformed in 1994. Whereas, before the ratification of GATT in 1947 the ICJ was the only Court where these cases were submitted and States did not want to be questioned over their trade policy, so case law was minimal. Conversely, a soaring increase was registered after the institutionalisation of the practice, although under GATT 1947 the dispute resolution process was based more on a power-oriented diplomacy and the positive consensus of the parties regarding the procedure and the result, rather than a real rule of law.[157] This procedural obstacle has been later removed since the "juridification" of the DSM, which now settles the highest number of cases of state-to-state disputes.[158] Without deepening into the subject that will be discussed in the

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[153] *Abaclat v Argentine*, at 150, para. 364.

[154] WTO Panel Report, *Argentina – Measures Relating to Trade in Goods and Services*, WT/DS453/R, circulated 30 September 2015, adopted 9 May 2016; and WTO Appellate Body Report, WT/DS453/AB/R, circulated 14 April 2016, adopted 9 May 2016.

[155] Among the high number of cases brought before the WTO DSS, there is no dispute dealing with investments. See < https://www.wto.org/english/tratop_e/dispu_e/dispu_subjects_index_e.htm >.

[156] K.J. PELC, *The Politics of Precedent in International Law: A Social Network Application*, American Political Science Review, 2014 Vol. 108(3), 557.

[157] A. REICH, *From Diplomacy to Law: The Juridicization of International Trade Relations*, Northwestern Journal of International law & Business, 1997 Vol. 17(1), 799.

[158] R.E. HUDEC, *The GATT Legal System and World Trade Diplomacy*, Westport U.S.,1975, 158.

next chapter, the wide scope of the WTO body of law must here be exalted, because almost every aspect related to the movement of goods, services and the respective barriers offers an extensive case law, with practical consequence in the ordinary commercial relations of state-actors, and not only.

Taking the example of the Most Favourable Nation principle, case law can be found from the first *Rights of UN nationals in Morocco case* 1952, where the ICJ considered the maintenance of fundamental equality without discrimination among all countries a general principle of law,[159] to the *EC – Seal Products case 2014*, where the same principle was recognized to preserve the equality of competitive opportunities for imported like products from all members.[160]

Lastly, in the context of natural resources, the relevance of state actors is absolute, especially after the enactment of UN General Assembly Resolution 1803 (XVII) in 1962 and the Charter of Economic Rights and Duties of States in 1974.[161] Despite the lack of binding force, they have been recognized to produce legal obligations.[162] The recognition of the right to permanent sovereignty - and the subsequent right to regulate and expropriate - gained higher importance, especially in relation to the requirement of its exercise in the interest of national development.[163] In the past, such an extensive power was mitigated by the prohibition to cause serious damages to other states or areas beyond national jurisdiction, which paved the way for few decisions by the ICJ, such as *Anglo-Iranian Oil Company 1952*,[164] and *Gabčíkovo-Nagymaros Project 1997*.[165] Unfortunately, state-to-state disputes on the topic have

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[159] *Case concerning rights of nationals of the United States of America in Morocco (France v. united States of America)*, Judgment of 27 August 1952, I.C. J. Reports 1952, 192s. Available at < https://www.icj-cij.org/en/list-of-all-cases >.

[160] Appellate Body Report, *EC – Measures Prohibiting the Importation and Marketing of Seal Products (2014)*, WTO Doc. WT/DS400/AB/R (adopted on 16 June 2014), para. 5.87.

[161] Article 2 UN General Assembly, *Charter of Economic Rights and Duties of States*, 6 November 1974, A/RES/3281.

[162] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment of 19 December 2005, I.C.J. Reports 2005, p.168, para. 244. Available at < https://www.icj-cij.org/en/list-of-all-cases >.

[163] Article I, *RPSNR*, GA Res 1803 (XVII), UN GAOR, 17th sess, 1194th plen mtg, UN Doc A/RES/1803(XVII) (14 December 1962; Article 2 Charter of Economic Rights and Duties of States, GA Res 3281 (XXIX), UN GAOR, 29th sess, 2315th plen mtg, Agenda Item 48, Supp No 31, UN Doc A/RES/3281(XXIX) (12 December 1974) Annex.

[164] *Anglo-Iranian Oil Co. case (Jurisdiction)*, Judgment of July 22nd, I952: I. C.J. Reports I952, 93. Available at < https://www.icj-cij.org/en/list-of-all-cases >.

[165] *GabCikovo-Nagymaros Project (Hungary/Slovakia)*, Judgment of 25 september 1977, I. C. J. Reports 1997, 7. Available at < https://www.icj-cij.org/en/list-of-all-cases >.

become rare nowadays, because permanent sovereignty is important in connection to economic interests of aliens on the territory, who are almost exclusively non-state actors, mainly corporations, which have built up oligopolistic markets, such as the energy sector. This is particularly comprehensible in this era of globalization, although in 1893 two parties for the first time decided to settle a dispute on the management of natural resources through arbitration instead of the standard diplomatic methods.[166]

3 Peculiarities of inter-state litigation

Before concluding the chapter, it is important to reaffirm that the focus of the following chapters will be only inter-State arbitration and adjudication, with due consequences. Indeed, the sole presence of state-actors must be considered in relation to a set of peculiarities which are intrinsic to their nature and to the nature of their disputes. As matter of fact, in the Westphalian doctrine, the system of international law is based on three substantial pillars that characterize the States as subjects: sovereignty; sovereign equality, which can be derogated substantially in the various fields of international Economic Law;[167] and independence,[168] that evolved into an economic interdependence.[169] Indeed, States are sovereign and independent entities in a system of formally sovereign equals, in other words they are the prime and unitary agents in international relations.

Sovereignty is both a general principle of international law and a principle about

[166] Precisely, they were United States and United Kingdom, who decided to settle their dispute on the Fur Seal population near Alaska, Fur Seal Arbitration: *Proceedings of the Tribunal of Arbitration, Convened at Paris Under the Treaty Between United states of America and Great Britain, Concluded at Washington February 29 1892, for the determination of questions between two governments concerning the Jurisdictional Rights of the United States in the waters of Bering Sea (Government Printing Office 1895).*

[167] Examples are the Compensating Inequality in WTO and Weighted Vote in IMF. See D. Leech, *Voting Power in the governance of the International Monetary Fund*, Annals of Operations Research LSE, 2002 Vol. 109, 375ss.

[168] *The Case of S.S. Lotus (France v. Turkey),* P.C.I.J. Series A, No. 10, p. 18. The decision held that "International law governs relations between independent states". Available at < https://www.icj-cij.org/en/pcij-series-a >.

[169] States need to defend their sovereignty and independency but they are also interested in the opening of frontiers to liberalize flows of trade and investments, services, money and people. This is why they permit exceptions creating a net of interdependent actors. See M.R. MAURO, at 152, 49; and H. KELSEN, *The Principle of Sovereign Equality of States as basis for International Organization*, The Yale Law Journal, 1944 Vol. 53(2), 207ss

international law,[170] but more related to our discussion, it is a central issue in international dispute settlement. Unfortunately, international conventional law lacks a unitary definition of the concept, but provides various non-binding considerations on the allocation of power and the policy-weighing processes it represents.[171] Despite this vacuum, what is relevant to the discussion is that the principle of sovereignty was recognized by the ICJ as customary law in *Nicaragua Case 1986,*[172] where it also confirmed the existence of a set of areas where courts could not rule because of the existing States' "Domain Reservé", which is also reflected in the text of Article 2(7) UN Charter.[173] Now, reaffirming the basic importance of sovereign equality,[174] as proposed in many documents,[175] and that international disputes shall be settled on that basis,[176] it seems logical that self-limitation is a necessary condition for the binding nature of international law on sovereign States, and that the parties' consent is essential to have an authoritative and centralized settlement system.[177]

An example of these abovementioned principles, applied to the context of economic law, is the Charter of Economic Rights and Duties of States 1974, which is a non-binding resolution of the UN General Assembly, whose relevance must be

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[170] Such pivotal concept has laid the basis for international law, because conflicts of sovereignty among independent States displayed the need to develop international legal rules, that arose only when independent sovereign States freely consented to mutual rights and obligations and to their regulation. Today, it represents both a fundamental principle of the international political order, and a ground of major contention among international lawyers. Basically, public international law and sovereignty imply each other. See S. BESSON, Sovereignty, Planck Encyclopedias of International Law (April 2011) < https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1472 >.

[171] See J.H. JACKSON at 110, 21.

[172] *Nicaragua case cit.*, (Merits) ICJ Report 1986, para. 202.

[173] The scope of subject-areas that fall within the "*domain reservé*" is not given, but dynamic and relative to treaty obligations and customary international law, due to the use of unclear wording. Surely today it has been restricted in comparison with Art. 15 Covenant of League of Nations in1919, because it has aligned to the development of international law. See L. PREUSS, *Article 2, Paragraph 7 of the Charter of the United Nations and Matters of domestic Jurisdiction (Vol. 74)*, Collected Courses of The Hague Academy of International Law, 556. Accessed May 10, 2021. doi:http://dx.doi.org/10.1163/1875-8096_pplrdc_A9789028611122_07.

[174] 5th Preambulatory Clause, UN General Assembly, *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations*, 24 October 1970, A/RES/2625(XXV).

[175] Article 10 UN General Assembly, *Charter of Economic Rights and Duties of States*, 6 November 1974, A/RES/3281.

[176] Section I, paragraph 3 UN General Assembly, *Manila Declaration on the Peaceful Settlement of International Disputes*, 15 November 1982, A/RES/37/10.

[177] See N. RONZITTI AT 139, 77.

considered in relation to the other A/Res/28/3082 1973 urging the establishment of universally applicable norms for the development of international economic relations on a just and equitable basis.[178] In that document, while Article 2 reaffirms states' "*exercise of full permanent sovereignty […] of economic activities*", Article 10 recalls that "*all states are juridically equal and…have the right to fully and effectively participate in the international decision-making […]*".[179]

Within the regulatory framework of international law, State-to-State dispute settlement is fatherly disciplined and guided by the principles of free choice of means and the peaceful nature of the same. The most fundamental dispositions on the subjects are to be found in the UN Charter, which will be our starting point to depict this important feature.

Article 1(1) UN Charter states that one of the purposes of the UN is "*to take effective collective measures for the, in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of peace*."[180] This disposition needs to be interpreted in relation to Article 2(3) of the same document where all UN members are required to "*settle their international disputes by peaceful means in such a manner that international peace, and security, and justice, are not endangered.*"[181] It is really important that the UN Charter adopt the word "shall" to stress the obligation that comes from such a rule, which is acknowledged to be a notable corollary one provided by Article 2(4) UN Charter: the prohibition of use of force.[182] In fact, the ICJ recognized customary relevance to the principle of Non-use of force ex Article 2.4 UN Charter,[183] with the logical consequence, by relevant academic referred to as a corollary, of the obligation to peacefully settle any dispute,[184] and not only

[178] UN General Assembly, *Charter of Economic Rights and Duties of States*, 6 November 1974, A/RES/3281.
[179] Articles 2-10 UN General Assembly, *Charter of Economic Rights and Duties of States*, 6 November 1974, A/RES/3281
[180] Article 1(1) United Nations, *Charter of the Untied Nations*, 24 October 1945, 1 UNTS XVI.
[181] Article 2(3) *Charter of the Untied Nations*.
[182] Article 1 Convention for the Pacific Settlement of international Disputes (Hague Convention I), 18 October 1907.
[183] *Nicaragua case cit.*, (Merits) ICJ Report 1986, p. 100, para. 190
[184] D.W. BOWETT, *Contemporary Developments in Legal Techniques in the Settlement of Disputes*, Collected Courses of The Hague Academy of International Law, Vol. 180, *177*. Consulted online on 08 May 2021 < http://dx.doi.org/10.1163/1875-8096_pplrdc_A9789024729623_02 >.

those "*the continuance of which is likely to endanger the maintenance of international peace and security*" as asserted by Article 33 UN Charter.[185]

Additionally, recognized as principle of customary law, sovereign states are bound to seek the settlement through "Peaceful Means",[186] which comprehend all the procedures whose enforcement necessitates reciprocal consensus of the disputing parties and whose function is to facilitate an agreed settlement of dispute.[187]

Additionally, within the perimeter of peaceful means, Article 33(1) UN Charter provides international scholars with a non-exhaustive list of possibilities that States may adopt, precisely negotiation, enquiry, mediation, conciliation, arbitration, and judicial settlement, without excluding "*other peaceful means of their own choice*".[188] The same principle has been recalled in the Vienna Convention on the Law of the Treaties 1969,[189] Friendly Relations Declaration 1970[190] and Manila Declaration 1982[191], strengthening the concept that it is for the parties to agree in conformity with the principles of justice and international law on the peaceful means they consider appropriate to the circumstances and to the nature of their dispute,[192] because without their consent there cannot be any compulsion to submit them.[193]

From this point the list in Article 33 distinguishes two types of settlement methods: diplomatic methods and adjudicative ones. The first are those, either carried out by the specific disputing parties or with the intervention of third-parties,[194] that are not

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[185] J. VERHOEVEN, *Droit International Public,* Brussels, 2000, 694

[186] *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear* (Cambodia v Thailand), Judgment of 11 November 2013, ICJ Report 2013, para. 105. Available at < https://www.icj-cij.org/en/list-of-all-cases >.

[187] G. PALMISANO, *Contributo allo studio giuridico dei metodi diplomatici per la soluzione delle controversie tra Stati*, 1stedn, Torino, 2019, 5.

[188] Article 33(1) *Charter of the Untied Nations*.

[189] Article 31(3)c, United Nations, *Vienna Convention on the Law of Treaties, 23 May 1969.*

[190] 5th paragraph, UN General Assembly, *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations*, 24 October 1970, A/RES/2625(XXV).

[191] Section I, paragraphs 3-10 UN General Assembly, *Manila Declaration on the Peaceful Settlement of International Disputes*. 15 November 1982, A/RES/37/10.

[192] Basically, States are unlimitedly free to choose, combine or create their technique/mean to settle a dispute between them. See J. VERHOEVEN AT 185, 696.

[193] *Status of Eastern Carelia,* Advisory Opinion of 23 July 1923, PCIJ Ser. B, 1923, No. 5, 27. Available at < https://www.icj-cij.org/en/pcij-series-b >.

[194] The most relevant third party in the sector of international dispute settlement is the UNSG, because of its role and the many cases where he has prevented escalation of international conflicts. See B. SIMMA AND OTHERS, *The Charter of the Untied Nations: A commentary,* 3rd edn, Vol. I, Oxford, 2012, p. 2013. In fact, events as Korean war 1953, Suez Canal Crisis 1956 and Berlin Crisis

based on rules of international law and whose outcome is not binding,[195] whereas the second ones are based on rules of international law and produce a binding outcome.[196] In other words, the basic difference could be seen in the method foreseen to settle a dispute: statically either adherence of tribunals that interpret the law,[197] or dynamic reliance on political decisions and initiatives that modify the legal framework at the basis.

It is important to signal this distinction because it has important consequences over the factual settlement of disputes, since states were and partially still are reluctant to adhere a judiciary third that can decide a controversy with a binding decision without considering the needs of each party.

Diplomacy is the principal substitute for the use of force to reach points of contact and peaceful adjustments of differences between States.[198] While it can be sustained that excessive diplomatic exchanges may weaken the position of smaller countries at the negotiating table, rather than ensuring them equal protection before the Court,[199] it is a fact that diplomatic methods precede judiciary ones. In *Interpretation of Judgments Nos 7 and 8,* the PCIJ itself recognized the desirability to avoid summoning another state to appear before the court without previously making clear to the other party the difference of views in question and trying unsuccessfully to resolve the dispute alternatively.[200] This try-out was later and further interpreted as a genuine attempt to discuss with a view to resolving the

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1958 have been positively influenced by the office of the UNSG as mediator or by its good offices. Consequently, in later times, the interest in these two means of dispute settlement has spread till the publication of official documents recognizing and promoting them. See examples in: Report of UN-Secretary General, *In Larger Freedom: Towards development, Security and Human Rights for All,* A/59/2005, 30, para. 108; and UN General Assembly Resolution, *Strengthening the Role of Mediation in the Peaceful Settlement of Disputes, Conflict Prevention and Resolution*, A/RES/70/304, 26 September 2016, paras.10-14.

[195] Negotiation is considered a non-third party diplomatic mean because it involves the direct contact between the two "delegations", while good offices, mediation and conciliation, for example, that demand the participation of a third with specific features and powers are named third-party diplomatic means. In these latter, the Secretary general of the Untied nations usually performs a significant role for the peaceful prevention of escalation of conflicts.

[196] J. MERILLIS, *The Means of Dispute Settlement*, in E.D. EVANS (ed.), *International Law*, 4th edn, Oxford, 2014, 564-6; and A. CASSESE, *International Law*, 2nd Edn, Oxford, 2005, 279.

[197] J.L. BRIERLY, *The basis of Obligation in International Law and other papers,* 1st edn, Oxford, 1958.

[198] S. MARKS AND C.W. FREEMAN, *Diplomacy*, *Encyclopedia Britannica*, 2020.

[199] See B.I. BONAFÉ, at 40, 22s.

[200] *Interpretation of Judgements Nos. 7 and 8 (Chorzòw Factory) case cit.,* 1927 PCIJ Series A No 13, 10s.

dispute.[201]

However, it is important to keep the two possibilities distinguished, because as the Court explicated, diplomatic effort do not interfere with its judicial function and would not prevent it from adopting a judicial decision on the dispute, unless parties withdrew the question,[202] which particularly in relation to more politicized exceptions such as national security in trade law, is the "rule".[203] So, the court facilitated the peaceful settlement, so far as was compatible with its statute, alternatively to a direct and friendly settlement between the parties.[204] This "survivance du passé", that saw the diplomatic settlement as the primary source of dispute settlement, persists today in the practice of Preventive Diplomacy of more developed and more influential countries.[205] These States believe this possibility to be more satisfying than adjudication, because it avoids the escalation of conflicts of disputes that can be kept out of the spotlight, not only by the expected bodies,[206] but by other States,[207] who may prefer the application of the rule of law.

In practice, international courts are adhered to settle minor disputes, because when there are larger interests at stake, persuasion and conciliation seem to be the most

[201] *Case concerning Application of the International Convention on the Elimination of All forms of Racial Discrimination case cit.* 2011, 132, para. 157.

[202] *Agean Sea Continental Shelf* (Greece v. Turkey), Judgement of 19 December 1978, ICJ Reports 1978, 12, para. 29. The ICJ explicitly mention that the two means can proceed in *pari passu*, therefore not creating any obstacle to each other. In fact, Judge Oda doubted about such approach and expressed it in its Separate Opinion to the same decision, but this did not stop the habit of simultaneous use of both ways and the discontinuing of the proceeding in case of external Agreement, as happened in the *Passage through the Great Belt* and *Certain Phosphate Lands in Nauru cases.* See *Passage through the Great Belt* (Finland v. Denmark), Order of 10 September 1992, Z.C.J. Reports 1992, p. 348; and Agreement between Australia and the Republic of Nauru for the settlement of the case in international Court of Justice concerning Certain Phosphate Lands in Nauru (1993) 32 ILM, 1474.

[203] See VAN DEN BOSSCHE and ZDOUC, at 125, 619-623.

[204] *Free Zones of Upper Savoy and District of Gex (France v Switzerland)*, 1929 P.C.I.J. (ser. A) No. 22 (Order of 19th August 1929), 13. Available at < https://www.icj-cij.org/en/pcij-series-a >.

[205] See Preventive Diplomacy is defined as an action to prevent disputes from arising between parties, to prevent existing disputes from escalating into conflicts and to limit the spread of the latter when they occur. See B. BOUTROS-GHALI, *An Agenda for Peace*, 2nd edn, New York 1995, 45, para. 20; J. BERCOVITCH and R. JACKSON, *Conflict Resolution in the Twenty-First Century: Principles, Methods and Approaches*, Michigan 2009, 87-98.

[206] 2011 Report of the UN-Secretary General, *Preventive Diplomacy: Delivering Results*, UN Document S/2011/552, 26 august 2011, 22 ss.

[207] M.S. LUND, *Early Warning and Preventive Diplomacy*, in D. DRUCKMAN AND P.F. DIEHL, *Conflict Resolution,* Vol. III, London, 2006, 6-10.

effective solution.[208] This is not surprising if we summon up that economic conflicts derive from clashing governmental measures favouring some parties, and that the possibility of non–third partial panels bother more in economic policy areas. However, a process toward juridification and de-politicization of economic disputes has been detected from the end of the previous century. Accordingly, it is necessary to consider the proliferation of international competent tribunals because effective judicial means are needed as much as the diplomatic ones to settle disputes and, more importantly, to ensure peace and security in the international community.[209]

The framework of the principles must be completed with a quick reference to three elements: Good Faith, Cooperation and Regionalism which influence the practical cases of dispute settlement, as we will see in the following chapters.

The principle of Good Faith is important because it is expressed in international declarations,[210] and because it ensures that if a solution by one of the means of dispute settlement was not reached, states would continue to seek a settlement of the dispute by other peaceful means agreed upon.[211] That commonly refers to the possibility to adopt the diplomatic methods first and then, if they resulted in a no deal, the next step would be before adjudicative bodies. Despite the specific topic will not be addressed here, the obligation of good faith is also extended during the adjudication process as well. Indeed, the parties are not only bound to embark with sincerity a procedure, but they shall also negotiate meaningfully so to reach an agreement.[212]

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[208] C. TOMUSCHAT AND M. KOHEN, *Flexibility in International Dispute Settlement,* Leiden, 2020, 27ss; G. ABI-SAAB, *Negotiation and Adjudication: Complementarity and Dissonance,* in L. BOISSON DE CHAZOURNES, M. KOHEN AND J.E. VINUALES (eds) at 129, 328ss.

[209] UN General Assembly, Report of the UN Secretary General, *Strengthening and Coordinating United Nations Rule of Law Activities,* A/70/206, 27 July 2015, 7, para. 21.

[210] See for a deep analysis A.R. ZIEGLER, *Good Faith as a General principle of Law*, in A.D MITHCELL AND M. SORNARAJAH AND T. VOON, *Good Faith and International Economic Law*, Oxford, 2015, 10ss; and Section I, paragraphs 1-5 UN General Assembly, *Manila Declaration on the Peaceful Settlement of International Disputes* 1982; D*eclaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations*, 1970, 124; Declaration on Principles of International Law concerning Friendly Relations and cooperation among States in Accordance with the Charter of the United Nations [UNGA Res 2625 (XXV) (24 October 1970) GAOR 25th Session Supp 28, 121]; *Marrakesh Agreement Establishing the World Trade Organization, opened for signature 15 April 1994*, 1867 UNTS 3 (entered into force 1 January 1995), annex 2 (*Understanding on Rules and Procedures Governing the Settlement of Disputes*) 1869 UNTS 401; and many others.

[211] See Y. TANAKA AT 1, 8.

[212] *North Sea Continental Shelf Cases cit.,* ICJ Reports (1969), 3, para. 85.

The duty to cooperation is strictly linked to Good Faith, and it is important in the network of obligations generated by dispute settlement mechanisms. While it has never been defined by a treaty or a resolution, it can be considered as the joint action of two or more subjects of international law of proactively working together, serving objectives that cannot be attained by a single actor.[213]

The sector of economic relations is more tightly linked to this obligation of conduct, because it is considered as customary international law although no legal binding document affirms that.[214] Relevantly, States sensed the need to highlight the existing interdependence of States and common interests of the international community: global welfare as a common good.[215]

When we focus on the dispute settlement sector, while the dispute implies disagreement and non-cooperation, some kind of cooperation in procedure or in substance is needed for the resolution, therefore for the settlement.[216] This means that the obligation to co-operate extends its effects before and during the proceeding of the method chosen, although the same duty alters significantly upon the settlement procedure of the single dispute. Furthermore, the less institutionalized a dispute settlement procedure is, the more the final result depends on the general obligation to co-operate.[217] indeed, as the dispute settlement is prescribed more as an obligation of result, the procedures of each judicial body are more likely to give more detailed and practical directions.[218] An example is the discipline of the behaviour parties shall have prior and during the process, such as the related doctrine of non-frustration of adjudication and abuse of process.[219]

The last element to be assessed in the frame of international adjudication is the upcoming relevance of regionalism, which today is an important factor to consider in the reality of international adjudication. Undeniably, the ratification of

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[213] R. WOLFRUM, *International Law of Cooperation*, II EPIL, 1995, 1242.
[214] Articles 9-17 UN General Assembly, *Charter of Economic Rights and Duties of States*, 6 November 1974, A/RES/3281.
[215] Article 55 *Charter of the Untied Nations.*
[216] A. PETERS, *International Dispute Settlement: A network for Cooperational duties*, European Journal of International Law, 2003 Vol. 14(1), 9.
[217] R. WOLFRUM, *International Law of Cooperation*, in *Oxford Public International Law*, 2010, para. 38.
[218] L. MAROTTI AND P. PALCHETTI, *Dispute Settlement in International Law* in Oxford Bibliographies, 12 May 2017 <https://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0074.xml accessed 01 June 2021.
[219] *See* at 143, 22.

more and more regional agreements in pursue of development, sometimes establishing different and more specific tribunals must be kept in mind because of both eventual restraints - as it may happen in the European Union - and because of the rise of common regional interests which could shape the behaviour and the decision of a member, in addition to the eventual deeper cooperation.[220]

In conclusion, inter-State disputes consist of a contrast of attitudes in relation to a certain conflict of interests, represented by different manifestation of will on a subject,[221] and must be grounded on a sufficient legal basis. Thus, international adjudication needs to be addressed as crucial and strategic in international law for the resolution of these discrepancies.[222] However, inter-state adjudication is characterized by a low level of independence from states, who are the only parties to have access to such systems, and by the necessity to have a direct governmental mediation in the implementation of outcomes of the decisions.[223] Consequently, it can be sustained that independent and effective tribunals in the frame of international law are subjected to the necessary condition of political unification.[224] This recalls the inseparable relation between political and legal elements in this specific type of disputes, and the fact that it may be argued that the most effective dispute settlement mechanism would be Ad Hoc Arbitration, where governments appoint the arbitrators and the interests at stake as well as the ideological imperatives are solely the ones of the parties.[225]
This thesis will be promptly discussed in the next chapters where the various possibilities for Sovereign states to litigate on economic matters appear on the global chessboard, with the strategic advantages and disadvantages on the balance.

Conclusive Remarks

[220] Article 12 UN General Assembly, *Charter of Economic Rights and Duties of States* 1974.
[221] *South West Africa case cit.*, Preliminary Objections 1962 – Dissenting Opinion of Judge Morelli.
[222] See Y. TANAKA at 1, 17.
[223] R.O. KEOHANE, A. MORAVCSIK AND A-M SLAUGHTER, *Legalized Dispute Resolution: Interstate and Transnational*, International Organization, 2000 Vol. 54(3), 460ss.
[224] J. YOO AND E. POSNER, *Judicial independence in international Tribunals*, California Law Review, 2005 Vol. 93(1), 12 ss.
[225] L.R. HELFER, A-M. SLAUGHTER, *Why States Create International Tribunals: A Response to Professors Posner and Yoo,* California Law Review, 2005 Vol. 93(3), 940ss.

Conclusively, we have cleared that inter-State economic disputes are better labelled as legal disputes on economic matters, with staking economic interests, and we have briefly defined the scope of them in the current reality of international disputes. It has also been established that the fact that the disputing parties are only sovereign States has its implications on the background to be considered and on the principles to be applied. So, the picture drawn permits to move forward to the next step of the dissertation, which is precisely focused on the methods and the fora States can adhere to settle the disputes we have just defined. If this first chapter gave a theoretical introduction to the issue, we shall now pass to a more concrete assessment of the reality of international economic adjudication.

Chapter II Evolution of inter-State settlement of economic disputes

After we have approached the discussion of specific inter-state economic disputes, we shall talk about the concrete settlement of these in the international scenario.

Surely, the proliferation of value chains and the performance of cross-border transactions increased the level of integration in global commerce and economy, with the consequence that different areas of international economic law cannot be seen independently due to their interconnecting features. Indeed, relevantly to the dissertation, this overall interconnection on economic, financial and technological level has reduced the relevance of jurisdiction of domestic Courts of individual States, in favour of international judicial bodies,[1] shaping a detailed legal system in the general fragmentation of the international community.[2] This trend is based on two traditional sets of reasons that include States procedural immunity from civil jurisdiction of domestic courts of other countries, the exemption from execution of sovereign assets (properties),[3] and their express reluctance in submitting disputes to domestic courts,[4] resulting in the inapplicability of municipal law and procedures.

[1] See A. DEL VECCHIO, *Globalization and its Effect on International Courts and Tribunals*, The Law and Practice of International Courts and Tribunals, 2006 Vol. 5(1), 1; and K. OELLERS FRAHM, *Multiplication of International Courts and Tribunals and Conflicting jurisdiction – Problems and Possible Solutions*, 2001 Max Planch Yearbook of United Nations Law, 69.

[2] F. ORREGO -VICUNA, *International Dispute Settlement in an Evolving Global Society*, Cambridge, 2004, 2.

[3] This principle of international law is prescribed by international conventions, but it has also been mentioned in various cases before international courts, such as ITLOS, and the ICJ. See UN General Assembly, *United Nations Convention on Jurisdictional Immunities of States and Their Property, 2 December 2004*, A/RES/59/38 on the base of European Convention on State Immunity, ETS No.074, 1976; *ARA Libertad (Argentina v. Ghana)* (Provisional Measures, 2012, ITLOS Report 21, para. 97; *Arrest Warrant of 1 I April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, I.C.J. Reports 2002, p. 24, para. 58; *Jurisdictional Immunities of the State (Germany v. Italy*: Greece intervening), Judgment, I.C.J. Reports 2012, p. 145, paras. 107-108. Available both at < https://www.icj-cij.org/en/list-of-all-cases >.

[4] B.H. OXMAN, *Courts and Tribunals: the ICJ, ITLOS, and Arbitral Tribunals*, in D.R. ROTHWEL, A.G. OUDE ELFERINK, K. SCOTT AND T. STEPHENS (eds.) *The Oxford Handbook of the Law of the Sea*, 1st edn, Oxford, 2017, 395.

On the international playing field, States have established different rules and various possibilities to judicially settle their controversies, balancing their interests in litigation and those in economic growth, in the consideration that international proceedings constitute methods to defend the rights of States.[5] Furthermore, economic development is considered to be a prerequisite for international peace, so means of settlement of economic disputes deserves a particular interest.[6]

It is important to analyse the structure of International Courts and Systems because in international law, decisions by a specific tribunal could affect litigation tactics of States and rulings of other bodies, that would rely on such material.[7] This is particular enhanced in international economic law, because it is a field where fragmentation is less problematic due to the various specialized systems (disciplines and tribunals) created since 1899. However, before analysing the specific bodies, it is important to retain a few characteristics of the international judicial system: consent-based empowerment, that develops both in compulsory and voluntary jurisdictions distinguishing the various bodies; the absence of a hierarchy among the systems of Dispute Settlement, that are chosen by States simply on specific interests;[8] its dynamic nature, with the consequence that each system must be considered in the bigger picture of international adjudication on economic matters, with its historical development, as different types of disputes and different phases of disputes demand different approaches, resulting in variable differences, advantages and disadvantages.[9]

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[5] In *Nottebohm, the* ICJ considered the reality of diplomatic protection as a possibility to exercise one State's rights, but it also included that international proceedings forwarded a similar interest, the resolution of disputes where States' rights stake. See *Nottebohm Case (Liechtensein v Guatemala)* Second Phase [1955] ICJ Rep 4, 24. Available at < https://www.icj-cij.org/en/list-of-all-cases >.

[6] Article 55 UN Charter states that economic and social progress is one of the aspects that UN is willing to promote with the objective to create the pre-conditions of peaceful and friendly relations among nations.

[7] For example, WTO Law is referred to by parties, arbitrators and tribunals also out of the sphere of the WTO DSS, precisely because WTO discipline provides for tools, concepts, to interpret and apply in different contexts. For example, MFN and NT. See D. A. GANTZ, 'Assessing the impact of WTO and Regional Dispute Resolution mechanism on the World Trading system', in J. JEMIELNIAK, L. NIELSEN AND H.P. OLSEN (eds) *Establishing Judicial Authority in International Economic Law*, *Cambridge*, 2016, 121.

[8] J.I. CHARNEY, *The Impact on the International Legal System of the Growth of International Courts and Tribunals*, NYU Journal of International Law & Policy, 1999 Vol. 31(4), 705

[9] O. RAMSBOTHAM, T. WOODHOUSE AND H. MIALL, *Contemporary Conflict Resolution: The Prevention, Management and Transformation of Deadly Conflicts,* 3rd edn, Cambridge, 2011, 10ss.

Surely, most of inter-State disputes are settled through negotiations, making judicial settlement relatively modest in the sphere,[10] nevertheless tribunals settling economic disputes have demonstrated to meet the interests of the disputing parties[11] and of the international community, producing also interesting principles that are applied nowadays.

1 Establishment of international jurisdiction

In international law, jurisdiction of a tribunal, a court, or a panel, refers to the power to decide a dispute in accordance with the law.[12] However, such power of international courts is strictly linked with the legally binding nature of their decisions that differ from the final reports of mediators, conciliators or the results of other diplomatic means.[13] Actually, all the questions on jurisdiction deal with the authority to adjudicate, which is concretely a power an International Court shall exercise, and must be kept separated by the questions on admissibility, that regard the conditions when a Court can claim its own right to avoid the exercise of that power.[14]

As mentioned in the first chapter when discussed about the free choice of means, and in the introduction of the second one, mentioning States immunity, great relevance is attributed to the consent of States, that is the prerequisite for the binding force of a decision issued by a specific Tribunal. So, international jurisdiction is an issue that falls within the control of the parties, and as such it has a binary nature: either it is conferred or not.[15] In other words, we can affirm that State parties promote the institution and recognize the authority of International Courts by

[10] J. MERRILS, *The Place of International Litigation in International Law,* in N. KLEIN (ed.) *Litigating International Law Disputes: Weighing the Options,* Cambridge, 2014, 3s.

[11] When States litigate before international bodies, there are always self-interests that are promoted, and often they link to domestic realities and international reputation that may pressure them. See S. SCOTT, *Litigation Versus Dispute Resolution Through Political processes,* in N. KLEIN (ed.*) ivi,* 26ss.

[12] H. THIRLWAY, *The International Court of Justice,* Oxford, 1978, 35.

[13] Usually, judicial bodies, international courts and tribunals are those organs that: are established under international legal instruments, apply international law and issue binding decisions. See K. OELLERS FRAHM at 1, 69.

[14] G. FITZMAURICE, *The Law and Procedure of International Court of Justice: General Principles and Substantive Law,* British Yearbook of International Law, 1950 vol. 27, 13ss.

[15] Y. SHANY, *Jurisdiction and Admissibility,* in C.P.R ROMANO, K.J. ALTER AND Y. SHANY (eds), *The Oxford Handbook of International Adjudication,* Oxford, 2016, 788.

international legal instruments, where they express their will agreeing on jurisdictional provisions.[16]

The will of the disputing parties can be translated in the 4 dimensions of international jurisdiction and in the binary choice between compulsory and voluntary jurisdiction. Regarding the 4 traditional categories[17] under which jurisdiction falls we shall refer to *Ratione Personae*,[18] *Materiae*,[19] *Temporis*,[20] and *Loci*[21], that define specifically by whom, when, where and about what a Court can be adhered. But, taking a step back, these four characteristics are defined in what is called Foundational Jurisdiction, obtained by a comparative analysis of the constitutive instruments of the Body itself and of the specific attributions made by the parties, who can still entitle themselves with the possibility to legitimately agree and demand some modifications in relation to their disputes, which is called Specific Jurisdiction.[22] In fact, Courts are likely to be empowered with limited foundational jurisdiction, with possible extensions and/or limitations by specific jurisdiction,[23] although there are examples of systems, whose focal point stands in the multilateral acceptance of the adjudicative function over subsequent cases without the need of further explicated consent.[24]

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[16] Jurisdictional provisions are important because they determine the legal power of the Courts and the political influence they exercise on the international community. See A. DEL VECCHIO AT 1, 297.

[17] C.F. AMERASINGHE, *Jurisdiction of international Tribunals*, Leiden, 2003, 53.

[18] This element defines the parties that can file a claim or that can be called as respondent before specific courts.

[19] This dimension delimitates the factual and legal questions that arise form the facts of cases brought by adjudication before the Courts, and that are thus considered and mentioned in the constitutive documents of these latters. Usually, this substantive reach is a specific area of international law or a specific treaty, as only the ICJ is truly a universal court in this sense.

[20] Time constraints regarding the facts from which the disputes arise. These types of limits can be established also in the specific jurisdiction when parties make reservations to the acceptance of the jurisdiction of the Courts.

[21] This dimension delimitates a geographical area, to which the relevant events for the jurisdiction of a Court must be linked to, in order to be discussed before the Body.

[22] The foundational jurisdiction can be defined as the jurisdiction agreed by the parties at the moment of the establishment of the adjudicative body onwards, while the specific jurisdiction is defined as the one conferred by two disputing parties in a specific dispute for the particular dispute. See Y. SHANY, *Jurisdiction and Admissibility*, in C.P.R. Romano, K.J. ALTER AND Y. SHANY (2016) at 15, 782s.

[23] We can consider the example of the ICJ, that was recognized the power to define its jurisdiction, to deliver advisory opinions, but was not entitled to decide a dispute between States, that have not consented to it. So, we can see that disputing parties, with the specific jurisdiction, can change this initial jurisdiction and permit this last power to the Court. See Article 36 ICJ Statute.

[24] An example is the system under the WTO DSU, whose discipline define the jurisdiction of the WTO DSS compulsory and exclusive in its scope.

Specifically, this last choice involves the distinction between compulsory and voluntary jurisdiction, because States can decide to empower an international body with the authority to consider a case *ex ante* or *ex post*. When States proceed with an *ex ante* acceptance, they subject themselves to the possibility that another State unilaterally refer the dispute to the court and they must abide to it, while with an *ex post* assessment, both disputing parties must agree, by a compromissory clause to clear their intention to submit the case to the court. In international economic adjudication, it is extremely convenient to establish the first, so that applicants can directly proceed with "*acts of seisin*",[25] without putting off the settlement of the dispute because of a disagreement with the aggrieving State, but in inter-State litigation it is rare to find States binding themselves unconditionally before the rise of a dispute, except for specialized cases, as we will see below.[26]

A comparative analysis of these two types of jurisdictions underline that apart from the unilateral or bilateral referral of the dispute, importance is attributed to the moment in which the jurisdiction is empowered, and to their procedural consequences. As matter of fact, Voluntary jurisdiction is habitually rendered by a compromise between the disputing parties, who agree on their preferred tribunal and procedures to face the dispute, thus limiting eventual jurisdictional and preliminary questions to solve, strengthening the adjudicative process.[27] Surely, this joint special agreement requires previous consultations,[28] but permits access only to bilateral applications and relies heavily on respondent's behaviour, which could be problematic considering a dispute between two imbalanced powers and the eventual preclusion of access to impartial tribunals empowered with the law. Conversely, two parties may extend, as seen above, the jurisdiction of the court,

[25] See Y. SHANY at 22, 784.

[26] Y. TANAKA, *The Peaceful Settlement of International Disputes,* Cambridge, 2018, 230

[27] There are various treaties that explicitly require such pre-litigation phase, and we can see Article 283 UNCLOS, WTO DSU requiring consultations, MERCOSUR proposing a first period of consultation, NAFTA before the establishment of the panel suggest an amicably settled solution. Also, if this was the case, there would be the need to appoint the arbitrators or to select which Court shall have jurisdiction.

[28] For example, under UNCLOS they may be either diplomatic communications or mere exchange of views.

then enlarging the power pf the court that conventionally would have been excluded.[29]

Compulsory jurisdiction, instead, is the result of specific compromissory clauses, that contain the dictum "*all the disputes between the parties under this agreement shall be settled by*",[30] so they create a legal foundation for unilateral access to the Court, that is very likely to be sustained by a system or an authority, States have committed themselves to. Undoubtedly, this choice resembles domestic jurisdiction, that is why it is not so common, except for regional mechanisms, where neighbouring States comprehend the additional value of ensuring disputes before a body they trust and that avoid escalations in the area. Moreover, an agreed legal process reduces the relevance of power in international relations, as all the nations are equal before the law,[31] granting certain advantages to certain categories of countries. Empirically, compulsory jurisdiction gains relevance when a dispute is submitted before a judicial tribunal, precisely because when the concept was first established, it was developed in opposition to the reality of arbitration specifically with the intent not to require an agreement between the parties, but to consider sufficient the existence of unilateral volition of the applicant.[32]

Relevantly, Kelsen stated that the most important aspect of a judicial system is compulsory jurisdiction, although in such a variable scenario, more specialized courts were needed.[33]

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[29] Sections 3 Part XV UNCLOS states globally that when disputes are excluded from proceedings before dispute settlement bodies under UNCLOS, unless they are submitted to other treaty, they can be brought before one of the compulsory procedures if agreed by the parties.

[30] Treaty clauses can refer to different mechanism but the text is usually very similar, indeed we can take as example: Article 26 British Mandate for Palestine "*if any dispute whatever should arise […] shall be submitted to the PCIJ provided Article 14 Covenant of the League of Nation*"; Article 23 Geneva Convention between Germany and Poland 1922 "*should differences of opinion […] arise […] they shall be submitted to the PCIJ";* US-Norway Arbitration Convention:*"Differences which may arise of a legal nature […] which it may not have been possible to settle by diplomacy, shall be referred to arbitration in the way which has been followed in this case*" Article XXI, paragraph 2, of the Treaty of Amity (Iran-US): *"Any dispute between […] not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice*."

[31] J. VON BERNSTOFF, *The Public International Law Theory of Hans Kelsen: Believing in Universal Law*, Cambridge, 2010, 221.

[32] P.M. BROWN, *Arbitrage et Justice,* in *Revue de Droit International et de Législation Comparée*, 1924, 137. But of course, this is not the only difference between arbitration and judicial courts, indeed, we shall look for organizational differences, permanency, constitution of the deciding body, pre-fixed procedures, differences in costs of the proceedings, a more achievable jurisprudence and a different speed of access to the System. See S. ROSENNE, *The Law and Practice of the International Court 1920-2005*,4th edn, Leiden, 2006, Vol I, 10s.

[33] See J. VON BERNSTOFF AT 31, 201.

It is neither unusual for the parties to establish the jurisdiction of the court or arbitral tribunal as the residual mean of dispute settlement,[34] because States prefer to leave for themselves a right of way out to achieve a less costly and often more effective solutions through negotiations, especially when complex and multi-disciplinary issues could detriment the effectiveness of justice.[35]

Overall, a State is by no means subject to jurisdiction of international courts without its express consent, so it is possible to conclude that international jurisdiction is a mixture of delegation and consent in the sense that States empower International Courts by delegation, and accept by consent the exercise of adjudicative function in the specific case.[36] Within these external boundaries, Courts are also entitled to interpret these acts of empowerments, stretching their scope of jurisdiction on the basis of hunger for cases and of their normative agenda.[37] Accordingly, Courts alone are empowered to decide on the existence and on the scope of their jurisdiction in compliance with their constitutive instruments, under the Competence-Competence principle.[38]

With these premises, the discussion may now move forward to the analysis of the evolution of economic adjudication throughout the various institutions that have been established by States for settling their disputes.

2 Inter-State arbitration

Inter-State arbitration has probably been the first adjudicative mean of dispute settlement between States, as it was firstly introduced in the Jay Treaty 1794 between the British Empire and the United States of America,[39] and then valorised

[34] International Scenario is rich of systems that are organized as such: WTO DSS, ITLOS, MERCOSUR, NAFTA are just some examples.

[35] States could limit their loss of control over international cases brough before adjudications. See G BIEHLER, *Procedures in International law*, Berlin, 2008, 298.

[36] J. KLABBERS, *Introduction to international Institutional Law*, 2nd edn, Cambridge, 2009, 55s.

[37] The real obstacle in exercising this power is that the Court can not decide on an ad hoc basis, as this would reduce its authority and legitimacy in front of the States, among which the customary principle that similar cases are to be treated similarly exists and is acknowledged.

[38] H.W.A THIRLWAY, *The International Court of Justice*, 2nd edn, Oxford, 2016, 38ss. This principle is found also as Kompetenz-Kompetenz and la compétence de la compétence.

[39] Articles 5-6-7 Treaty of Amity, Commerce and Navigation between Great Britain and the United States 1794. These introduced three arbitral commissions dealing respectively with Croix River, British Debts and maritime Claims between the contracting parties, as it happened with *Alabama Claims* 1872 and *Bearing Sea Fur Seal* 1893 arbitrations.

among the delegates of the first international peace conference in 1843.[40] In the Hague I Convention 1899, inter-State arbitration was said to be the most efficient mean of settling differences between States that diplomacy had failed to settle, by Judges of their own choice and on the basis of respect for law.[41]

Actually, Arbitral conception of dispute settlement entails the referral of the settlement of an international controversy to an individual or to a collegial body by mutual willingness of the parties,[42] thus, the structure of arbitration falls entirely within their control through negotiation and agreement. That is why, it is defined as a legal (negotiating) institute that provides for a partial definition of the relationship between the litigants to be integrated by the decision of third arbitrator/s,[43] who is/are chosen by them and apply the law agreed in the constitutive legal instrument.[44] However, since the foundation of the Permanent Court of Arbitration (CPA) in 1899, 20 years before the institution of the PCIJ, these procedures have been institutionalized providing technical trails to follow.[45] Nevertheless, arbitration is connected to the concept of Ad-Hoc settlement of disputes, for the reason that arbitrators are chosen by the disputing parties on a case-by-case basis and are not permanent,[46] therefore, creating a "confidential" connexion between the parties and the deciding body, increasing the authoritativeness of the process but diminishing its detachment/independence.[47]

Regarding the scope of disputes to be brought before an arbitral tribunal, we shall mention Articles 15-17 Hague Convention on the peaceful Settlement of

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[40] In London, States delegations agreed to consider Arbitration in treaty clauses as the compulsory procedure to resolve controversies on the interpretation and application of the treaties. See J. ALLAIN, *A Century of International Adjudication: The Rule of Law and its Limits,* The Hague, 2000, 13s.

[41] Articles 15-16 Convention on the Pacific Settlement of International Disputes 1899.

[42] G. MORELLI, *La Sentenza Internazionale,* Padova, 1931, 194-195.

[43] Arbitration would then rely on the existence of two elements: direct appointment of judges by the parties and particular clauses that are the legal foundations for parties' obligations during the process and after the issuance of a decision. See D. ANZILOTTI, *Corso di Diritto Internazionale, III, Roma, 1912-1914, 40s;* and *Ivi* at 1, 296.

[44] Article 37 Convention on the Pacific Settlement of International Disputes 1899.

[45] Chapter III on "*Arbitral Procedure"* of the Convention on the Pacific Settlement of International Disputes 1899 (Articles 30-57) describe all the steps for the nomination of the arbitrators and the development of the arbitral procedure with the choice of the seat, the phases of the process and the rules concerning the award.

[46] United Nations, *Handbook on the peaceful Settlement of Disputes between States*, New York: United Nations, 1992, 5, para. 170.

[47] Permanent Court of Arbitration (CPA), Circular Note of the Secretary General (1960) 54 American Journal of International Law, 934.

International Disputes 1899. Practically, the object depends entirely on the disputing States, as they can conclude an arbitration clause on a difference between them, that can belong to a specific category or that can be outlined generally,[48] and that results either in questions already existing or that may arise in the future. The only limit stands in which cases the parties consider impossible to submit before arbitration, otherwise they can stretch obligatory jurisdiction by subsequent agreements.[49] During the first Hague Conference it was only established a default jurisdiction for the PCA system over disputes that dealt with contract debts between parties that had agreed to arbitrate without specifying before which institution,[50] but this was an isolated case.

One peculiar aspect that must be considered by States wishing to use international arbitration is the appointment of arbitrators, because differently from a permanent body, this can be a strategic choice in relation to the outcome of the proceeding. In the context of the CPA, there is the advantage of choosing arbitrators from the national lists provided by the member States to The Hague Convention, with the further possibility to ensure their impartiality and independence, with consideration to their habitual preferences in the interpretation of international rules. In fact, it is suggested to appoint individual from third countries, with the purpose to increase confidence in the validity and effectiveness of the process,[51] but the decisions are public, so litigants study the way in which a specific arbitrator has applied a certain rule.[52] Specifically, in this particular type of arbitration principles and rules applied to commercial and investment arbitration must be reviewed taking into consideration the practice of inter-State disputes, as the arbitral tribunal stated in *Chagos Marine Protected Area arbitration.*[53] In more detail, while dealing with the claim by Mauritius over the partial appointment of an arbitrator by United Kingdom in breach of the IBA Guidelines and the "*Appearance of Bias"* standard,[54]

[48] In this case, we would find the voice "*any dispute arising between the parties…"*
[49] Article 19 Convention on the Pacific Settlement of International Disputes 1899.
[50] Article 53(2) Hague Convention for the Pacific Settlement of international Disputes of 1907(I).
[51] Article 6(4) 1992 CPA Optional Rules for arbitrating Disputes between Two States.
[52] See < https://pca-cpa.org/en/cases/ >.
[53] *Chagos Marine Protected Area arbitration,* Reasoned Decision on Challenge, 30 November 2011, 28, para. 156. Available at < https://www.pcacases.com/pcadocs/MU-UK%2020150318%20Award.pdf >.
[54] International Bar Association Guidelines on Conflicts of Interests in International Arbitration.

the tribunal asserted that inter-State previous disputes favoured an interpretation of the threshold for partiality and dependency[55] in harmony with the different *"Specific Prior Investment Involvement"* standard.[56] This new doctrine based on previous practice[57] is to be mentioned, because standards applicable to inter-State arbitration necessarily rely on consensual nature of only inter-States dispute settlement and the other rules of public international law,[58] ex article 38 ICJ Statute, and effectively become applicable source of law before international courts and arbitral tribunals.[59] So, when States deal with the appointment of independent and impartial arbitrators, they should consider specific statements at the moment of taking office,[60] where arbitrators shall solemnly declare to perform their duties honourably, faithfully, impartially and conscientiously.[61] However, in this sense, prior activities as representatives (diplomats and judges) of governments do not

[55] This doctrine was supplemented by the law and the practice of inter-State previous disputes, namely OSPAR Case, MOX Plant case and by the Eritrea-Ethiopia Commission that were resolved by arbitrations administered by the CPA. See *MOX Plant Case (Ireland v. United Kingdom),* Rules of Procedure of the Annex VII Tribunal, Article 6; "*OSPAR" Arbitration (Ireland v. United Kingdom),* Rules of Procedure of the Tribunal, Article 6; *Eritrea-Ethiopia Boundary Commission (Eritrea/Ethiopia),* Rules of Procedure of the Commission, Article 8.

[56] This different standard is based on Articles 2-16-17-24 of the ICJ Statute and on the Article 34 Rules of the (ICJ) Court. Additionally, in the specific case further relevance was given to supporting interpretation of Articles 7-8-17 of the statue of ITLOS in relation to Annex VII UNCLOS that specifically addresses the question of dispute settlement. This view was reflected in the Decision on Challenge 2011, at page 24, para. 133. Also See the opinion of Judge Guillaume that had previously concluded that "[*T]he practice of the Permanent Court of International Justice and that of the present Court is clear: a member of the Court or an ad hoc judge having had in the past close relations with one of the Parties to the dispute need not for that reason alone be disqualified*".

[57] *Chagos Marine Protected Area arbitration cit.*, Reasoned Decision on Challenge, 30-31, paras. 163-168. This opinion is also supported by the fact that Optional Rules for arbitrating Inter-State disputes are based on UNCITRAL Arbitration Rules, but are modified consistently to reflect the public international law character of disputes between States and diplomatic practice appropriate to such disputes. See Notes to the Text of 1992 PCA Optional Rules.

[58] rules adopted by Non-governmental institutions are not taken into consideration unless they had been expressly adopted by sovereign States.

[59] *Chagos Marine Protected Area arbitration cit.*, Reasoned Decision on Challenge, 31, paras. 166-167.

[60] This Declaration of Acceptance and a Statement of Impartiality and Independence directs each arbitrator to consider "*whether there exists any past or present relationship, direct or indirect, with any of the parties or their counsel, whether financial, professional or of another kind, and whether the nature of any such relationship is such that disclosure is called for pursuant to the criteria below. Any doubt should be resolved in favour of disclosure."*. Then the arbitrator is required to accept one of two options that consider the existence or not of facts or circumstances that are "likely to give rise to justifiable doubts on his/her impartiality and independence.

[61] It is important to note that despite the relevant dispositions are Article 4(1) ICJ Statue and Article 8(3) CPA Optional Rules, their discipline is extended also to arbitrators that are not judges enlisted or appointed in the CPA or ICJ. See Article 4 ICJ Statute; Article 8(3) 1992 CPA Optional Rules for arbitrating Disputes between Two States.

trigger the application of the Article 17(2) ICJ Statute, as was expressed in *South West Africa* and *Wall advisory opinions*,[62] and in the specific dissenting opinion of Judge Buergenthal in the second.[63]

A second element to assess is the applicable law, which we have mentioned can be agreed by the disputing parties without restraints, but when an explicit applicable law lacks, then we shall refer to Article 28 General Act for the pacific Settlement of International Disputes, among others,[64] which recognize the residual application of Article 38 ICJ Statute in regard to the substance.[65] In *Taba Arbitration 1988*,[66] a dispute on economic matters, the arbitral tribunal interpreted the absence of applicable law establishing the assumption on the application of public international law, and its sources under Article 38 ICJ Statute.[67] With such a precedent, it was not surprising to find another tribunal adopting a similar approach in *Norwegian Shipwoners case*, the arbitral tribunal took into consideration the work of Dr. Lammasch, claiming that when an arbitration is set "on the basis of respect for law" the arbitrator must decide in first place in accordance with international law, derived from treaties, customary law and practice of judges of other international courts.[68] The panel recognized the

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[62] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970),* Advisory Opinion, ICJ Reports 1971, p. 16, para. 9; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* Order of 30 January 2004, ICJ Reports 2004, p. 3. Available at < https://www.icj-cij.org/en/list-of-all-cases >.

[63] Judge Buergenthal's dissent concerned an interview Judge Elaraby gave two months before his election to the Court when he was no longer an official of his Government and hence spoke in his personal capacity. See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory cit.*, Order 2004, Dissenting Opinion of Judge Buergenthal, p. 7, paras. 6-7,

[64] It is not the only one, indeed, Article 26 European Convention for the Peaceful settlement of Disputes 1957, Article 33(1) CPA Optional Rules for arbitrating Disputes between Two States 1992,

[65] The text of article 10 Model Rules on Arbitral procedure, 1958 drafted by the ILC Commission appearing in Yearbook of the International Law Commission, 1958, vol. II expresses precisely this possibility.

[66] *Case concerning the location of boundary markers in Taba between Egypt and Israel*, Arbitral Award, Decision of 29 September 1988, 20 RIAA, 65. Available at < https://legal.un.org/riaa/cases/vol_xx/1-118.pdf >.

[67] Considering Article II Compromis between Egypt and Israel, and *Case concerning the Location of boundary markers in Taba between Egypt and Israel*, 29 September 1988, 20 RIAA, 65, para. 239. The tribunal has avoided the claim by Israel for which the scope of the arbitration was limited by the *compromis* where there was no applicable law, thus leading to *non liquet*, specifying that the principle applies only when the there are reasons for which the tribunal cannot reach a decision on the merits of a specific case.

[68] The panel decided as such, performing a cross interpretation of Articles 37 and 73 Hague Convention 1907. This assertion was confirmed by J. Brown Scott who affirmed that *"In the absence of an agreement of the contending countries excluding the law of nations, laying down specifically*

exception to what affirmed in special principles as agreed by the parties, although this has not prevented the question over binding States to public international law also when they have not consented to it. Despite this doctrine for which inter-State arbitration is disciplined by definition under international law, with State parties free to mutually agree to remove the dispute from the public international level,[69] we shall underline that the internal world of inter-State arbitration typically is created and defined by treaty or treaties.[70] As matter of fact, the primary alternatives available to State delegations drafting disputes settlement clauses would be either the Accords were the United Nations Draft Convention on Arbitral Procedure or the UNCITRAL Rules of Arbitral Procedure, yet only the first was designed for inter-State arbitration because the second was intended for international commercial arbitration.

Lastly, States need to consider the value of an eventual arbitral award and its enforcement, to assess its effectiveness toward the settlement of economic matters. The initial point should be Article 18 Hague I Convention, under which State parties loyally submit to the award of arbitration they commit themselves to. Despite the legal commitment, States are likely to comply with an award, because they find it more convenient than refusing its acceptance and incurring in political consequences, that are costly.[71] Despite the low chances, sometimes there have been issues of non-compliance with the awards, however, in such cases the real determinant was the non acceptance of arbitration as a whole. A clear example of this assertion is the *South China Sea arbitration 2016*, where People's Republic of China never recognized the arbitration[72] and did not appear before the arbitral tribunal, although it had agreed to settle disputes with Philippines in the area of South China Sea by negotiation. Consequently when the decision was issued,[73] the

the law to be applied, international law is the law of an International Tribunal." See *Norwegian shipowners Claims (Norway v United States of America)*, Award, Permanent Court of Arbitration (13 October 1922) (1922) I RIAA, 331. Available at < https://pca-cpa.org/cases/ >.

[69] D.D. CARON, *The Nature of the Iran-United States Claims Tribunal and the Evolving Structure of International Dispute Resolution*, American Journal of International Law, 1990 Vol. 84, 111.

[70] The agreement to arbitrate and (where applicable) and the treaty establishing the responsible institution are the most relevant.

[71] J. MERRILLS, *International Dispute Settlement*, 6th edn, Cambridge, 2017, 114

[72] PCA Case No. 2013-19, the *South China Sea* arbitration (Jurisdiction and Admissibility), 29 October 2015, 15, para. 27. Available at < https://pca-cpa.org/cases/ >.

[73] The absence of a party to an arbitral procedure, does not influence the possibility to issue an award. Y. TANAKA at 26, 114s.

respondent opposed its validity, affirming it to be null and void. Nevertheless, it is important to clarify that despite the factual failure in the settling dispute, unilateral declarations of invalidity do not automatically vitiate the award, because interstate arbitration are not subject to any compulsory control mechanism,[74] thus preserving its interpretation and application of international law as an eventual precedent for future cases. Yet, in the different case where both parties initially accepted the arbitration and one steps back after the issuance of the arbitral award, there are two alternatives to claiming the nullity of the award, which is legitimate only in very few cases.[75] Firstly, the party can recourse before the ICJ for revision of the award, as happened in 1957 for the award of *King of Spain* between Honduras and Nicaragua,[76] secondly, it can try to solve the initial dispute by mediation or good offices with the intervention of third parties, as happened in the *Beagle Channel case* with the interposition of the Holy See.[77]

Though, in both cases, States can rely on the fact that arbitral awards are not subject to appeal,[78] not even by the ICJ, thus the question is finally limited to the

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[74] This common opinion is based on two arguments: (i) interstate arbitral awards are completely "delocalized", so they are subject only to public international law, not to any national law that could be applied by domestic courts; (ii) inter-States arbitration usually concern sovereign rights rather than commercial transactions. See PETER TZENG, *The Annulment of Interstate Arbitral Awards* (Kluwer Arbitration Blog, 1st July) <http://arbitrationblog.kluwerarbitration.com/2017/07/01/the-annulment-of-interstate-arbitral-awards/#:~:text=In%20commercial%20and%20investment%20arbitration,an%20ICSID%20ad%20hoc%20committee.> accessed 4 June 2021.

[75] The only reasons for which nullity of the award can be claimed are: Excès du pouvoir, corruption, failure to motivate the award, serious departure from fundamental rules of procedure, the nullity of the compromis where the undertaking to arbitrate was present. See Article 34 UNCITRAL Model Rules; Articles 35-37 Model Rules on Arbitral Procedures 1958;

[76] *Case concerning the Arbitral Award made by the King of Spain on 23 December 1906 (Honduras v. Nicaragua)*, Judgement of 18 November 1960, ICJ Report 1960. Available at < https://www.icj-cij.org/en/list-of-all-cases >.

[77] *Beagle Channel Arbitration* between *the Republic of Argentina and The Republic of Chile*, Report and Decision of the Court of Arbitration of 18 February 1977, 53. Available at < https://pca-cpa.org/cases/ >; and T. PRINCEN, I*nternational Mediation: The view from the Vatican: Lessons from Mediating the Beagle Channel Dispute*, Negotiation Journal, 1987 Vol. 3, 350-360.
This was a particular case where arbitration by British Crown failed, but further tri-lateral diplomatic efforts achieved the result to settle the dispute. In other words, it is an example of how mixing adjudicative and diplomatic means can sometimes be necessary to resolve international conflicts, before they escalate in wars, as was happening in the case after that both Argentina and Chile had deployed troops on their border.

[78] Under international law, appeal requires a hierarchically superior court that decides on an international dispute (case) already decided, with the same parties and the same process, by a lower court. See W.M. REISMAN, *The Supervisory Jurisdiction of the International Court of Justice: international Arbitration and international Adjudication,* Recueil des Cours de l'Académie de Droit International, 1996 Vol. 258, 221.

effectiveness, so it cannot be changed in its merits, unless by an agreement between them.[79]

Of course, the risk of non-compliance cannot be totally eliminated, but States usually comply with international awards, which however could be enforced and recognized around much of the world under the New York Convention 1958.[80]

In the development of an overall assessment, the advantages States benefits from arbitration consist in a more effective adjudicative process, where both parties have agreed to attend,[81] that is expected to cost slightly less than a trial before international courts, and more importantly that may be totally confidential, differently from what may happen before other tribunals, such as the ICJ.[82] The possibility to require confidentiality on the procedures, making pleadings and oral statements totally confidential, has gained arbitration the title of "litigation in conditions of privacy".[83] Such a legal regime permits also the non-interference of external actors and municipal Courts, who would still remain competent on the enforceability of the final (and binding) awards, subjected to the national law,[84] normally precluded due to State procedural immunity.[85]

Despite a conventional wisdom for which inter-State arbitration has experienced a declining trend after the "high noon" of the beginning of XX century,[86] it has not fallen in disuse on economic matters. Indeed, if in the past arbitration was chosen to settle cases such as *Venezuelan preferential case in 1904,* where it established

[79] *Case concerning the Arbitral Award made by the King of Spain cit.*, ICJ Report 1960, 214-217.
[80] See Article II NY Convention 1958.
[81] Default proceedings, as *south China Sea arbitration are the exceptions to the rule.*
[82] Article 40(3) ICJ Statute and Article 42 Rules of the court require the proceedings to be public.
[83] I. BROWNLIE, *The peaceful Settlement of International Disputes,* Chicago Journal of International Law, 2009 Vol. 8.
[84] G.R. DELAUME, *ICSID Arbitration and the Courts,* American Journal of International Law, 1983 Vol. 77, 784.
[85] 2004 UN Convention on the Jurisdictional Immunities of States and Their Property and 1972 European Convention on State Immunity. Although the first has not come into effect yet, while the second was ratified only by a small number of countries, it is undoubted that States Immunity is a pillar of international (economic) law and it s recognized by international tribunals as well. See *Jurisdictional Immunities cit. 2012; and* N. RONZITTI, *Introduzione al Diritto Internazionale,* 5th edn, Torino, 2016.
[86] C. PARRY, *Some Considerations upon the Protection of Individuals in International Law*, Recueils des Cours de l'Académie de Droit International, 1956 II Vol. 90, 660; and M. STUYT, *Survey of International Arbitration* 1794-1970 (1976).

the *Drago Doctrine* on preferential treatment of payment of claims,[87] there are also current examples of bilateral treaties where arbitration is inserted in the dispute settlement clause, such as UK Withdrawal Agreement after Brexit, where Articles 169-170 recognize the possibility for the parties to request the constitution of an arbitration panel after 3 months of consultations looking for a mutually agreed solution. Or also the treaty on fisheries signed in 1994 between US and certain pacific island States.[88] Moreover, recently another milestone in the history of interstate arbitration was laid, precisely in the *Softwood Lumber Dispute* between the United States and Canada. There, for the first time, two States have decided to bring before a private dispute settlement mechanism a dispute which belongs to the reality of public international arbitration,[89] thus demonstrating that it is not a dying practice.

3 Universal courts

A shift toward permanent courts and international judicial settlement at the first half of last century was based on the idea that permanent courts could be more effective, because they could be more easily and rapidly adhered, they could ensure compliance by their authority, with the further possibility to collect jurisprudence and resolve the question of legal certainty in international environs.[90] Additionally, the warfare background that had just touched the entire world favoured the idea that International Adjudication had to be considered the method to resolve disputes raised by breaches of binding law with solutions based on rights and justice that

[87] PCA Case No. 1903-01, *Preferential Treatment of Claims of Blockading Powers against Venezuela Case, (Germany, Great Britain, Italy v. Venezuela),* (1904), Rep 123-8, adopted 22 February 1904, 3s. Available at < https://pca-cpa.org/cases/ >.

[88] Article 6(2) Treaty on Fisheries between the Governments of Certain Pacific Island States and the United States.

[89] In the specific case, the disputing parties have decided together not to use one of the prescribed public dispute settlement mechanisms they usually would pursue, but instead they agreed to bring the dispute before the London Court of international Arbitration (LCIA), requiring the application of its rules and locating the seat of Arbitration in London. See L. GUGLYA, *The Interplay of International Dispute Resolution Mechanisms: The Softwood Lumber Controversy,* Journal of International Dispute Settlement, 2011 Vol. 2, 176ss.

[90] See J. ALLAIN, *A Century of International Adjudication: The Rule of Law and its Limits*, The Hague, 2000, 77.

may not have been accepted by both litigants,[91] without recurring to war.[92] Accordingly, when founded the PCIJ had the true function to decide disputes between States or Members of the League of Nations on the bases of international law.[93]

The differences of the conceptual Court from the PCA were sharp, because the PCA is not permanent, it is not a Court, and as such it has been hardly accessible on an ad-hoc basis in relation to the case.[94] Moreover, if States may be reluctant to bring cases before individuals, the arbitrators, who may be influenced by diplomatic agents, they may prefer a court, where judges decide under a judicial responsibility upon the records presented by the parties over questions of facts and law, and could consider it as a last resort option to avoid the escalation of disputes.[95]

In the analysis of the systems of the Permanent Court of International Justice and of the International Court of justice, we must bear in mind that the ICJ is the successor of the PCIJ and that its statute resulted from a transplantation of the one of its predecessor. Particularly, the ICJ has interpreted Article 36(5) of its Statute as a disposition whose purpose is to maintain the legal position of the Court consistent, consequently underlining the feasibility of jurisdictional titles in relation to the predecessor.[96] This is the reason why for the purpose of the dissertation I will consider them simultaneously, mentioning only the differences in the historical background,[97] and in the role within their organizations, indeed, while the PCIJ was

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[91] Actually, within the context of the PCIJ itself, the committee of jurists stated that that was the type of court the PCIJ was meant to be: a permanent court with a broad and compulsory jurisdiction. See Permanent court of International justice, Advisory Committee of Jurists, Procès-Verbaux of the proceedings of the committee June 16 to July 24, 1920 (republished 2005), Clark, 104; and J.H. RALTSON, *International Arbitration, from Athens to Locarno,* Palo Alto, 1929, 102s.

[92] D.D. CARON, *War and International Adjudication: Reflection on the 1899 Peace Conference*, American Journal of International Law, 2000 Vol. 94(4), 12.

[93] In one of its cases, it affirmed that Article 38 of the Statute contained a clear indication to this function. See *Payment of Various Serbian Loans Issued in France (France v. Kingdom of the Serbs, Croats and Slovenes),* 1929 P.C.I.J. (ser. A) No. 20 (July 12), para. 28. Available at < https://www.icj-cij.org/en/pcij-series-a >.

[94] M.E. O'CONNEL and L. VANDERZEE, *The history of International Adjudication,* in C.P.R. ROMANO, K.J. ALTER AND Y. SHANY (eds) at 15, 49.

[95] E. ROOT, *Instructions to the U.S. Delegation to the Second Hague conference 1907,* US Foreign Relations, 1907, 1135.

[96] R. KOLB, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (1984 to 1986),* in in E. BJORGE AND C. MILES (eds), *Landmark Cases in Public International Law,* Oxford, 2017, 361.

[97] Not only the UN Charter explicitly mentions the ICJ as successor of the PCIJ, but the statute of the ICJ is formed on the model of the one of the PCIJ, in Article 92(1) UN Charter.

not an organ of the League of Nations in 1919, the ICJ operates within the system of the United Nations since 1945, with a consequential major contribution in the exercise of its judicial or advisory functions on the establishment of principles and objectives of the United Nations.[98]

Both the ICJ and the PCIJ are important to mention not only because they were the first international tribunals to be constituted, but also because they have been the only courts with a general (universal) jurisdiction.[99] This means that they have dealt and (nowadays only ICJ) can deal with any legal contentious "difference" pending between two States,[100] that have not obtained a successful outcome by diplomacy, arbitration or otherwise.[101] Quite the reverse, article 34(1) ICJ Statue restricts the jurisdiction *ratione personae*, pointing out that the Court deals exclusively with inter-States disputes, as neither individuals nor international organizations can participate to trials before it, but there is no discrimination between members and non-members of the United Nations. Accordingly, in the past both the Italian Republic in 1954[102] and Germany in 1969[103] submitted a dispute accepting the ICJ jurisdiction without being UN Member States (MSs). Certainly, these exceptions

[98] Article 92 UN Charter; differently from the PCIJ that was founded in accordance with articles 13-14 Covenant of the League of Nations. The difference in the two articles is that while the PCIJ was established as an international court as one of the alternatives among which disputing parties may choose to settle disputes that diplomacy had failed to solve, the ICJ is recognized as the principal judicial organ of the Untied Nations, and its functioning refers to its Statute, its Rules of Court and the UN Charter itself, with the more important consequence that all the UN Member States are ipso facto parties to these other documents as expressed in article 94 UN Charter. moreover, while the decision of the PCIJ were to be executed in good faith, UN MSs undertake to comply with the ones of the ICJ under an explicit disposition.

[99] The ICJ today is the only Court that can be adhered for an unlimited scope substantial questions. See Article 36 ICJ Statute and *Applicability of the obligation to Arbitrate under section 21 of the Untied Nations Headquarters Agreement of June 26, 1947 [1988], ICJ Report 12, 27.* Available at < https://www.icj-cij.org/en/list-of-all-cases >.

[100] A. DEL VECCHIO, *I tribunali internazionali tra globalizzazione e localismi*, Bari, 2015, 37. After the foundation of the PCIJ, its scope was later commented in Article 17 General Act for the Pacific Settlement of International Disputes 1928, which stated "All disputes with regard to which the parties are in conflict as to their respective rights shall, subject to any reservations which may be made under Article 39, be submitted for decision to the Permanent Court of International Justice, unless the parties agree, in the manner hereinafter provided, to have resort to an arbitral tribunal."

[101] F.L. GRIEVES, *Supranational and international Adjudication,* Champaign Illinois, 1969, 49.

[102] *Monetary Gold removed from Rome in 1943 (Italy V. France, United Kingdom of Great Britain and Northern Ireland and United States of America),* Preliminary Objection, Judgement of 15 June 1954, ICJ Report 1954, 21-22. Available at < https://www.icj-cij.org/en/pcij-series-a >.

[103] Memorial submitted by the Government of the Federal Republic of Germany for the case concerning *North Sea Continental Shelf,* 21 August 1967, 152.

are practically irrelevant today because almost all the States in the international community have the member status.[104]

Nonetheless, the real limit of the ICJ is the establishment of its jurisdiction, which is conditioned entirely to the consent of the parties, as the ICJ universal jurisdiction is neither compulsory nor explicitly delimited, notwithstanding the interpretation of the competence-competence principle under Article 36(6) ICJ Statute and in *Nottebohm case*.[105] Furthermore, because it is a preliminary assessment often contested by the respondent, it is not extraordinary that proceedings on the merit are suspended and put off while such formal step is examined with the issuance of a judgement.[106] So, concretely, the real problem relies on the scope of the jurisdiction a State consents to, but taking a step back, it is the result of four alternative ways, enlisted under Article 36(1), with which a State expresses its choice of the World Court: special agreement, compromissory clause, *forum prorogatum* and the optional clause.[107] It is curious, however, that already in one of the first landmark disputes, the PCIJ did not have unanimous opinion on the establishment of compulsory jurisdiction, as matter of fact, there were judges

[104] With the extension of UN Membership to South Sudan in 2011, there are 193 Sovereign and independent States being members of the United Nations. See https://www.un.org/en/about-us/growth-in-un-membership >.

[105] Article 36(6) ICJ Statute explicitly states "[…] In the event of a dispute as whether the court has Jurisdiction, the matter shall be settled by decision of the Court", but there is no disposition openly delimiting where the jurisdiction starts and where it ends; *Nottebohm* (*Liechtenstein v. Guatemala),* Preliminary Objection, Judgement of 18 November 1953, ICJ Reports 1953, 119. Available at < https://www.icj-cij.org/en/list-of-all-cases >.

[106] See H. THIRLWAY AT 38, 167-170.

[107] Special Agreements giving the ICJ the jurisdiction over disputes are very rare, and in fact, there has been no dispute based on Special Agreement since 2010 *Frontier Dispute* between Burkina Faso and Niger. *forum prorogatum* is also rare as it involves complex procedural preliminary issues such, deeming possible a consent to the procedure before the ICJ, after the proceedings have started, which however is not guaranteed by anyone and it is not clearly defined in its scope. Instead, Compromissory Clauses are very common, indeed there are over 300 treaties that provide for States to compulsorily bring claims before the ICJ for any dispute arose in the interpretation and application of them. See M. KAWANO, *The Role of Judicial Procedures in the process of the Pacific Settlement of International Disputes*, RCADI, 2009 Vol. 346, 461-462; Speech by H.E. JUDGE HISASHI OWADA to the Sixth Committee of the UNGA, 30 October 2009, 4.

supporting this idea,[108] and other criticizing it in favour of a voluntary jurisdiction of the Tribunal.[109]

Independently by the specific method between special agreement and compromissory clause, it is in the interest of States to clarify the width of their consent, otherwise they take the risk of a wider spectrum of interests to be subjected to the authority of the court assessment, and to eventual abuses of process.[110] As in both these cases, and in a slightly different way with the *forum prorogatum*, all the applications are bilateral, some scholars distinguish this jurisdiction of the court as "arbitral", so chosen ad hoc by the parties, from the "judicial" one in case of acceptance *ipso facto* of the optional clause by States, between whom a controversy arises.[111]

The optional clause requires a different analysis because it is a peculiar clause foreseen in Article 36(2) ICJ Statute, thanks to which States accept preventively the jurisdiction of The Court in all the disputes with other States that have taken the same commitment. This possibility deserves attention because it opens the way for unilateral submissions (*Requêtes*), that are sure to meet the preliminary jurisdictional requirements of the Court due to bilateral engagements.[112] An additional incentive for applicants is that such declaration cannot elapse or be withdrawn after the Court has been seised, under the practice named *Nottebohm Rule*.[113] However, because it may not be advantageous for respondents, only the

[108] This idea was sustained by a couple of judges that underlined the importance of justice and of the opinion of European Continental judges. See Dissenting Opinion of Judge Moore to *Mavrommatis Case*; and the position of Judge Loder subsequently. See O. SPIERMANN, *International Legal Argument in the Permanent Court of International Justice: The Rise of International Judiciary*, Cambridge, 2004, 203s.

[109] There was also an interesting precedent position, the *Advisory Opinion on the Status of Eastern Carelia 1923*, where the PCIJ bench expressed a preference for such choice. See *Advisory Opinion on the Status of Eastern Carelia 1923* (23 July 1923) Series B, No. 5. Available at < https://www.icj-cij.org/en/pcij-series-b >.

[110] S. YEE, *Forum Prorogatum Returns to the International Court of Justice*, Leiden Journal of International Law, 2003 Vol. 16, 47.

[111] See for the first I. CHARNEY, *Compromissory Clauses and the Jurisdiction of the International Court of Justice*, American Journal of International Law, 1987 Vol. 81(4), 855; See for the second G. MORELLI, *Accettazione Incondizionata della Giurisdizione della Corte Internazionale di Giusitizia*, Rivista di Diritto Internazionale, 1983, 94.

[112] *Nicaragua case*, Jurisdiction and Admissibility, Judgement of 26 November 1984, ICJ Reports 1984, 418, para. 60.

[113] *Nottebohm case*, Preliminary Objections, Judgment of 18 November 1953, ICJ Reports 1953, p. 122; This principle was also confirmed in *Genocide Convention case 2008.* See *application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Croatia v. Serbia),

37.3% of UN Members have accepted the optional clause, and among these minority many have made reservations in order to condition their acceptance of the jurisdiction of the court,[114] reducing substantially its potential.[115]

The ICJ has supplied to this limitation with the practice and jurisprudence over the interpretation of article 36(2), suggesting an interesting way out based on two elements. Firstly, the adoption of the "two matching declarations" principle, that specifically requires two States to actually agree to the "*same obligation*" under the optional clause,[116] and secondly, the principle of Reciprocity and the prevalence of the narrower acceptance, favouring the position of litigating States,[117] but without restricting the possible theoretical scope of the formula "*any question of international law or any breach of international obligation*".[118] However, States still consider the acceptance to the optional clause a weakness, because as inferred in *Right of Passage case,* those that have accepted it are in a tactically disadvantageous position compared to the others, with the result that State

Judgement of 26 February 2007, ICJ Reports 2008, p.438, para. 80. Available at < https://www.icj-cij.org/en/list-of-all-cases >.

[114] The reservations, or conditioned acceptance of the optional clause, are admitted under Article 36(3) ICJ Statute and can be Ratione Personae, Materiae and Temporis, precluding the jurisdiction for disputes namely with specific categories of States, within a specific time scope and/or on certain categories of disputed matters. See N. RONZITTI AT 85, 291 and See Y. Tanaka at 26, 151.

[115] Today, only 72 States have submitted the declaration of acceptance of the optional clause, but many States, often the most influential ones, have withdrawn its declaration after a disadvantageous decision, as happened for the Islamic Republic of Iran after after *Anglo-Iranian Oil Co. case* and for the United States after *Nicaragua case. See C.I.J. Annuaire - I.C.J Yearbook* 1951-1952 (No.*6*), *184; C.I.J. Annuaire - I.C.J Yearbook* 1985-1986 (No.*40*), *60;*

[116] Article 36(2) ICJ Statute states *"The States parties to the present statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court concerning: the interpretation of a treaty, any question of international law, the existence of a fact which, if established, would constitute a breach of international obligation, the nature and extent of the reparation to be made for the breach of an international obligation."*

[117] The principle of Reciprocity stresses the possibility for a party to invoke a reservation that is only present in the other party's acceptance, as was stated in *Interhandel case 1959,* and relevantly, limits the jurisdiction of the Court to those areas where there is a common attributing will of the disputing parties, which is thus delimited by the narrower of the two acceptances, as expressed in the *Norwegian Loans case 1957.* See *Interhandel case (Switzerland v. United States of America,* Judgement of 21 March 1959, ICJ Reports 1959, p. 23; and *Case of Certain Norwegian Loans (France v. Norway),* Judgement of 6 July 1957, ICJ Reports 1957, p. 23. Both available at < https://www.icj-cij.org/en/list-of-all-cases >.

[118] Article 36(2) ICJ Statute states: "*The States parties to the present statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court concerning: the interpretation of a treaty, any question of international law, the existence of a fact which, if established, would constitute a breach of international obligation, the nature and extent of the reparation to be made for the breach of an international obligation."*

accepting compulsory jurisdiction in this way shall always be prepared to be called to be respondent before the ICJ and be subjected to "surprise applications".[119] Undoubtedly, acceptances of optional clause have diminished, but some States, such as United Kingdom or Italy, have precluded their acceptance in case of abuses, when countries accept specific clause just to file an application against them.[120]

Conclusively, it is possible to assert that the Optional Clause would be the key instrument to establish the compulsory jurisdiction of the ICJ, and to permit unilateral claims, however, differently from the 1920s, when PCIJ functioned and international law was at its embryonic stage, nowadays international law has developed so extensively that States do not have interest in the settlement of economic disputes [investments, loans, monetary transactions] before the ICJ. They would rather respect specific institutions and specific procedures, see the WTO DSS, other regional Courts, discussed below, and the concept idea of a Multilateral Investment Court (MIC),[121] with a proper specialization, despite fuelling the opposite trend of de-politicization of economic dispute settlement sought in the past century.[122] Then, regarding the more specific reality of international economic law, on specific subjects States may exclude ICJ jurisdiction by making Reservations *ratione materiae* or by agreeing to settle disputes through other means of peaceful settlement,[123] as the position of the judicial bench demonstrated in *Phosphate Lands*

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[119] *Right of Passage over Indian Territory (Portugal v. India)*, Preliminary Objections, Judgement of 26 November 1957, ICJ Reports 1957, p.146s. Available at < https://www.icj-cij.org/en/list-of-all-cases >.

[120] Article 1.iii Declaration of the United Kingdom of Great Britain and Northern Ireland recognizing the jurisdiction of the Court as compulsory and Article 1.ii Declaration of the Republic of Italy recognizing the jurisdiction of the Court as compulsory. See < https://www.icj-cij.org/en/declarations/gb > and < https://www.icj-cij.org/en/declarations/it >.

[121] The European Union has proposed a new mechanism involving disputes dealing with investment, which should be a permanent Court. Despite the idea remains theoretical at the multilateral level, the EU has already agreed to such a possibility in bilateral treaties such as CETA, or Vietnam-EU FTA. See A. REINISCH, *Will the EU's Proposal concerning an Investment Court System for CETA and TTIP lead to Enforceable Awards? - The Limits of Modifying the ICSID Convention and the Nature of Investment Arbitration*, Journal of International Economic Law, 2016 Vol. 19(4),761-762; and Article 12 (2), EU-Vietnam FTA. And European Commission. European Commission Press Release, The EU and Vietnam Finalize Landmark Trade Deal (Dec. 2, 2015); Article 8 CETA. And Joint Interpretative Instrument on the Comprehensive Economic and Trade Agreement (CETA) Between Canada and the European Union and its Member States, OJ L 11, 14 (Jan. 2017).

[122] It is certain that the institutionalization of the system influences the politicization of the disputes brought before it, indeed, the more direct is the link between State parties and adjudicators, the less a de-politicised system can be achieved with the same degree of Investor-State dispute settlement systems, such as ICSID.

[123] J.G, MERRILS, *Optional Clause Revisited*, British Yearbook of International Law, 1993 Vol. 64(1), 225.

in Nauru case.[124] A third hypothesis that will be deeply discussed below is to attribute compulsory jurisdiction to other international Courts/Panels through multilateral treaties. Finally, States have the possibility to avoid judgements on specific contentious cases, without adopting the *extrema ratio* of domestic jurisdiction,[125] when they find their interests to be better protected by settling disputes before other *fora*, and an example is Japan that has extended its reservation precluding all the disputes regarding living resources of the sea before the ICJ, after the *Whaling in Antarctic case in 2014*.[126]

Before further procedural points, States must make observations over the deciding bench. Without spending excessive time on the composition of the Court,[127][128] the ICJ provides for the interesting institute of judge ad hoc,[129] about which we shall discuss due to its peculiar raison d'être. Despite the friction with the theoretical independence and impartiality of (regular and not only) judges and the

[124] *Case concerning Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, Judgement of 26 June 1992, ICJ Reports 1992, p.245, para. 8.
[125] See Y. TANAKA at 26, 157.
[126] M.A. BECKER, J*apan new Optional Clause Declaration at the ICJ: a Pre-emptive strike?* (EJIL:Talk!, 20 October) <https://www.ejiltalk.org/japans-new-optional-clause-declaration-at-the-icj-a-pre-emptive-strike/> accessed 19 May 2021.
[127] The Court consists of 15 judges, nationals of Member States of the UN, although they are required to be independent, impartial, autonomous other than professional, as mentioned above and according to Articles 2-16-17-20 ICJ Statute. In fact, while it is not a problem for a judge to have previously been an agent, a counsel or a political-administrative official of his/her own State, the fundamental element that is considered determinant is the past participation in the specific case as it has been considered in *Namibia Advisory Opinion* in 1971, *the Construction of a Wall in Palestinian territory case* in 2004 and *in the matter of Arbitration before an Arbitral Tribunal between Mauritius and United Kingdom* in 2011, additionally to the established Practice Direction VIII. See *Legal Consequences for States of the continued Presence of South Africa Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970),* Advisory Opinion cit., 18, para. 9; *Legal Consequences of the construction of a Wall in Occupied Palestinian Territory cit.,* Order 2004, 4, paras. 4-5; *in the Matter before an Arbitral Tribunal Constituted under Annex VII of the 1982 UNCLOS between the Republic of Mauritius and the Untied Kingdom of Great Britain and Northern Ireland,* Reasoned Decision on Challenge, 20 November 2011, 26, para. 143.
[128] Articles 26-29 ICJ Statute state that the Court can hear cases in various organizations, which are the Chamber of Summary Procedure, the Special Chamber and an Ad Hoc Chamber, however while the first two have never been used a part for the *Treaty of Neville case in 1924* before the PCIJ, the third needs to be particularly mentioned because it was used to decide the relevant economic *ELSI case 1987*. See *Treaty of Neuilly, Article 179, Annex, Paragraph 4 (Bulgaria v. Greece)*, 1924 P.C.I.J. (ser. A) No. 3 (Sept. 12) and *Elettronica Sicula S.P.A. (ELSI), (United States of America v. Italy),* Judgment of 20 July 1989, I.C.J. Reports 1989, p. 15.
[129] Article 31(2-3) ICJ Statute. The Judges Ad hoc are sometimes subjected to different regulation, indeed, the incompatibility with political and administrative or other professional functions finds in them an exception. See *In the Matter before an Arbitral Tribunal Constituted under Annex VII of the 1982 UNCLOS between the Republic of Mauritius and the Untied Kingdom of Great Britain and Northern Ireland,* Reasoned Decision on Challenge, 20 November 2011, 30, para. 164.

practical risk of influencing the judgement (which is very low considering the weight of one judge over the normal number of judges in a chamber),[130] it has been prescribed not to underestimate the psychological interest of disputing States that have no judges of their nationality in the bench and the fear that their arguments would not be fully appreciated by the decisional commission.[131] Due to this function, there is no obligation over disputing parties to appoint ad-hoc judges, although states consider it a guarantee of equality in case one of the two parties has one national judge seating in the deciding bench.

This is not the only element that guarantees the parties a fair trial, and influence States' decision to adhere the Court Indeed, it is in the interests of litigants to avoid abuses during the analysis of the pleadings and during oral hearings. The safeguard of these interests is ensured by the fact that a trial before the ICJ is a public adversarial system where the parties are granted equality.[132] Consequently, the hearings are public, unless the parties require and the bench decides that the doors should remain closed,[133] and the disputing parties must be given equal rights and opportunities during the entire course of the proceedings, where such equality of arms should not put a more powerful State in a better judicial position.[134]

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[130] Previous judges of the ICJ has actually questioned the fact that a Judge Ad Hoc, differently from the regularly elected ones, is appointed by the party, with a more likely loyalty to the appointing State rather than to the Court. This could be a double edged weapon because they incentive States to adhere the Court, which however risks to have sided individuals on the bench additionally to the already prescribed advocates and counsels. See Observations of M. Gerald-Gray Fitzmaurice (1954-I) 45 *Annuaire de l'Institut de droit international, 445;* and Observations of H. Lauterpacht (1954-I) 45 *Annuaire de l'Institut de droit international, 534.* Contrarily, it must be said that practice has demonstrated that it is not said that the Ad Hoc judge votes in favour of his/her appointing State, as it happened in *Case Concerning the Continental Shelf* between Tunisia and the Libyan Arab Jamahiriya in 1985. See *Application for Revision and Interpretation of the Judgement of 24 February 1982 in the Case Concerning the Continental Shelf (Tunisia v. the Libyan Arab Jamahiriya)*, Judgement of 10 December 1985, ICJ Reports 1985, 229, paras. 69A-C.

[131] G. GUILLAME, *Some Thoughts on the Independence of international Judges Vis-à-Vis States*, The Law and the Practice of International Courts and Tribunals, 2003 Vol. 2, 164; and Separate Opinion of JUDGE LAUTERPACHT in the *Crime of Genocide case*, Order of 13 September 1993, ICJ Reports 1993, 409, Para. 6; and Dissenting Opinion of Judge Ad Hoc SIR GEOFFRY PALMER, *Request for an examination of the situation in Accordance with Paragraph 63 of the Court's judgement of 20 December 1974 in the Nuclear Tests* (New Zealand v. France) case, Order of 22 September 1995, ICJ Report 1995, 420, para. 118.

[132] R. KOLB, *The Elgar Companion to the International Court of Justice,* 1st edn, Cheltenham, 2014, 216.

[133] Article 46 ICJ Statute. Moreover, it is important to say that confidence can be granted on sensitive information.

[134] This is a fundamental principle of the ICJ, which was affirmed in *Military and Paramilitary Activities in and against Nicaragua* (Merits) *(Nicaragua v. United States)*, Judgment, 26 June 1986, *ICJ Report, 1986*, p. 26, para. 31.

This aspect is an incentive for smaller and less influential countries that may seek a correct application of the Rule of Law in such an important international forum, where they can be ensured with further procedural conditions such as secrecy, privacy of the deliberations of the bench, the high quorum necessary for any question to be decided, with the name of the judges voting for and against.[135] On the contrary, such equality may be eroded by the practical implementation of other procedural rules such as those disciplining the burden of proof, where there is no verbalized standard and the Court is entitled to discretion in the estimation of the value of elements, with flexible approaches toward factual matters of public knowledge and undisputed facts.[136]

Another flaw of the procedure stands when respondents decide not to appear before the Court, not only because they highlight the ineffectiveness of the authority of the ICJ and the bad administration of justice within the UN framework,[137] but also they clearly anticipate non-compliance with whatever may be decided.[138] What is worse is that non-appearing States usually tend to respond by political "backstairs" and unofficial communications, practically ignoring the existence of the court and of pending trials,[139] creating the problems of stretching the length of proceedings and leaving the Court in the critical position to decide default cases, without the participation of both parties, under international law.[140]

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[135] Under Articles 54-55-56 ICJ Statute, Judges of the ICJ cannot abstain themselves from voting. Relevantly, other adjudicative mechanisms do not provide the possibility under Article 47 ICJ Statute for judges to express either separate or dissenting opinions on the legal questions over which the bench decided without consensus, strengthening the transparency and the reliability on the process.

[136] Articles 48-52 ICJ Statute and Article 62 Rules of the Court lack any type of directive for the assessment of the Court, although this latter in *Nicaragua case* established to be bound only by the Statute and its Rules. See *Nicaragua case cit.*, Merits, ICJ Reports 1986, p. 40, para. 60.

[137] *Nicaragua case cit.*, Merits, 23, para. 27; and *Nuclear Test case (Australia v. France)*, Judgement of 20 December 1974, ICJ Reports 1974, p. 257, para. 14.

[138] L. CALFISCH, *Cent ans de règlements pacifique des différends interétatiques,* Le Recueil des Cours de l'Académie de Droit International, 2001 Vol. 288, 353.

[139] *Nicaragua Case cit.* Merits, ICJ Reports 1986, p. 25, para. 31.

[140] This would also go against the principle of the equality of the parties and would make the assessment of proofs much more difficult. Moreover, the interpretation of elements deduced out of the trial, such as the consideration of this unofficial communications that avoid the formal appearance before the bench anticipate a sure protest by the absent party, which is surely put in a disadvantageous position. See Article 53 ICJ Statute; See L. CALFISCH AT 138, 353; and *Corfu Channel (United Kingdom v. Albania),* Assessment of the amount of compensation due from Albania to the United Kingdom, Judgement of 15 December 1949, ICJ Reports 1949, p. 248.Available at < https://www.icj-cij.org/en/list-of-all-cases >.

Surely, one reason why all States have found satisfactory to adhere the ICJ, and the PCIJ before, was the legal certainty provided on the applicable law in other words, the rules applied to decide a case, which currently are UN Charter, the ICJ Statute the rules of Court and the practice direction.[141] The main disposition on the topic is Article 38 ICJ Statute, which includes an unlimited list of legal instruments, substantially based on the three categories of the traditional sources in international law.[142] Additionally, even though it formally comprehends *lex lata*, as it is positively given,[143] Article 38 embraces also the *lex ferenda*, so, the developing norms that may affect the application of the dictated rules in a certain historic moment.[144] Such possibility must be kept in mind by the litigants, because differently from customary international law that is considered equally before other mechanisms, Article 38 ICJ Statute does not have any equivalent in terms of comprehensiveness and width, including in plus rules non-explicitly recognized by the parties. That is strategically relevant because *lex ferenda* could not be anticipated but could be determinant for the decision of the Court, and the *Fisheries Jurisdiction cases* brought by United Kingdom are pertinent proofs.[145]

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[141] See R. KOLB AT 131, 63ss. The Practice Directions do not derogate the Rules of Court, but are additional sources of law for the development of the procedures.

[142] Article 38 ICJ Statue enlists the sources according to which the ICJ decides its cases and those are: International Conventions, international custom, general principles of law recognized by civilized nations, judicial decisions and the teachings of highly qualified publicists.

[143] *Lex Lata* is defined as the ratified law, in other words, the positive law that is in force at the moment. See Oxford Reference at < https://www.oxfordreference.com/view/10.1093/acref/9780195369380.001.0001/acref-9780195369380-e-1247 >. On the topic it is important to quote the ICJ In *South West Africa 1966* when it underlined that the Court has the duty to apply the law as it is and as it is found finds by the bench. See *South West Africa (Liberia v. South Africa)*, Judgment of 18 July 1966, Second Phase, ICJ Reports 1966, 48, para. 89. Available at < https://www.icj-cij.org/en/list-of-all-cases >.

[144] *Lex Ferenda* is defined as the law that ought to be, in other words that is sought to establish. See Oxford Reference at < https://www.oxfordreference.com/view/10.1093/acref/9780195369380.001.0001/acref-9780195369380-e-1239 >. Despite the fact that the ICJ recognized the possibility for international law to change constantly, it specified in *Fishery Jurisdiction 1974* that this is not a justification for not basing a judgment on the law existent at the time of the decision. See *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland)*, Merits, Judgment of 25 July 1974, ICJ Report 1974, 19-23, paras. 40-53.

[145] In this case, the ICJ remembered simultaneously the possibility for the law to change over time, and however, that the Court keeps a fixed role in deciding cases on the basis of the existing law at the moment of the decision, without considering law that may be developing. Nonetheless, despite the adjudicative function of the court which has not legislative powers as also expressed in *South West Africa case*, developing law may demonstrate that the mere application of the existing law could not be effective and thus mitigate the rigid though of the Court. See *South West Africa case cit.*, Second Phase, ICJ Reports 1966, p. 48, para. 89; and *Fisheries Jurisdiction (United Kingdom*

In the interpretation and application of law to the facts, the ICJ is bound by the *ne ultra petita principle,* for which judges cannot decide beyond the claims of the parties.[146] This is a very important consequence of the principle of free choice in inter-State dispute settlement and as such should be considered an important basis and limit for international jurisdiction in general.[147] Nonetheless, States shall not misinterpret this principle, confusing it with other prerogatives of The Court, that are instead represented by the *Kompetenz-Kompetenz* and the *Iura Novit Curia* principles stressing that it is the Court to decide on the existence of a dispute, on its relative jurisdiction, and on the applicable law, without being bound by the arguments of the parties.[148]

The result of the judicial process before the ICJ is a judgement, which under Articles 59-60 ICJ has binding force *inter partes* in the specific case where it is issued, and it is considered final and unappealable, resulting in the creation of *Res Judicata.*[149] These features are to be studied with the *Ne Bis in Idem* principle, thus precluding the re-discussion of an identical dispute that has been conclusively settled between two parties on a specific matter,[150] favouring legal certainty. This legal certainty can be however challenged in the request for an authoritative interpretation of the judgement, because in claiming their right to clarity in relation to the meaning and to the scope of the decision, States may tend to insert questions that have not been answered by the Court. Satisfactorily, the ICJ has insisted on a

v. Iceland), Merits, Judgement of 25 July 1974, ICJ Reports 1974, p. 19-23-34, paras. 40-52-79(1). Available at < https://www.icj-cij.org/en/list-of-all-cases >.

[146] See R. KOLB AT 132, 226.

[147] The Court discussed the relevance of the principle in the interpretation of the decision of *Asylum case,* while considering if the request for interpretation of the judgement was aimed at introducing new legal questions that were not decided at first instance. See *Request for interpretation of the Judgement of 20 November 1950, in the Asylum case (Colombia v. Peru),* Judgement of 27 November 1950, ICJ Reports 1950, p. 402s.

[148] On the two principles see respectively A. ORAKHELASHVILI, *The International Court and its Freedom to select the Ground upon which It will base Its Judgement*, International and Comparative Law Quarterly, 2007 Vol. 56, 176-180; and See Y. TANAKA AT 26, 187.

[149] Separate pinion of Judge Greenwood *in Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v. Colombia),* Preliminary Objections, Judgment of 17 March 2016, ICJ. Reports 2016, p. 178, para. 4; and *Corfu Channel cit.* 1949, Assessment of the amount of compensation, p. 248.

[150] In fact, to avoid the re-discussion of a dispute, it must be proved that the same dispute is pending again before a tribunal, so the Court should ensure that three elements are congruent: *Personae* (parties), *Petitum* (claim) and *Causa Petendi* (cause of claim). See Dissenting Opinion of D. Anzilotti in *Interpretation of Judgements No. 7 and 8 (Factory at Chorzow),* Judgement of 16 December 1927, PCIJ Series A, No. 13, p. 23.

restrictive approach toward the admissibility of these questions,[151] preserving its authority ascertained in final judgements and merely declarative interpretations.[152] Another lawful re-opening of res judicata is connected to the possibility to request the revision of the landed judgement, questioning its validity,[153] but, in the few cases the Court was seised, it raised the admissibility standard so high to decline all of them, preventing also the fall of the judicial system.[154]

Once the decision is issued, and neither its validity nor its meaning are contested, States must face the thoughtful problem of enforcing it against a sovereign State, or over its assets. While the theoretical frame ex Article 94 ICJ Statute proposes a smooth solution, it does not mirror the reality, for two orders of reason: firstly, implementation relies only and limitedly on the spontaneous compliance of both parties to the dispute, and secondly, the residual recourse to the UN Security Council would imply the failure of the adjudicative mechanism of dispute

[151] The ICJ admits a request for interpretation of a judgement only after it has assessed, together with its jurisdiction that is not preconditioned, the existence of opposite views in regard to the meaning or the scope of sole operative clauses in a rendered judgement, possibly not tardy from the issue in order not to result in an abuse of process. See *Request for interpretation of the judgement of 31 March 2004 in Case concerning Avena and Other Mexican nationals (Mexico v. United States of America)*, Request for the indication of Provisional Measures, Order of 16 July 2008, ICJ Reports 208, p. 325, para. 53; *Request for Interpretation of the Judgement of 15 June 1962 in the case concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, Request for the indication of provisional measures, ICJ Reports 2011, p. 542, paras. 21-23. Both available at < https://www.icj-cij.org/en/list-of-all-cases >.

[152] *Request for Interpretation of the Judgement of 20 November 1950 in the Asylum case (Colombia v. Peru)*, Judgement of 27 November 1950, ICJ Report 1950, p.402; *Application for Revision and Interpretation of the Judgement of 24 February 1982 in the case Concerning the Continental Shelf (Tunisia/Libyan Araba Jamahirya) (Tunisia v. Libyan Araba Jamahirya)*, Judgement of 10 December 1985, ICJ Reports 1985, p. 223, para. 56. All available at < https://www.icj-cij.org/en/list-of-all-cases >.

[153] See Y. TANAKA AT 124, *218*.

[154] The Court not only interpreted two positive temporal limits for the request, but also excluded the admissibility of the ignorance of a new fact in case of negligence. There are only four cases, where such claim was brought, and they were almost all declined. See *Application for Revision and Interpretation of the Judgement of 24 February 1982 in the case concerning the Continental Shelf (Tunisia V. Libya)*, Judgement of 10 December 1985, ICJ Reports 1985, p. 206, para. 26*; Application for Revision of the Judgement of 11 July 1996 in the case concerning Application of the Genocide Convention (Bosnia Herzegovina V. Yugoslavia)*, Judgement of 3 February 2003, ICJ Reports 2003, p. 11, para. 14*; Application for Revision of the Judgement of 11 September 1992 in the case concerning the Land, Island and Maritime Frontier Dispute (El Salvador V. Honduras)*, Judgement of 18 December 2003, p. 399, paras. 19-20*;*

settlement in favour of a purely political one, with all due consequences.[155] In fact, the *Nicaragua Case* was a clear example, where the United States vetoed every resolution that required them to comply with the judgement of the ICJ,[156] despite the principle of *Nemo Iudex in Re Sua*,[157] derived from Article 27(3) UN Charter.

In practice, there is no possibility to bind a Permanent member not to use its vote against (veto) a resolution, decision, or recommendation of the UNSC dealing with the implementation of ICJ judgements, ex article 94(2) UN Charter. In other words, it is impossible for the UNSC (the main political organ of the UN) to take action if one of the P5 refuses to comply with ICJ judgements, or use its veto power to protect incompliant allies.[158]

Pending disputes with ineffective judgements against States, which is a not advisable trend for a judicial body, may be the result of other doctrines or arrangements that do not require to be among the 5 most powerful countries in the international community. Indeed, when a judgement of the ICJ did not satisfy the need of justice perceived by a State, the enforcement could be resisted,[159] and a concrete example was the *Ferrini Case*, when the Italian Constitutional Court clearly stated that the legal principle invoked as basis for the decision of The World Court was incompatible with the fundamental principles of Italian constitutional system, giving the possibility to condemn Germany irrelevantly of the decision of the ICJ.[160]

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[155] UNSC is the executive branch in the system of the United Nations and its role cannot be compared to that of the ICJ, indeed in case of non compliance, its discretionary intervention is conditioned to the fact that the non-execution of a judgement may endanger the maintenance of international peace and security. Consequently, the evaluation of this Institution would focus on a more political aspect that does not assess the merit or the law of the case, which are still prerogative of the ICJ. See R. KOLB, *The International Court of Justice*, Oxford, 2013, 845-851.

[156] J. COLLIER AND V. LOWE, *The Settlement of Disputes in International Law: Institutions and Procedures*, 1st edn, Oxford, 1999, 178.

[157] See Y. TANAKA AT 26, p. 82.

[158] A. ZIMMERMANN, *Voting Article 27*, in B. SIMMA AND OTHERS (eds.), *The Charter of the United Nations: A Commentary*, 3rd edn, Vol. I, Oxford, 2012, 919.

[159] Supreme Court of the United states of America decided that ICJ judgments were not justiciable in the US. See *Medellin v. Texas* [2008] 552 US, 491.

[160] Not only the Italian Court considered customary international law as a constitutional disposition because it entered into the Italian Legal system through Article 10 Italian Constitution, thus it could not contradict with one of the fundamental principles expressed by Articles 2-24 of the same documents, but It declared the unconstitutionality of the Law with which Italy accessed the United Nations to the extent it established the denial of jurisdiction of the domestic judges dealing with such matters. See *Jurisdictional Immunities of the State cit.* 2012, p. 99; and Sentenza Cost. n. 238/2014, ECLI:IT:COST:2014:238, Caso Ferrini.

Overall, the International Court of Justice offer an important advantage, especially to smaller States, that could be subjected to fair and equal treatment of States before the law, while still could suffer unbalances before different mechanisms due to their minor economic, political and military influence.[161] Moreover, the bench of judges guaranteed from excessive political infringements,[162] that is required to represent the forms of civilization and the principal legal systems of the world is a further signal of fairness and authority, working as an incentive for the function of the Court.[163] This characteristic has permitted the ICJ not to experience stalls, such as the current one of the Appellate Body of the World Trade Organization, whose members' appointment was vetoed and resulted in an insufficient numbers of panellists, thus blocking the entire system of appeal.[164] Yet, despite that at least one judge out of fifteen must represent one of the P5,[165] which should be an incentive for them, it is not surprising that the highest number of cases has been submitted by developing or smaller countries.[166]

All State parties, instead, can rely on an important and unique feature of the ICJ decisions, which practice has demonstrated not to be only binding *inter partes* and strictly on the matter, but intended to stretch their effect on subsequent controversies before the same court,[167] and to the actual development of

[161] See Y. TANAKA AT 26, 128. The example of *Lockerbie case,* where Libya adhered the ICJ, while US and UK addressed the UNSC highlights this difference of political versus legal approach to the crises.

[162] The process of election of the judges cannot be subject to veto in the voting procedure before the UNSC, so a majority vote in both UNSC and UNGA is sufficient to elect these nationals of member States that have been already recognized as qualified in respect of Articles 2-8 ICJ Statute. The entire process of the election, however, is entirely discipline by Articles 4-15 ICJ Statute.

[163] Article 9 ICJ Statute. It must be said that in the election of the various benches, a seat for each of the P5 has always been ensured, probably to stabilize the system. See H. THIRLWAY at 38, 4.

[164] E. MANFRED, *The World Trade Organization's Legitimacy Crisis: What Does the Beast Look Like?*, Journal of World Trade, 2007 Vol. 41(1) , 85;

[165] C. MACKENZIE, C.P.R. ROMANO, AND OTHERS, *The Manual on International Courts and Tribunals*, Oxford, 2nd ed, 2010, 7.

[166] N. KLEIN, *Who Litigates and Why*, in C.P ROMANO, K.J. ALTER AND Y. SHANY (eds), *The Oxford Handbook of International Adjudication,* Oxford, 2016, 573-575.

[167] The court itself answered the question on whether its judgements were to follow the reasoning and conclusions of previous cases, clarifying that except for the existence of a cause, they should apply as they remain valid. See *Land and Maritime Boundary between Cameroon and Nigeria*, preliminary Objections, Judgement, ICJ Reports 1998, 275, para. 28. Available at < https://www.icj-cij.org/en/list-of-all-cases >.

international law.[168] Relevantly, although the ICJ is not a world appeal court, States have turned to the Court only after the exhaustion or the unsuccessful use of other means of dispute settlement.[169] As matter of fact, it is undoubted that since the constitution of specialized Courts, particularly on economic disputes, States have showed a clear preference for these latter, resulting in the plummet of annual cases before the ICJ.[170] It may be that it remains more a Court of principles of international law, as it is unique in this sense, but with the recognized reservation in case of multilateral treaties, the interests of States in compulsory jurisdiction has moved to other modern international Courts.[171]

4 Universal Specialized Mechanisms

The existence and the functioning of the ICJ has been seriously contested since the 70s, when States negotiated the foundation of new Organizations and Agreements, consequent to the phenomenon of globalization, expressing the need for specialized tribunals that could decide disputes among them on economic matters with binding force, without necessarily binding themselves to the general jurisdiction of the ICJ. The interest in looking for new Courts derives also from the delusion of States with lengthy and politicized decisions, and with important States withdrawing from the Court compulsory jurisdiction.[172]

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[168] Actually, it has been recognized among the functions of the ICJ. See R.Y. JENNINGS, *The role of the International Court of Justice in the Development of International law,* Review of European Community and International Environmental Law, 1992 Vol. 1(3), 240.

[169] D.D. FISHER, *Decisions to Use the International Court of Justice: Four Recent Cases*, International Studies Quarterly, 1982 Vol. 26, 255s. Specifically the article carries four examples where this assertion is proven, and these are: the *Nuclear Tests cases* (Australia v. France and New Zealand v. France); The *Fisheries Jurisdiction cases cit.* (*United Kingdom of Great Britain and Northern Ireland v. Iceland, and The Federal Republic of Germany v. Iceland*); *The North Sea Continental Shelf cases* (the Federal Republic of Germany v. Denmark; the Federal Republic of Germany v. The Netherlands); the *Trial of Pakistani Prisoners of War case* (Pakistan v. India).

[170] There has never been a case of international trade before the PCIJ or the ICJ, while numerous disputes have arisen in relation with investments, before the institution of ICSID in 1966. The principal cause is linked to the fact that in trade treaties States have avoided to include a compromissory clause in favour of those courts. G. JAENICKE, *International Trade Conflicts before The Permanent Court of International Justice and the International Court of Justice,* in H-U. PETERSMANN AND G. JAENICKE (eds) *Adjudication of International Trade dispute in International and National Economic Law,* Fribourg, 1992, 43.

[171] See J.G, MERRILS at 123.

[172] In 1980 France withdrew and in 1984 the US did, both following two cases in which the ICJ decided against the superpowers.

This necessity has led to the development of systems such as International Tribunal of the Law Of the Sea (ITLOS), the World Trade Organization Dispute settlement System (WTO DSS) and the International Centre for Settlement of Investment Disputes (ICSID), although this latter was intended to satisfy the protection of foreign investors abroad, thus providing a form of Investor-State dispute settlement system, that will not be discussed here, as does not settle inter-State disputes.

In general terms, we can esteem that the baselines for this new step of international economic justice are: specialization, compulsory jurisdiction, enhanced enforcement and de-politicization, all of which do not preclude but are organized to be applied on a global scale.[173] The analysis below will consider the framework of the UNCLOS and of the WTO Agreements as they constitute today the two most important systems that shape regulatory governance with economic relevance across a high number of jurisdictions, with specific disciplines regulating the disputes among members.

4.1 UNCLOS: ITLOS and the Seabed Chamber

Although it may sound surprising, the United Nations Convention on the Law of the Sea (UNCLOS) has a great economic relevance because it regulates part of the sea, which contains a vast wealth, represented by the valuable resources such as food, minerals, energy, and materials for bioresearch, and by its exploitation, aimed at facilitating the interconnection among countries with effects on communication, and trade, which can be source of important economic losses in case of hazards or congestion.[174] Moreover, when the convention was drafted, it was based on a plausible economic logic, indeed, the exclusive jurisdiction over areas was granted only when a State could control it,[175] and portions of oceans were addressed to the

[173] It was precisely because the ICJ was loosing authority in the international scenario, that countries such as United states promoted and incentivised the negotiations of other comprehensive treaties. See M.E. O'CONNEL and L. VANDERZEE, *The history of International Adjudication,* in C.P.R. ROMANO, K.J. ALTER AND Y. SHANY at 15, 59.

[174] The case of Suez Canal in march 2021, where the cargo-ship "Ever Given" got stuck and blocked the entire flow of the Suex canal for 7 days, leading to an overall damage resulting from the use of alternative longer roots, delays in the shipment and the practical stop to the navigation of more than the 12% of the global trade. See https://managementcue.it/blocco-canale-suez-effetti-commercio/29188/#:~:text=Dal%2023%20al%2029%20marzo,Canale%20di%20Suez%2C%20in%20Egitto.

[175] It gave states exclusive jurisdiction over areas that they could control rather than treating those areas as open access resources. See R.L. FRIEDHEIM, *A Proper Order for the Oceans: An Agenda*

countries that could regulate them with the lowest costs and value them with the highest profits. This economical vision found its natural limit in the redistribution of the economical wealth derived from the exploitation of this common pool is more difficult due to political interests.

Nevertheless, UNCLOS entered into force in 1994, and since then it has been ratified by most major nations, although the United States remains a holdout,[176] facilitating global efficiency gains through its approach to these issue areas. The UNCLOS provides for more than a tribunal, providing under Part XV for both voluntary and compulsory procedures for States that wish to settle disputes under the convention.[177]

These measures concern the development of human activities in the oceans, but we shall focus on the possible disputes, where economic interests of States are at stake. As abovementioned, we can consider within the wide wealth of the sea the economic relevance of the exploitation of marine resources, that come down to the disciplines of Fisheries,[178] Economic Exclusive Zones,[179] and Sea-Bed reserves.[180]

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for the New Century, in D. VIDAS, AND W. OSTRENG, *Order for the Oceans at the Turn of the Century*, Amsterdam, 1999, 537.

[176] There are 167 States (plus the European Union) that have become parties of UNCLOS, among which 143 are coastal states, who also have proclaimed EEZs. See G. ANDREONE, *The Exclusive Economic Zone*, in D.R. ROTHWEL, A.G. OUDE ELFERINK, K. SCOTT AND T. STEPHENS (eds.) *The Oxford Handbook of the Law of the Sea*, 1st edn, Oxford, 2017, 162.

[177] UNCLOS Part XV is divided in Section 1 that deals with the voluntary procedures and Section 2-3 that discipline the compulsory procedures and their limitations. See UN General Assembly, *Convention on the Law of the Sea, 10 December 1982,* (hereafter UNCLOS).

[178] Fisheries are a complicated issue because there are fishes that migrate through the seas during their life, passing by inland seas, high seas and EEZs of more countries. Actually, while UNCLOS refer to the jurisdiction of the Coastal State for fishing in inland seas, and there is no regulation for fishing in High Seas which is practically unlikely to raise issues, problematic is the fishing of species that swim between two or more EEZs. For regulation of this conflictual aspect, however, we should consider more the jurisprudence of the WTO, further in the chapter, as the dispute settlement system has been adhered in a coupe of disputes precisely on this topic, from a trade perspective. See A. O. SYKES & E. POSNER, *Economic Foundations of the Law of the Sea* (John M. Olin Program in Law and Economics Working Paper No. 504, 2009), 24; *United States – Restrictions on Imports of Tuna (Mexico)*, DS21/R (September 3, 1991); and *United States – Import Prohibition of Shrimp and Shrimp Products*, WT/DS58/AB/R (Appellate Body Report adopted November 6, 1998).

[179] Articles 55-56(1)-77 UNCLOS. The EEZs are important because they entitle States of right to explore, exploit, conserve and manage natural resources, both living and non-living, of super-adjacent and subsoil space near the seabed. The economic utilization regards not only water but also other natural elements such as winds and currents other than animal life. (Considered the regime of waters super-adjacent to the seabed and the one of the seabed and of its subsoil).

[180] The deep Sea-Bed contains extensive mineral deposits, and although they are not economically exploitable yet, States are interested in extending their jurisdiction before the day arrives where technology permits the economic utilisation of the non-living resources in deep oceans. As UNCLOS was signed in 1982, and no state could control the oceans, especially for the Sea-Bed, there was the foundation of an international Authority, so called Sea-Bed Authority, and of an

In case of disputes in these areas, before taking steps in the specific adjudicative processes, Article 283 UNCLOS has been interpreted to require an exchange of views between disputing parties over the possible means to adopt,[181] allowing also consensual alternatives to mandatory negotiation.[182]

On the matter, a mutual agreed peaceful mean would have consequently all the compulsory procedures under UNCLOS dis-applied till the moment it fails to produce a result or misses the time limit predetermined by the parties.[183] In such case, UNCLOS provide for more possibilities to settle international disputes, among which conciliation, arbitration and litigation, with different characteristics. As a matter of fact, only the first is voluntary and non-adjudicative, while the others are compulsory and issue binding final reports (Articles 284-286(2) UNCLOS).

Keeping in mind that there are certain similarities with the ICJ, such as the application of Competence-Competence principle under Article 288(4) UNCLOS, the proposed means are disciplined in the Part XV UNCLOS, whose Section 1 describes that any dispute regarding UNCLOS "*shall be submitted to the court or tribunal having a jurisdiction under Section 2"*.[184] However, the referred "*court or tribunal*" indicates four possible forums (ICJ, ITLOS and two Arbitral Tribunals) among which the parties can agree on, and where compulsory procedures follow.[185]

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enterprise whose main focus would have been to license and regulate the exploration and exploitation of activities on the sea-bed. See A.O. SYKES AND ERIC POSNER AT 177,19; and 1994 Implementation Agreement relating to Part XI of the UNCLOS of 10 December 1982;

[181] Article 283 UNCLOS prescribes the previous exchange of views, both because it underlines a preference for non-adjudicative means of dispute settlement that could be facilitated by bilateral communication and because it represents a guarantee of good faith in the exploration for the most effective alternative before acceding to Part XV UNCLOS.

[182] The Annex VII Arbitral Tribunal has interpreted Article 283 UNCLOS in such way three times, stressing the need of a contact between conflicting parties in the settlement of disputes that require the application and the interpretation of the convention. See *Chagos Marine Protected Area arbitration (Mauritius v. United Kingdom*), Award of 18 March 2015, para. 378; *Artic Sunrise arbitration* (The Netherlands v. the Russian Federation), award on merits, 14 August 2015, para. 151 (p. 34); *Philippine/China arbitration*, (Jurisdiction and Admissibility), PCA Case No. 2013-19, 29 October 2015, para. 333 (p. 115). Available both at < https://pca-cpa.org/cases/ >

[183] Article 281, UNCLOS.

[184] Article 286 UNCLOS introduces the section regarding the compulsory procedures entailing binding decisions that comprehend both the Court and Tribunals under the convention.

[185] This is also referred to the *Montreux Formula* that derives from a simultaneous interpretation of Articles 286-287 UNCLOS. See A. O. ADEDE, *The Basic Structure of the dispute Settlement Part of Law f the sea Convention*, Ocean Development and International Law, 1982 Vol. 11, 130-131. The forum among which States can choose are: the ICJ, ITLOS under Annex VI, Arbitral Tribunal under Annex VII and a Special Arbitral Tribunal under Annex VIII for specific disputes, in fact, some State has agreed to more than one forum, raising the issue and a necessary exchange of views in case of dispute to really assess the procedure to follow. See the declarations of Australia, Belgium,

Surely, this is a great novelty for States, because differently from the ICJ, when two States agree on a specific procedure, that procedures becomes the only procedure they can use to settle their dispute. The exception is represented by the Annex VII Arbitral Tribunal[186] with its residual jurisdiction in cases when a mutual agreement lacks, which has become a frequent trend considering the declarations of member States.[187] But, when two declarations under Article 287 UNCLOS refer to the same procedure but accord jurisdiction differently, then the attribution is interpreted only on the substance where the two declarations coincide,[188] which could also be limited to a single dispute or a particular subject.[189] Caution should be given if a dispute exceeded the application of UNCLOS, because States would face a "mixed dispute",[190] for which they could adhere one of the mentioned compulsory forums, and the most common choices have detected the ICJ, ITLOS or the Arbitral Tribunal.[191] Nonetheless, lacking a mutual agreement, Article 282 UNCLOS could not be used as legal basis for the jurisdiction of the Court in unilateral applications.[192]

Italy and Spain for example, that have both chosen the ICJ and ITLOS. See < https://www.itlos.org/en/main/jurisdiction/declarations-of-states-parties/declarations-made-by-states-parties-under-article-287/ >.

[186] The characteristics of this tribunal recall international arbitration, indeed, Annex VII to LOST disciplines the access to such tribunal, the nomination and the necessary qualification of arbitrators composing the tribunal and the jurisdiction which is exactly the same of ITLOS Ratione Materiae. It is an arbitral alternative to ITLOS proceedings, with a list of possible arbitrators that resemble the system of the CPA. See Articles 2-3-5-10-11 Annex VII to UNCLOS.

[187] See Declarations made by States Parties under Article 287 UNCLOS < https://www.itlos.org/en/main/jurisdiction/declarations-of-states-parties/declarations-made-by-states-parties-under-article-287/ >.

[188] The *M/V Louisa Case (Saint Vincent and the Grenadines v. Kingdom of Spain),* Judgement, 28 May 2013, ITLOS Reports 2013, p. 30, para. 81. Available at < https://www.itlos.org/en/main/cases/list-of-cases/ >.

[189] The *M/V Norstar Case (Panama V. Italy),* Preliminary Objections, 4 November 2016, ITLOS Case No. 25, para. 58. Available at < https://www.itlos.org/en/main/cases/list-of-cases/ >.

[190] A mixed dispute is generally considered a dispute where legal questions require the interpretation and application of other conventions, in addition to UNCLOS, because of issues involving also other laws. See B.H. OXMAN, *Courts and Tribunals: the ICJ, ITLOS, and Arbitral Tribunals*, in D.R. ROTHWEL, A.G. OUDE ELFERINK, K. SCOTT AND T. STEPHENS at 176, 400; and Y. MORIMASA, *How do the compulsory dispute settlement procedures of the United Nations Convention on the Law of the Sea deal with disputes concerning land sovereign issues?*, World Maritime University Dissertations, 2017, 18.

[191] Articles 20-22 Annex VI UNCLOS

[192] For example, sovereignty dispute over a coastal territory/or an island would be out of scope o LOSC, but ITLOS president once referred to the existence of jurisdiction on the topic, when the sovereignty question was incidental to the main question. See ITLOS President Wolfrum before UNGA (8 December 2006).

An interpretation of Articles 188(1)-287 UNCLOS suggests that the jurisdiction of the mechanisms prescribed by the convention is both compulsory and exclusive, precluding the access to external choices, except for the possibilities provided by Article 281 and 282, when the parties exercise their right to free choice of peaceful means of settlement under Article 286 UNCLOS. While in the first case, UNCLOS is considered a residual solution in case of no settlement through the preferred procedure,[193] the second permits a different procedure *ab initio* conditioned to the deployment of compulsory jurisdiction, thus unilateral applications and binding decisions.[194]

In the substantive description of jurisdiction, though, the definition *ratione personae* is open to all the parties of UNCLOS,[195] and to Non-State Actors, while the *ratione materiae* includes any dispute on the interpretation of UNCLOS or any other international agreement linked to the purposes of UNCLOS,[196] and all those that according to international legal instruments should be settled by ITLOS (Articles 288 UNCLOS and 21 ITLOS Statute).

[193] In this case the disposition ex Article 281 does not expressly require a procedure that leads to a binding decision, thus its invocation may be used to delay the institutional procedures before reaching the binding adjudication or arbitration ex Section 2 Part XV UNCLOS, that are still not precluded, unless a declaration excluding further procedures was presented in the alternative procedure. But such an opening would allow to derogate the compulsory jurisdiction of UNCLOS Mechanisms with bilateral agreements (other treaties), strategy that would be inconsistent with article 311 UNCLOS, establishing primacy of UNCLOS as a regime, and has been rejected by ITLOS that has stated that Dispute Settlement under UNCLOS would become "*a paper umbrella that dissolves in the rain*". See *Southern Bluefin Tuna (Australia v. Japan; New Zealand v. Japan)*, Jurisdiction and Admissibility, Decision of 4 August 2000, XXIII RIAA 1, p. 35, para. 41(k); and B.H. OXMAN, *Complementary Agreements and Compulsory Jurisdiction*, American Journal of International Law, 2001 Vol. 95, 277.

[194] Article 282 UNCLOS results in a mere clause on the choice of forum, as we may find in Private International Law.

[195] Article 291 UNCLOS.

[196] The issues brought before tribunals in this case can deal with issues of continental or insular sovereignty when they can be considered ancillary to the principal question falling within the scope of UNCLOS. See R. WOLFRUM, *The Settlement of Disputes before International Tribunal for the law of the Sea: A progressive Development of International Law or Relying on traditional mechanism*, Japanese Yearbook of International Law, 2008 Vol. 51, 161.

Keeping out of the discussion the optional exceptions provided by article 298 UNCLOS,[197] and the limitations by Article 297,[198] disputes can have an economic nature. Indeed, economic interests can stake in disputes dealing with Exclusive Economic Zones (EEZs) or Sea Bed exploitations, however, compulsory jurisdiction is positively limited in the first,[199] due to the exercise of sovereign rights and the sensitiveness of activities connected to the exploitation of resources in the areas [fishing and research on living resources],[200] and it is governed by a special chamber in the second.[201] This chamber, is particularly significant for our discussion, because it resulted from an arrangement between States that were willing to settle these disputes strictly within ITLOS mechanism and those who did not want to prevent themselves from the more convenient practice of arbitration. As matter of fact, differently from ITLOS bench, the seats composing this particular chamber are to be elected with the approval of the disputing parties.[202] The incentive given by the speciality of this chamber is further particularized by the

[197] They include the possibility for a state to subtract from binding dispute settlement procedures (Optional Exceptions) matters in relation with maritime delimitations, military activities, or pending issues before the UNSC. However, it is competence of the court to establish if the subject can be exempted according to the Convention. See Article 298 UNCLOS and the PCA Case No. 2013-19 *South China Sea Arbitration cit.*, Jurisdiction and admissibility, 2015.

[198] Limitations to the jurisdiction under Section 2 Part XV UNCLOS are based on the relations between the exercise of sovereign rights or jurisdiction by Coastal States granted by the Convention and the compulsory jurisdiction of the mechanisms under the section. Article 297 provides for three situations where exceptions to the regular jurisdiction of ITLOS and Arbitral Tribunals take steps in favour of conciliation, and they deal with scientific research in EEZs and the Continental shelves and fishing in the EEZs. See Article 297 UNCLOS.

[199] Articles 246-297(2-3.a-3.c) UNCLOS

[200] These subjects shall be brought before a compulsory conciliation, which not only is not binding in its decisions, but increases the fragmentation within the dispute settlement system of UNCLOS. A consequence, indeed, may be that States try to present the claims under this scope to avoid a judicial procedure without a logical basis, for example the treatment of fisheries [fish stocks] between the regime in high seas and EEZs. See A. BOYLE, *Dispute settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction*, International and Comparative Law Quarterly, 1997 Vol. 46, 43-45; See as example the *Conciliation between the Democratic Republic of Timor-Leste and the Commonwealth of Australia,* Decision on Australia's Objections to Competence, 19 September 2016, p. 16-21.

[201] The Sea-Bed Disputes Chamber was instituted under Section 5, Part XI UNCLOS and Article 14 ITLOS Statute in 1997, with 11 members that shall represent the principal legal systems of the world and an equitable geographical distribution. The Special Chamber is considered the compulsory system of the settlement of disputes in this particular regime. See Article 35 ITLOS Statute.

[202] Relevantly, it is subject to a special procedure which is different from the rest of ITLOS chambers and mechanisms, thus some author has attributed it the title of "arbitration within a tribunal". See Article 36 ITLOS Statute and See R. WOLFRUM, at 196.

jurisdiction that extends in the specific regime, not only between States,[203] but also with the possible participation of non-state actors (different from State Owned Enterprises) and the Sea-bed Authority.[204] This element may diminish the interest of States because despite the formal power to judicially review the acts of an International Organization in excess of power or jurisdiction, the panel cannot decide extensively on the regular process of it.[205]

It is undoubted that ITLOS provides for a wider scope of compulsory jurisdiction in its area of interest, and the possibility to accept unilateral claims enhanced by the establishment of more compulsory alternatives (Articles 286-287) and by the acceptance of the *forum prorogatum* (Article 54(5) Rules of Tribunal), is a definitive point in its favour.

In the development of the proceedings, States Parties shall fulfil in good faith the obligations assumed under the Convention and avoid abuses of right.[206]

Despite the restricted legal regime that is presented by the Convention, ITLOS (and the Sea Bed Chamber) shall apply not only UNCLOS but also other rules of international law that are not incompatible with the convention,[207] among which we shall consider customary rules of international law.[208] This is because the law of the sea does not exist in isolation, but it belongs to the wider corpus of

[203] The number of State Parties to UNCLOS is valuable also for considering the membership of the International Seabed Authority, and thus to the special characteristics of the regulations and disputes over matters related to seabed. See Article 156(2) UNCLOS.

[204] Article 37 ITLOS Statute and Article 187 UNCLOS. The International Sea-Bed Authority (ISA), whose structure is disciplined by Section 4 Part XI UNCLOS and 1994 Implementation Agreement, is the international organization "*through which State parties shall organize and control activities in the Area",* in the sense that it regulates mining, promotes and carries out scientific research and the transfer of technology, and promote international cooperation in the seabed, ocean floor and subsoil beyond the limits of national jurisdictions. See Articles 1(1)(1)-143-144-160 UNCLOS.

[205] The panel can not decide on the merit of discretionary measures adopted by the Authority and on the compliance of Authority procedures with UNCLOS. See Article 189 UNCLOS and M. W. LODGE, 'The Deep Seabed', in D.R. ROTHWEL, A.G. OUDE ELFERINK, AND OTHERS AT 176, 249.

[206] Article 300 UNCLOS.

[207] Article 293 UNCLOS; In the case of a dispute before the Sea-bed Chamber, other rules including rules regulations and procedure of the Sea-Bed Authority may be applied.

[208] Indeed, in two cases the Court has decided that customary law, that is often applied together with treaty law in international disputes, shall be considered also before ITLOS. *ARA Libertad Case (Argentina v. Ghana),* Case No. 20, Order of 15 December 2012, 1-2, paras. 6-7; *M/V Saiga (No. 2) case* (Saint Vincent and the Grenadines v. Guinea), Judgement of 1 July 1999 ITLOS case No. 2, (1999) 38 ILM, p. 1355, para. 155; *The Arctic Sunrise Arbitration*, Merits, p. 46, para. 197s.Available at < https://www.itlos.org/en/main/cases/list-of-cases/ >, and < https://pca-cpa.org/cases/ >.

international law. Although it is a comprehensive convention disciplining all issues relating to the law of the sea, it has no voice on matters not regulated by the convention, which still involve more aspects such as States' Responsibility, only referenced in some disposition.[209] But, this does not mean that ITLOS or the other mechanisms decide on the basis of external sources of the Convention, although they may interpret and apply text of the Convention in relation to these external sources,[210] so that a wider applicable law does not infringe the narrower jurisdiction,[211] but promotes a decision that is more reliable in the bigger context of international law.

Differently from the ICJ, ITLOS and particularly the Sea-Bed special chamber can decide on provisional measures requested unilaterally by a party, when it considers to have *prima facie* jurisdiction.[212] ITLOS mechanisms can not move *propriu motu*, contrarily to the ICJ, but they can prescribe, modify or revoke them to prevent "*serious harm to marine environment"*, which is an element detached by the interests of the disputing parties,[213] who shall comply with the notwithstanding the fact that they may be different from what requested.[214]

When it comes to the final decision, the Tribunals are entitled and empowered to issue legally binding judgements and awards,[215] also as a

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[209] Articles 74(1)-83(1)-293 for example all refer to international law and Article 38 ICJ Statute with the consequence that they are sources from which the Tribunal shall take into consideration.

[210]ITLOS take ICJ jurisprudence on procedural issues, so we could consider that the same points are relevant, as for the case of non-appearance before the Court, where the absence of a party does not create a bar for the trial, because the non-appearing party is still a party. See *Arctic Sunrise case cit.*, Provisional Measures, Case No. 22, Order of November 2013, ITLOS Reports 2013, p. 242, para. 51.

[211] *Dispute concerning Delimitation of the Maritime Boundary in the Bay of Bengal (Bangladesh/Myanmar)*, Judgement of 4 March 2012, ITLOS Reports 2012, p. 55, para. 183. See < https://www.itlos.org/en/main/cases/list-of-cases/ >.

[212] Article 290 UNCLOS.

[213] This consideration is important because the marine environment is considered a "*Common Pool Resource"*, not only in the sense that no-state actor has an established control, a part from the territorial waters, but that its consumption is rivalrous, so exploitation reduces the offer for other potential consumers. See R. WOLFRUM, at 196, 155; and A.O. SYKES & E. POSNER, at 178, 3.

[214] The verb "SHALL" means that there is an obligation by the parties to comply, which is further implemented by the request of the submission of reports dealing with the implementation of measures. When these reports lack or demonstrate inconsistency, a wrongful act occurs and then State responsibility arises according to ITLOS jurisprudence. See Article 95 Rules of ITLOS and Article 290(1-3-5) UNCLOS; The *Southern Bluefin Tuna cases*, paras. 90(1-2*)* and *The Arctic Sunrise Arbitration*, (Merits), p. 84, para. 337.

[215]Articles 290(1-6)-296 UNCLOS, Article 33 Annex VI, Article 11 Annex VII, Article 4 Annex VIII, Articles 7-16-31 Implementation Agreement Relating to Conservation and Management Of Straddling Fish Stocks And Highly Migratory Fish Stocks 1995.

consequence of unilateral submissions ex Article 286 UNCLOS. The principle is made more effective by the fact that decisions are binding also on non appearing parties,[216] and they are more stringent than those of the ICJ, with checking mechanisms prescribed to satisfy the compliance. This is surprising, as the International Tribunal for the Law Of the Sea (ITLOS)[217] is not an organ of the UN, differently from The World Court,[218] although the prerogatives of the judges are equal,[219] replicating the possibility for parties to appoint Ad Hoc judges,[220] with all due consequences already discussed above.

In the context of the specific disputes before the Special Seabed Chamber, the decisions issued by the chamber are formally equal to the one rendered by ITLOS, in the sense that they are considered as rendered by ITLOS,[221] and as such, they are enforceable in all the territories of the state parties and formally equal to domestic decisions under Article 39 ITLOS Statute. However, especially in economic fields [mainly EEZs], States tend to refrain from adhering international tribunals that could give an interpretation on doubtful and controversial dispositions.[222] Relevantly, article 59 UNCLOS, despite its presence in the discipline of EEZs, introduces an interesting point of constant weighted balance of interest between costal states and third states, under the bigger frame of international obligations

[216] Article 33 ITLOS Statute.

[217] The tribunal is seated in Hamburg, Germany, with a body of 21 independent members assuring the representation of the principal legal systems of the world with an equitable geographical distribution. Its expenses since its inauguration in 1996 have been sustained by the member States and by the Sea-bed Authority, which is instituted and empowered under Articles 19(1) and 153 UNCLOS. See Articles 2 ITLOS Statute (which is the Annex VI to UNCLOS).

[218] Article 1(1) Agreement on Co-operation and Relationship between the Untied Nations and the International Tribunal for the Law of the Sea 1997. This disposition specifically recognizes ITLOS as an autonomous international judicial body.

[219] The members of ITLOS are subject to the same incompatibility with any political and administrative function, and additionally to any actively association or financial interest in any enterprise concerned with the exploration and exploitation of sea resources. They are also bound to other rules regarding their participation in a specific case See Articles 7(1)-8-11 ITLOS Statute.

[220] Article 17 ITLOS Statute.

[221] Article 15(5) ITLOS Statute.

[222] Recently, there have been only a couple of cases that have touched the topic, but that have been withdrawn by the complainant for a preferred non-judicial settlement. See *Mutually Agreed solution between Chile and European Communities in DS326 - Definitive Safeguard Measures on Salmon*: < https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds326_e.htm >; *Fisheries Jurisdiction (Spain v. Canada)*, Jurisdiction of the Court, Judgment of 4 December 1998, I.C.J. Reports 1998, p. 450-452-468, paras. 33-34-41-88; M. ORELLANA, *The EU and Chile suspend the Swordfish Case Proceedings at the WTO and International Tribunal of the law of the Sea*, American Society of International Law, 2001 Vol. 6(1).

binding all the States,[223] which could be interesting to be spread across the entire convention and to the adjudicative system.

A problem with UNCLOS may rise because it deals not only with inter-State dispute, so there may be disputes whose settlement may be preferred through international commercial arbitration.[224] Additionally, provisions of dispute settlement leave the parties great flexibility but they neither override nor are overridden by the same provisions in other treaties, to avoid the deviation from the guarantees granted by the treaty.[225]

4.2 World Trade Organization Dispute Settlement System

Also the World Trade Organization, which is the widest economic organization regulating trade relations with 164 members,[226] has a peculiar system of dispute settlement. It is important to remember that the WTO has succeeded and integrated the previous legal regime of GATT 1947,[227] that proposed a relatively inefficient system of dispute settlement.[228] Within the WTO system, Annex 2 to the WTO

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[223] R. VIRZO, *La Convention des Nations Unies sur le Droit de la mer et la pollution provenant d'activités militaires dans la zone économique exclusive,* in G. ANDREONE, A. CALIGIURI AND G. CATALDI (Eds.), *Droit de la mer et émergences environnementales*, Napoli, 2012, 257.

[224] In Seabed mining, non-State-actor parties may seek a decision on the interpretation of a contract signed between a Sponsored Corporation and the International Seabed Authority, then the dispute may be submitted before classical international commercial arbitration, with binding decisions. Article 188(2) UNCLOS. In such a case, the discipline to apply would follow UNCITRAL Model and all the rules of Private International Law.

[225] *Southern Bluefin Tuna (Australia v. Japan; New Zealand v. Japan)*, Jurisdiction and Admissibility, Decision of 4 August 2000, XXIII RIAA 1, p. 35, para. 41(k). Available at < https://legal.un.org/riaa/cases/vol_XXIII/1-57.pdf >.

[226] The WTO accounts for 95% of the world trade, with 164 members since 29 July 2016. Moreover, those countries who have not joined it as members, have acquired the status of observers (For example Belarus, Iran, Iraq, Libya, Syrian Arab republic). see < https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm >.

[227] After the failure of the International Trade Organization project, the GATT 1947, which was a multilateral agreement thought to regulate trade in the meanwhile, remained in force till the establishment of the WTO in 1994, when the Annex 1A included the GATT1994 that was the distinct successor of the GATT 1947. See M.R. MAURO, *La Teoria e prassi del Diritto Internazionale dell'economia*, 2019, Napoli.

[228] Articles XXII-XXIII GATT1947 prescribed mandatory consultations between the disputing parties and the transfer of the dispute to "Working Parties", which later became the "Panels" for the consequent investigation and issuance of report. There were three orders of problems, as the procedures for dispute settlement and the implementation of the reports were not described in detail and they relied on positive consensus, with the result that the procedure evolved with its practice and was based on a more diplomatic approach to the resolution of conflicts, where both the parties must consent to the decision ex post, once the decision has ben made. See N. SAIKI, *WTO Rules and Procedures for the Settlement of Disputes –Their formation: A practitioner's view*, in M.K. YOUNG AND Y. IWASAWA (eds.), *Trilateral Perspective of International Legal Issues: relevance of Domestic Law and Policy*, New York, 1996, 404; E-U. PETERSMANN, *The Dispute Settlement System of the*

Agreement, i.e. the Dispute Settlement Understanding (DSU) is entirely dedicated to the government of the rules and procedures of the settlement of disputes. Article 3 DSU recalls the importance of such annex in the specific field of trade because it states that the dispute settlement system (DSS) provides security and predictability in the multilateral trading system[229] by clarifying the interpretation of relevant dispositions and consequently preserving the rights and the obligations of Member States under those,[230] finally securing a positive solution to the disputes. Similarly to ITLOS, the WTO DSS has the advantage to be the only system for dispute settlement on the relevant trade agreements, which means that it can consider the overall perspective of the trading system (and of all pertinent agreements) when deciding a case.[231]

It is important to talk about the WTO DSS because it has been the most efficient body in dispute settlement since 1995, the year of its entrance in activity, as it has faced more than 560 cases, gaining the title of the "jewel of the crown", although today it is affected by an unpleasant crisis.[232] It is a more impressive result, when we consider that only States are admitted to file a claim before the DSB.[233] This has not precluded non-state actors to have an important role, acclaimed as indirect access to the system,[234] as they lobby to bring violations of WTO Agreements to the attention of their governments, they pressure them to file applications, often entitled under a domestic (official and public) regulation,[235] and they can either

World Trade Organization and Evolution of GATT Dispute Settlement since 1948, Common Market Law Review, 1994 Vol. 31, 1203; J.H.H. WEILER, *The Rule of Lawyers and the Ethos of Diplomats*, Journal of World Trade, 2001 Vol. 35(2), 194-196.

[229] In more cases, the panel has mentioned this importance of the general system, which has been further sustained by practice. See Panel Report, *US – Section 301 Trade Act*, WT/DS152/R, adopted on 28 February 2000, *para. 7.75;* and Appellate Body report, *US – Stainless Steel (Mexico) 2008*, WT/DS344/AB/R decision adopted on 30 April 2008, para. 160.

[230] The dispositions under which a dispute can rise are all the agreements within the WTO Legal Framework: WTO Agreement, GATT, GATS, TRIPS and DSU.

[231] Article 1(1) DSU.

[232], P. VAN DEN BOSSCHE, AND W. ZDOUC, *The law and Policy of the World Trade Organization*, 4th edn, Cambridge, 2017, 165.

[233] Only States that are members to the WTO can adhere the System, which means that both observer States and non-state actors find precluded this possibility. See Appellate Body Report *United States – Import Prohibition of Certain Shrimps and Shrimp Products,* WT/DS58/AB/R, adopted on 6 November 1998, para. 101.

[234] T.J. SCHOENBAUM, *WTO Dispute Settlement: Praise and Suggestions for Reform*, ICLQ, 1998 Vol. 47, 654; and P. VAN DEN BOSSCHE AND W. ZDOUC at 232,184s.

[235] In the EU, the Trade Barriers Regulation 1995, and in the US the Trade Act 1974 provide for this possibility. See Council Regulation (EC) No. 3286/94 (on Community Procedures for the exercise of rights under international trade rules); and Section 301(a)(1) 1974 Trade Act, 19 USC 2411(a)(1).

organize the legal strategy, or even submit "amicus curiae briefs" which may be considered by panels when assessed pertinent and useful.[236]

The DSS can not be considered without the Dispute Settlement Body (DSB), which is the core of the system and its more fundamental peculiarity. Indeed, the WTO is the only system where a political organ supervises the adjudicative settlement of disputes.[237] Additionally, it is a sui generis system due to its structure in the development of dispute settlement, where States must go through consultations, panels and arbitral tribunals and finally an appellate body, and I voluntarily avoid the discussion of voluntary procedures such as good offices, mediation and conciliation, which are prescribed anyway.[238]

It is possible to assert that there are two defining features of the system that we need to consider deeply, and these are consultations and panel procedures. Although the dissertation focuses on the adjudicative settlement of disputes, the DSU offers a specific disposition on the previous stage, of consultations[239] which not only can be prolonged during the development of the adjudicative procedure, but it must be given preference in the sense that parties must be repetitively given the opportunity

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[236] Appellate Body Report, *United States – Import Prohibition of Certain Shrimps and Shrimp Products,* WT/DS58/AB/R, adopted on 6 November 1998, para. 106-110; and Appellate Body Report *United States – imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom,* WT/DS138/AB/R, adopted 7 June 2000, para. 39. It is important to specify that there is no duty of the panels to consider the briefs, as this decision is discretionary and can vary on case-by-case basis. See Appellate Body Report, *European Communities – Trade Description of Sardines,* WT/DS135/AB/R, adopted 23 October 2002, para. 167. All available at < https://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm >.

[237] Article 2(1) DSU. The DSB is indeed an authority composed by the representatives of all the States Member of the WTO, and has an overall control over the adjudicative functions of the DSS, in the sense that it decides on the establishment of panels, adopts their reports together with the ones of the Appellate Body and it supervises the implementation of the decisions eventually authorizing the suspension of concessions or obligation under the agreements. Such decisions would represent an excessive infringement of political decisions over judicial functions if it was not for the fact that the main decisions are adopted by negative consensus, that relevantly reduces the possibility that politically directed decisions create an obstacle to the development of the proceedings. See Y. TANAKA AT 26, 280.

[238] In fact, within the WTO there are many options among which the parties can choose, but differently from consultation and panel proceedings, the others require a bilateral submission and intent to settle the disputes. Usually they require the presence, by initiative or support, of the WTO SG and are more rarely used than the other compulsory procedures. See P. VAN DEN BOSSCHE, AND W. ZDOUC, at 232.

[239] Articles 3(7)-4(1) DSU underline the commitment of State parties to strengthen and improve the effectiveness of the step of consultations, where a mutually acceptable solution, if reached, would be preferred. Moreover, consultations offer confidentiality except for a notification to the DSB of the start and eventual agreement.

to reach such a mutual agreement. Encouragingly, practice has demonstrated that it is an efficient way to approach the problem.[240] However, when initial consultations fail, parties take steps forward in the panel proceedings,[241] with the submission of the request of the establishment of a panel. This third decisional body is practically automatically established, as the WTO is based on the principle of negative consensus, differently from its predecessor: the GATT1947.[242]

In the assessment of panels, many differences rise in relation to ICJ and ITLOS, mainly because these latter are Courts, with national or ad hoc judges, while WTO Panels are deciding boards, composed by technique experts, not necessarily jurists, who cannot be nationals of the disputing parties.[243] Specifically, they serve in their individual capacities and not as governmental representatives,[244] thus they are appointed by the Secretariat because well-qualified, independent and impartial.[245] The reason behind this choice is that panels were thought to be auxiliary tools for the DSB to give decisions and recommendations on trade controversies, yet, due to the automatic adoption of their reports, these are equally compared to judgements issued by international tribunals.[246]

[240] P. VAN DEN BOSSCHE, AND W. ZDOUC, at 232, 274.

[241] There are three hypotheses for which consultations may fail disciplined by article 4(3-7) and 6 DSU: if respondent do not respond within 10 days from the receipt of the request by the applicant, if after 60 days there is no settlement, or if within those 60 days the parties agree that consultations have failed.

[242] According to the discipline of DSU, the establishment of a panel may be blocked only if there was a consensus against it (reverse consensus criteria). Moreover, there is no requirement of the exhaustion of local remedies to file a claim.

[243] Article 10(2) DSU states that members whose governments are parties to the disputes or third parties can not serve on a panel concerned with that dispute unless the parties agree otherwise.

[244] Article 8 DSU is similar to the dispositions of the ICJ Statute and the ITLOS Statute. Such prerogatives are re-stressed in Rules of Conduct.

[245] Theoretically, the secretariat should propose the names of the panellists among those present in an indicative list of well-qualified individuals that can be opposed by parties when they oppose compelling reasons. Practice demonstrated that parties often rejected the appointment proposed delaying the timeline of the process, so it is common to avoid the proposal and leave the choice to the SG. See A. GUZMAN AND J.H.B. PAUWELYN, *International Trade Law*, 3rd edn, Alphen aan den Rijn, 2016, 133.

[246] This is particularly true because the DSB, unless through the negative consensus, can not avoid the deliberation on the report, so its knowledge has been recognized more as a notarial acknowledgement rather than a check of the political branch over the judicial one. G. SACERDOTI, *The Disputes Settlement system of the WTO: Structure and Function in the Perspective of the First 10 Years,* in A. DEL VECCHIO, *New International Tribunals and New International Proceedings,* Milano 2006, 162.

Despite the result of the process, panel proceedings include various phases that differ from the normal course of international judicial ones:[247] examination,[248] review,[249] and issuance of a final report[250], and appeal. Particularly, it strikes a balance between the confidential regime with the need for transparency and the right of the parties to participate fully to the proceeding.[251] On the one hand, official documents can not be disclosed to public or other WTO Members before the adoption of the report by the DSB, with two exceptions: the first submissions,[252] that are usually shared to permit third interested parties to join the procedure, and voluntary disclosures of the parties carried out by mutual acceptance or leak to the press. A similar arrangement is provided for hearings, that take place behind closed doors unless parties agree differently, ensuring the most comfortable choice for States.[253] On the other hand, transparency, as well as impartiality, is ensured by the prevention of *ex parte* communications during the deliberation of decisions, after which parties are allowed to submit questions and requests of review, in order to discuss factual findings, unclear drafting and the findings of the panels.[254] Despite this innovative mechanism, transparency is still enquired by less influential members.[255]

So, panel proceedings resemble arbitration due to the relevance of the parties, instead, the appeal before the Appellate Body (AB) is developed with judicial features, with the result that the WTO DSS can be considered a system *sui generis*. The mixed adjudicative procedures are indeed complemented by the prorogation of

[247] WTO SECRETARIAT, A Handbook on the WTO Dispute Settlement System, 2nd edn, Cambridge, 2017, 47.
[248] That is a common stage in all judicial proceedings, where the parties make two rounds of submissions, and they meet in hearings before the deciding body.
[249] This is the phase where the panels deliberate internally, but give the parties, who have been kept apart, to submit comments to a draft report, and then requests of review to a special document (exclusive of the WTO DSS) which is the interim report.
[250] The final report is the last document of the DSB process, and it must be published within 6 months from the submissions and must include a discussion of arguments that were present at the interim phase. The final report must be adopted by the DSB, whose approval lays the ground for the publication and circulation of the decision.
[251] Article 16(3) DSU explain that the panel must ensure that the views of the disputing parties are fully recorded.
[252] Article 4.11 DSU.
[253] Appendix 3 para. 2, Working Procedures of the panels
[254] The same guarantees are not ensured before the Appellate Body, as it is more similar to a judicial body. See Article 15 DSU.
[255] Sutherland Report, para. 261.

consultations, mediations and good offices provided by the Secretary General of the World Trade Organization (WTO SG), and a real alternative arbitration under Article 25 DSU,[256] confirming a unique system of dispute settlement in the international community.[257] With such a variety of possibilities, it is important to mention that the DSU incentive the parties to settle amicably the dispute out of courts,[258] because it is cheaper and more satisfactory in the long term trade relations between the disputing parties, who should benefit and prefer this opportunity, but are anyhow bound to agree a solution that is consistent with WTO Law.[259]

When a trade dispute arises between two Member States of the WTO, they are bound to access to the DSS, because the WTO DSS has a compulsory jurisdiction, similarly to the UNCLOS mechanisms. Actually, it is the principle for which decisions, also the one regarding the constitution of a panel, shall be taken by reverse consensus that opposes the regular rule that States must give consent to international tribunals,[260] resulting in the absence of any preliminary jurisdictional question before the panel. In its compulsoriness, the WTO DSS is also exclusive, as it precludes the use of other forums with an opposite approach to the *Montreux Formula*.[261] The reason for the obligation States commit to under Article 23 DSU[262] has a dual nature: to stress the exclusivity of the WTO DSS vis-à-vis any possible tribunal, and to avoid unilateral conducts that could have threatened the system.[263]

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[256] States may agree to settle a dispute through arbitration, but they shall notify their choice to the DSB, who will be notified in case of an award to ensure there are no incoherent interpretation of covered agreements and who will principally manage the implementation of the award itself. Surely, dispositions on the implementations of the reports extend to the one of the awards. But the nature of arbitration in the WTO is voluntary, in all its features, and is prescribed as compulsory only for two types of disputes, that have concretely found space/cases in practice: determination of reasonable period of time for implementation of reports, and level of retaliation. See P. VAN DEN BOSSCHE AND ZDOUC, at 232, 292.

[257] Y. IWASAWA, *WTO Dispute Settlement as a Judicial Supervision*, Journal of international Economic Law, 2002 Vol. 5(2), 291.

[258] This incentive has been positively considered, as one fifth of the disputes submitted to the DSS has been settled without recurring to the panels.

[259] Article 3(5-7) DSU.

[260] Article 23 DSU.

[261] WTO SECRETARIAT, A Handbook on the WTO at 247, 8.

[262] Panel Report, *US – Section 301 Trade Act*, WT/DS152/R, adopted on 28 February 2000, *para. 7.43.* Available at < https://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm >.

[263] Panel Report, *EC – Commercial Vessels*, WT/DS301/R, adopted on 22 April 2005, para. 7.193. Available at < https://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm >.

Once explained the rules about who and when can adhere the DSS, we shall say that the most important limitation focuses on the *ratione materie*, because, quoting Article 1(1) DSU, the dispute settlement system faces disputes, where the interest of the parties is to obtain a consultation on the agreements covered by the DSU,[264] and on the conflicting rights and obligations under the same.[265] Relevantly, DSU empowers the DSS to preserve the rights and the obligations of members, but not diminish or extend them,[266] interpreting only the WTO covered agreements, excluding its jurisdiction on external matters[267] or non-adjudicative ones.[268]

However, in comparison to the system elaborated in Articles XXII-XXIII(1) GATT1994,[269] the DSS provides for a wider scope of application, because it permits the common claims for violation of relevant rules of international law,[270] but also non-violation and situation complaints, which have been introduced for the first time here, although practice has demonstrated their unsuccessfulness before the panels.[271] Most of the disputes that have led to violation complaints are based on domestic measures breaching the commitments taken under the agreements, however, the DSS has not given a definite scope of the term "measure", leaving wide possibilities for applications under this category.[272]

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[264] Appendix 1 to the DSU.

[265] Article 6 DSU.

[266] The role of the WTO DSB and AB shall not be seen as a gap-filling or a rule-making, as their mandate is limited to the clarification of relevant provisions and they have stressed often the interpretation of the DSU where they are not entitled with legislative power, which is reserved to the Ministerial Conference. Judicial Activism is not condoned. See Appellate Body Report, in *US – Anti-dumping and Countervailing Measures (2011) (China)*, WT/DS379/AB/R, adopted on 25 March 2011; Appellate Body Report, *US – Import measures on Certain Products from the European Communities (2001*), WT/DS165/AB/R adopted on 11 December 2001, para. 92; Appellate body Report, *Chile – Alcoholic Beverages (2000)*, WT/DS87/AB/R adopted on 13 December 2000, para. 79.

[267] Panels may include an objective assessment of "such other findings" as long as they will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. See Article 11 DSU.

[268] This means that there are certain decisions under WTO rules that are not covered under the DSU and the other Agreements attributing a certain section to dispute settlement, such as ministerial decisions, declarations of Final Act. See Article 19 DSU.

[269] Only these two articles are mentioned because the dispositions regarding dispute settlement in the other agreements either refer explicitly to the articles in GATT1994 and in DSU, or use the exact same words, with the necessary modifications in relation to the matters touched by the single agreement. See Article XXIII GATS, Article 64 TRIPS, Article 14 TBT Agreement, Article 11 SPS Agreement, Article 22 DSU.

[270] WTO SECRETARIAT, A Handbook on the WTO at 247, 30.

[271] P. VAN DEN BOSSCHE AND D. PRÉVOST, *Essential of WTO Law*, 1st edn, Cambridge, 2016, 268.

[272] The scope of the term has been discussed to include also actions by private parties that are attributable to States, mandatory and discretionary legislation (as such), unwritten norms (practices),

As introduced before, the Panels and the Appellate Body shall decide the cases through the interpretation of the agreements,[273] but there is no explicit provision that describe which is the applicable law in a trade dispute.[274] Nevertheless some DSU dispositions seem to delineate a profile to reach that conclusion,[275] and to understand how WTO law relates with other rules of international law.[276] Suitably, Article 3(2) DSU reveals that to achieve the correct interpretation the existing provisions shall be "*interpreted in accordance with customary rules of interpretation of public international law",*[277] because they are not to be read in absolute isolation from other rules of international law.[278] This advances the idea that WTO Law is not rigid or inflexible enough to avoid and block reasoned judgements based on the changing facts in real cases, making headway for evolutionary interpretations.[279]

In practice, the only relevant external dispositions panels and the AB have interpreted are Article 31-32 Vienna Convention on the Law of the Treaties (VCLT) 1969, whose status of customary international law was recognized in many cases,[280]

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ongoing conduct and measures composed by several instruments. Well, any act or omission attributable to a WTO member can be a measure to be subject to dispute settlement. See P. VAN DEN BOSSCHE AND W. ZDOUC, at 232, 171-178.

[273] Article 19(2) DSU.

[274] J. PAUWELIN, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law*, Cambridge, 2003, 456.

[275] An interpretation putting together Article 3(2) "DSS is central […] to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law"; Article 7 where it is stated "to examine […] the relevant provisions in any covered agreement or agreements cited by the parties to the dispute"; Article 11 states that the BSD "make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements".

[276] S.P. SUBEDI, *The WTO Dispute Settlement Mechanism as a New Technique for Settling Disputes in International law*, in D. FRENCH, M. SAUL AND N.D. WHITE (eds.), *International Law and Dispute Settlement: New Problems and Techniques*, Oxford, 2010, 185.

[277] Appellate Body Report, *US – Final Anti-Dumping Measures on Stainless Steel from Mexico (2008),* WT/DS344/AB/R adopted on 30 April 2008, para. 161; Appellate Body Report, *United States – Import prohibition of Certain Shrimp and Shrimp Products,* WT/DS58/AB/R, adopted on 6 November 1998. Available both at < https://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm >.

[278] Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline,* WT/DS2/AB/R, adopted 20 May 1996, p.17.

[279] Appellate Body Report, Appellate Body Report, *Japan – Taxes on Alcoholic Beverages,* WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, para. 122-3; Appellate Body Report, *United States – Continued Existence and Application of Continued Zeroing (2009),* WT/DS350/AB/R adopted on 4 February 2009, para. 306.

[280] Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline,* WT/DS2/AB/R, adopted 20 May 1996, p.17; Appellate Body Report, *Japan – Alcoholic Beverages cit.* 1996, p. 10; Panel Report, *United States – Definitive Anti-Dumping and Countervailing duties*

and is now referred to as supplementary means of interpretation of the agreements.[281] According to Article 31 (1c) VCLT, and the derived principle of systemic integration, the deciding body should apply "*any relevant rule applicable in the relations between the parties*", which means the panels must take into account and balance non-WTO obligations of WTO members and harmonious interpretation among all WTO members.[282] This is interesting because State members can legitimately expect a decision on a trade dispute without incurring into conflicts of commitments between treaties. However, the DSU addresses specifically the case of conflict between the DSU and one WTO Agreement, where the second should prevail when inserting a special or additional rule to a discipline, notwithstanding that agreements procedures [special or additional] and the DSU [general] ones form the comprehensive and integrated system of dispute settlement in the WTO.[283]

The real challenge for the parties resides in the decisions of the panels and of the Appellate Body that are produced in the form of reports. The legal effect of these documents is similar to international judgements, because according to Articles 17-22 DSU, States commit themselves to accept the report of the dispute settlement bodies unconditionally, adopting the necessary conducts to re-balance the system.[284] But in order to become binding, reports must be adopted by DSB, a procedure that happens easily due to the principle of reverse consensus, unless the parties benefit from the condition-exception constituted by the appeal procedure, a

on Certain Products from China, WT/DS379/R, adopted 25 March 2011, para. 7.1. Available both at < https://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm >.

[281] Appellate Body Report, *European Communities- Measures Affecting the importation of Certain Poultry Products*, WT/DS69/AB/R, adopted 23 July 1998, paras. 79-83; Panel Report, *European Communities – Measures Affecting the approval and marketing of biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, adopted 21 November 2006, para. 7.67. Available both at < https://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm >.

[282] Appellate Body Report, *European Communities and Certain Member states – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R, adopted 1 June 2011, para. 845. Available both at < https://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm >.

[283] Appellate Body Report, *Guatemala – Cement I (1998)*, WT/DS60/AB/R, adopted on 2 November 1998, para. 66. Available both at < https://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm >.

[284] We shall refer to the violation complaints, that are the only ones that have produced successful proceedings and actual decisions, where the complaining party, if found liable, shall withdraw the measure in question or follow any other recommendations the bodies may have made. See J. PAUWELYN, *Enforcement and Countermeasures in WTO: Rules are Rules toward a more Collective Approach*, American Journal of International Law, 2000 Vol. 94, 335.

unique possibility in the scenario of international tribunals,[285] that started a frequent trend.[286]

There are some restriction on the discipline of the appeal, so that only disputing parties can appeal a report, and they are limited in questioning only issues of law, thus considering the application of a specific disposition of an agreement, or its interpretation.[287] This peculiarity, together with the composition of the AB, sustained the assertion that the AB is the main judiciary organ of the WTO with a *réelle expertise juridique*, while panels are associated with arbitral tribunals.[288]

When a report is appealed, a new phase starts with the appointment of the members of the AB that have to examine the case,[289] and the time for the final report stretches to the moment of the adoption of the AB Report.[290] Unfortunately, due to the current WTO AB crisis, States have had to shift to External procedures for this second instance, as happened between the EU and Canada in CETA, unless they found it advantageous to block the decision of DSB without implementation.

The rest of the process is similar to that of the panels, although there is no interim phase because it has to be quick, the final report is subject to adoption by the DSB by reverse consensus scheme.

In deciding cases, both the panels and the AB do not abide to a formal rule of binding precedents, but they usually consider the reasoning provided in other decisions, that although they bind only the parties of a dispute, they compose the *acquis* of the system and create legitimate expectations in WTO members.[291] The result is that the *ratio decidendi* and the interpretation of the Appellate Body can

[285] Article 17 DSU and Working Procedures for Appellate Review.

[286] Up to 2020 174 reports had been appealed on the 265 reports produced. See WTO Dispute Settlement Statistics, < https://www.wto.org/english/tratop_e/dispu_e/dispustats_e.htm >.

[287] An appeal before the Appellate body can not deal with factual issues or with the evaluation of the evidence on which the panel has made an objective assessment. See Article 11 DSU, and P. VAN DEN BOSSCHE AND D. PRÉVOST AT 271, 282.

[288] E. CANAL-FORGUES, *Le Système de règlement des différends de l'Organisation Mondial du Commerce, in* Revue Générale de droit International Public, 1994, 703.

[289] The Appellate body is composed by 7 people, three of which must be present at any case as a minimum requirement. These people must be expert in law, international trade and the subject matter of the covered agreements, other than the classical independent and impartial, so they can not be working as governmental official or in other positions that may create a conflict of interest. That is an important difference with the panels, whose members are technical experts in trade and not necessarily in law. See Articles 8-17 DSU, Rules of Conduct Section II, Para. 1.

[290] Article 16 DSU.

[291] Appellate body Report, *Japan –Alcoholic Beverages cit. 1996*, p.14.

not be disregarded by subsequent panels, who *"will resolve the same legal questions in the same way"* unless other cogent reasons affected the decision, obtaining effectiveness *erga omnes partes contractantes*.[292]

Once the decision is issued, it requires immediate compliance by the loosing party,[293] nevertheless the parties can agree or demand an arbitrator to settle a reasonable period of time for the compliance.[294] Any other issue dealing with the consistency of the State's conduct with the rulings of the panels shall be settled through the normal course of proceedings restarting from the panels, under a specific discipline.[295] Luckily, the rate of implementation is very high, as the majority of States demanded to withdraw a measure after the issuance of a report have done so in a timely manner.[296] What is curious, and must be considered by litigant States, is that in case of breach of WTO Law, the customary rules on States Responsibility do not apply as the special WTO rules are favoured, under article 55 ILC Articles and the established principle of *lex specialis*.

But how must the loosing States comply with the decisions or the recommendations of the reports?

Differently from normal international tribunals, States adhere the WTO DSS to obtain the withdrawal of the measure, but sometimes they also demand compensation or suspension of successions (retaliation), but while the first is a definitive solution, the other two are solely temporary ones.

Relevantly, compensation aims at balancing the future damage sustained due to the application of a domestic measure or policy, but it is rare to be accorded, because it must be voluntary, so agreed by the loosing party as well, and consistent with the

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[292] Appellate Body Report, *United States – Final Anti-Dumping measures on stainless Steel from Mexico*, WT/DS344/AB/R, adopted 20 May 2008, paras. 158-160. Available at < https://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm >.

[293] Award of the Arbitrator, *Chile – Tax on Alcoholic Beverages*, Arbitration under Article 21.3(c) of the understanding on Rules of Procedures governing the Settlement of Disputes, WT/DS87/15, WT/DS110/14, 23 May 2000, para. 38. Available at < https://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm >.

[294] Article 21(3) DSU provides for these two options, where arbitration is residuary.

[295] Article 21(5-6) DSU mentions that when there is disagreement on the existence or consistency of measures to comply with the rulings or recommendations, as the DSB shall keep under surveillance the implementation of adopted recommendations, any issue may be raised at the DSB.

[296] PAVAN S. KRISHNAMURTHY, *To Enforce or Manage: An analysis of WTO Compliance*, Emory International Law Review, 2018 Vol. 32(3), 378ss.

various agreements towards all the WTO members.[297] So, the last chance for applicants is to pursue retaliation,[298] for which they need to obtain the authorisation of the DSB.[299]

These two countermeasures, however, are not economically advantageous, because in practical terms they are trade restrictive and entail potential multilateral damages, given that while the general rule is to authorize retaliation in the same sector where a damage occurred,[300] when there are asymmetrical trade relationships, the access to cross-retaliation is ensured to reach an equivalent level of impairment.[301] As the topic is quite tricky, there are rules that are intended to avoid abuses, such as the prospective nature of the retaliation or compensation, which must not be understood as retroactive punitive instruments.[302]

Globally, the WTO System enables legal certainty in dispute settlement on trade, because its system permits to avoid unilateral actions through the recourse to multilateral procedures.[303] Surely, WTO DSS is more favourable for a State seeking

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[297] Compensation within the WTO System shall not be constituted by a monetary transaction, but as a tariff benefit or a particular market access that permits a diminishment of the damage sustained after the violation of the agreements. In other words, it is not backward but forward looking in the sense that it aims at avoiding the future perpetration of the damage in the future economic relations. It is problematic because a loosing party that accept to loosen certain barriers or that decides favourable treatment, must then comply with the MFN principle. See Article 22 DSU; and WTO SECRETARIAT AT 247, 80.

[298] Retaliation consists in the suspension of concessions or other obligations under the agreements.

[299] The procedure for the request of such an authorisation comprehends the approval by the DSB, which is conditioned to the reverse consensus principle, but when the responding party objects the authorisation, all the subject is referred to Arbitration and is practically delayed till the settlement by the appointed arbitral tribunal. In case an arbitration was necessary, the original panel would be asked to assess the implementation of its report. See Article 22(3-6) DSU; and Y. TANAKA, at 26, 300.

[300] This type of retaliation is limited to the trade agreement and can not be claimed under the other agreements.

[301] When we talk about cross-retaliation, it is important to divide under Article 22(3b-c) DSU the cross-sector retaliation and the cross-agreement retaliation, because the first falls within the same agreement, where the violation occurred, while the second refers to the dis-application of dispositions or obligations under a different agreement of the WTO Legal Framework.

[302] Retaliation can not be authorised if the agreement specifically prohibits the suspension in a sector, it can not be valid for measures adopted before the authorisation itself and must be terminated as soon as inconsistent measures are removed. See J. PAUWELYN at 284, 338.

[303] Article 23(1-2) DSU mention this characteristic, that was repeated in *US – Certain Products 2001,* and it was recognized as an obligation for all the WTO members in *EC – Commercial Vessels (2005).* See Appellate Body Report, *US – Import measures on Certain Products from the European Communities cit.*, para. 111; Panel report, *EC – Commercial Vessels (2005),* WT/DS301/R adopted on 22 April 2005, para. 7.207. Available at < https://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm >.

justice in a regime of confidentiality[304] and in the short term, as Article 20 DSU establish a time no longer than 9 or 12 months namely if the decision of the DSB is appealed or not.[305] Another guarantee consists in the application of due process[306] and good faith principle,[307] all the WTO parties are bound to during proceedings.

A positive element is also that a member is expected to regulate its access to the system in the sense that it should consider, exercising its judgement, whether the application could be fruitful,[308] in order to start eventually the application with good faith and a real interest in putting its efforts in resolving the disputes, as mentioned in Article 3(10) DSU. Therefore, applicants may be favoured if we consider that

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[304] Theoretically, Articles 17(10)-18(2) explain a rigid discipline for the confidentiality of documents and information that are considered sensitive, in the sense of restricting the actors entitled to read them to the parties, the panel and the AB. The ratio is that with economic interests at stake and with the participation of non-state actors, the protection of BCI and HSBI must be maintained. However, in relation with documents, State parties can decide to disclose the information of their submissions as they prefer, unless special procedures have been adopted. Regarding the Panel meetings and the AB hearings, we should follow two different disciplines because the Panel meetings may have a legal basis in Article 12(1) DSU and Paragraph 2 of the Working procedures of the Panels to be considered open to public, while the on AB hearings, conversely to what establishes the Article of DSU, the AB itself interpreted Article 27 Working Procedures evoking the competence-competence principle to decide on confidentiality of the oral hearing, keeping in mind the rights and interests of third parties, participants and the integrity of the process. Surely, these disciplines avoid the discussion of the frequent practice of leaking to the media information about the panel interim report. See Appellate Body Report, *EC – Large Civil Aircraft*, WT/DS316/AB/R adopted on 1 June *2011, Annex III*; Appellate Body Report, *US/Canada - Continued suspensions on obligations in the EC – Hormones Dispute,* WT/DS321/AB/R adopted on 2008, *Annex IV, paras. 6-7;* P. VAN DEN BOSSCHE, AND W. ZDOUC at 232, 276s.

[305] Article 12(8) DSU and Article 17(5) DSU respectively organize the that the examination of a case by a panel shall not be longer than six months and by the AB 90 days. While for the Panel, the possibility to prolong the time frame is possible if it informs the DSB, for the AB this possibility does not exist explicitly, creating criticism for the validity of delayed decisions. Surely, with the increasing workload for both, these time frames are not respected anymore, but it is rare to find excessive delays, as happened in *EC – Large Aircraft 2011 and US – Large Civil Aircraft 2012* that lasted about 60 months each. Differently from the beginning, nowadays it is difficult to keep with time limits as there is an overload of work before the AB, but the premises are good, and there is certainty that the case will not last as long as one before the ICJ.

[306] This principle ensures that no party is unfairly disadvantaged with respect to the other disputing parties, which means that all the WTO members have an adequate opportunity to file their claim and make out their defences to conduct the proceeding in a balanced way toward the solution. Appellate body Report, *Chile – Price Band System (2002),* para. 176; Appellate Body Report, *US/Canada – Continued Suspension*, cit. 2008, *para. 433;* Appellate body report, *Thailand – Cigarettes (Philippines),* WT/DS371/AB/R adopted on 15 July 2011, *para. 147.* Available both at < https://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm >.

[307] Articles 3(10)-4(6) DSU. Indeed, States can be sanctioned if it violated a substantive provision of the WTO Agreements but has committed more than a mere violation. See Panel Report, *Argentina - Definitive Anti-Dumping Duties on Poultry from Brazil,* WT/DS241/R adopted on 19 may 2003, para. 7.36.

[308] The applications, however, can be considered objectively fruitful, as the panels have decided almost all cases in favour of the applicants. See Article 3(7) DSU, and Appellate Body Report, *EC –Bananas III (1997),* WT/DS27/AB/R adopted on 25 September 1997, para. 135. Available at < https://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm >.

before the WTO DSS there is no exhaustion of local remedies rule, and that they benefit from the non rebuttable presumption on nullification and impairment in violation claims, which constitute the majority of cases.[309] Nonetheless, this theoretical advantage is balanced by the classical prima facie burden of proof on them.[310]

Among all the applicants, developing countries are treated also more favourably, as they can have one panellist from a developing country when the dispute is between developed and developing countries, and they can benefit from further legal assistance and advice.[311] Moreover, their participation triggers further efforts to promote extra judicial settlement by the exercise of the WTO SG,[312] which means that they may be incentivised to bring a case at the DSB, differently from what happens for developed countries, although they still have to face expensive trials that could not be always afforded by transition economies. By now, the WTO has demonstrated to be an interesting forum for the developing countries that oppose trade measures of developed countries, who would normally rely on influence and power to avoid international conflicts, with the result that the system has been used almost equally by the two types of Members.

In fact, nowadays, the main problem is represented by the increase in free-trade agreements and mega-regional agreements that amplify the risk for abeyance of the DSB. This practice has taken relevance, because the comprehensive and integrated

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[309] Panel Report, *EC –Bananas III cit. (1997)*, WT/DS27/R, adopted on 22 May 1997, para. 7.398

[310] Appellate body Report, *US – Wool shirts and Blouses*, WT/DS33/AB/R adopted on 23 May1997, p.12, para. 7.12*; and* Appellate Body Report, *Japan – Measures Affecting the Importation Apples*, WT/DS245/AB/R adopted on 26 November 2003, para. 157. An interesting point is that the AB interpreted also the burden of establishing the applicable law and which is the most suited interpretation lies on the panels, under the principle of *Iuria Novit Curia*. See Appellate Body Report, *EC – Tariff preferences*, WT/DS246/AB/R adopted on 7 April 2004, para. 105; and Appellate Body Report, *US – Carbon Steel*, WT/DS213/AB/R adopted on 19 December 2002, para. 157. Available at < https://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm >.

[311] Article 27 DSU made available a set of legal experts to provide assistance to the team of lawyers defending developing states, that are often addressed as respondent and rarely applicants, at the various stages of WTO procedures. A concrete example of this was the foundation of the Advisory Centre on WTO Law (ACWL) in 2001, whose scope is precisely this one. See G. SHAFFER, 'How to make the WTO Dispute Settlement System work for Developing Countries: Some proactive developing countries strategies, in G. SHAFFER, V. MOSOTI, A. QUARESHI, *Towards a Development Supportive Dispute settlement System in the WTO*, ICSID Resource Paper No. 5, March 2003, p. 16; and Agreement establishing the ACWL.

[312] Article 24 DSU mentions a set of special procedures involving least-developed countries.

system of the WTO applies only to the WTO agreements,[313] but it does not extend to the reality of other legal instruments disciplining trade more specifically. Luckily, custom has demonstrated a favourable consideration for the WTO, because DSU seems to accomplish its objective to guarantee an efficient settlement of disputes among its member states, but we shall not avoid the consideration of those regional realities that are gaining foot in the area of dispute settlement in economic matters, especially, with the current crisis of the WTO AB.

5 Bilateral Dispute settlement mechanisms: Iran-US Claims Tribunal and Ethiopia-Eritrea Claim Commission

We have analysed three systems that permit the settlement of economic disputes between States on a universal level. In other words, we have considered the systems before which almost any State can file a claim against almost any other respondent. However, it would be an error to conclude that these are the only effective mechanisms to adhere, indeed, States may be interested in resolving specific economic claims that have arisen with another specific party and may not be willing to adhere a universal system, but to empower a special system, which is constituted on an ad hoc basis. The examples that follow refer to two historical instances where special tribunals or commissions were instituted in wider peace processes of crisis settlement between only two specific parties,[314] who demanded a more efficient and enforceable system than the traditional inter-State arbitration. These examples are the Iran-US Tribunal, after the Hostage Crisis in 1980 and the Ethiopia-Eritrea Claim Commission, after the armed conflict of 1998.[315]

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[313] The appellate body strengthened this idea in its jurisprudence, where it mentioned the difference with the previous GATT, where every agreement had its own proceedings. See Appellate Body Report, *Guatemala – Cement I (1998),* WT/DS60/AB/R, adopted on 2 November 1998, para. 64.

[314] Indeed, the Iran-US Tribunal is an institution that was created with the Algiers Accords 1981, with the precise goal to ameliorate the peaceful solution of the political dispute raised after the Hostage Crisis in 1980 where the American embassy was seized in Teheran. While the Claim Commission was constituted to restore peace after that Eritrea had unlawfully invaded Ethiopian-controlled territory and had started an armed conflict in 1998.

[315] On the unlawful invasion see Partial Award, Jus ad Bellum, Ethiopia's Claims 1–8, 19 December 2005; on the economic frustration sustained by the Ethiopian citizens see Partial Award, *Western and Eastern Fronts, Ethiopia's Claims 1 and 3*, 19 December 2005 and Partial Award, *Central Front, Ethiopia's Claim 2*, 28 April 2004. For the claims acknowledged in the other sense, see Partial Award, *Central Front, Eritrea's Claims 2, 4, 6, 7, 8 and 22*, 28 April 2004; Partial Award, *Western Front, Aerial Bombardment and Related Claims, Eritrea's Claims 1, 3, 5, 9–13,14, 21, 25 and 26*,19 December 2005. Available at < https://pca-

An element these two systems have in common is that both are grounded on agreements signed in Algiers, namely the Algiers Accords 1981 and the Algiers Agreement 2000, which attributes the inter-State characteristic to these mechanisms. Nevertheless, The Iran-US Tribunal was only prescribed in the accords, but its specific discipline was laid down in the Claims Settlement Declaration,[316] while the Claim Commission, was empowered by the agreement to establish its own rules on jurisdiction and procedures,[317] which were based on the PCA Optional rules for arbitration disputes between two States.

Furthermore, both have been seated in The Hague, but the first is a Tribunal while the second is a Commission and has the PCA as registry. In the exercise of their functions, however, the first is similar to a mixed-arbitration dispute settlement system because it provided both the settlement for disputes between two governments, and non-state actors and the opposite governments,[318] while the second decided only on claims bought by one government against the other.

These two mechanisms have international treaties as ground for their jurisdiction, so we shall look at those dispositions to analyse it. Considering Iran-US Tribunal, the jurisdiction *ratione personae* is strictly limited to two governments and their respective nationals, and *ratione temporis* is restricted to all the disputes prior to 19 January 1981, that were both standing at the moments of the foundation of the tribunal and filed within 1 year term (until 19 January 1982) from that moment.[319] Finally, the *ratione materiae* delimitates tribunal's jurisdiction to nationals' claims and counterclaims based on debt, contracts, expropriations and other measures affecting property rights, and inter-State disputes on purchase contract of goods,

cpa.org/en/cases/71/#:~:text=The%20Claims%20Commission%20was%20established,Conventions%2C%20or%20other%20violations%20of >.

[316] Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States and the Government of the Islamic Republic of Iran (1981).

[317] Agreement signed in Algiers on 12 December 2000 between the Governments of the State of Eritrea and the Federal Democratic Republic of Ethiopia.

[318] The Locus Standi of the tribunal was extended equally to the two governments and any other nationals of the two, and in fact, they both had the equal judicial status. Specifically, inter-States disputes may rise in regarding the interpretation of Algiers Declarations and/or official claims on purchase and sale of goods and services. See J. COLLIER AND V. LOWE at 156, 77.

[319] This also means that the number of claims was established after the deadline and no more disputes shall be submitted before that specific tribunal after the expiration. See Article II(1) –III(4) Claims Settlement Declaration.

services and any interpretation of the general provision of the Algiers Accords.[320] In the first category, diplomatic exception is excluded as the wording of Article II(1) of the Claims Settlement Declaration refer to claims "*on behalf of the interests of its nationals*" or "*on the basis of injury to its nationals*".

Contrarily, the Ethiopia-Eritrea Claim Commission was established to "*decide through binding arbitration all claims for loss, damage or injury by one Government against the other*" related to the armed conflict and resulting from "*violations of international humanitarian law, including the 1949 Geneva Conventions, or other violations of international law*."[321] Among the various claims filed by the two governments after 12 December 2001,[322] on their own behalf and on behalf of their nationals, the economic nature of the commission resulted from the commitment of the parties to address "*the negative socio-economic impact of the crisis on the civilian population*" through the settlement of claims for loss, damage and injury by binding arbitration.[323]

In both cases, the organisms were empowered to deal with specific economic claims among the other, so we can affirm that both have played a role in the adjudicative settlement of economic claims.

In the pursuance of their tasks, both applied international law, however, while the Iran-US tribunal was empowered to decide cases interpreting both rules of public international law and those of private law,[324] with Dutch law governing the arbitration,[325] the Claim Commission interpreted its legal basis the international

[320] Article II Claims Settlement Declaration.

[321] Article 5 of the Algiers Agreement of 12 December 2000 signed between Republic of Ethiopia and the State of Eritrea.

[322] Claims dealt with matters including the conduct of military operations in the front zones, treatment of prisoners of war, treatment of civilians and their property, diplomatic immunities and the economic impact of certain government actions during the conflict. See < https://pca-cpa.org/en/cases/71/ >.

[323] Article 5(1) Agreement signed in Algiers on 12 December 2000 between the Governments of the State of Eritrea and the Federal Democratic Republic of Ethiopia.

[324] Moreover, in the agreement the lex fori was declared to be public international law. See Article V Claims Settlement Declaration; and T. STEIN, *Jurisprudence and Jurists' Prudence: The Iranian-Forum Clause Decisions of the Iran-United States Claims Tribunal*, American Journal of International Law, 1984 Vol. 78, 18.

[325]The Accords did not result from commercial negotiations, but rather memorialize diplomatic efforts to end the crisis. See M.B. FELDMAN, *Implementation of the Iranian Claims Settlement Agreement-Status, Issues and Lessons: View from Government's Perspective*, in SYMPOSIUM, *Private Investors Abroad-Problems and Solutions In International Business*, Dallas, 1981, 97ss.

jus ad bellum and 5 bilateral conventions/agreements that disciplined specifically trade and commercial relationship between the disputing parties.[326]

The result for the Iran-US Tribunal are public final and binding awards,[327] with an interesting mechanism for ensuring compliance, specifically by Iranian government in favour of American citizens,[328] which is a security escrow account under the control of the Algerian government.[329] The critical discussions have risen on the possibility to recognize the assessment as *res judicata*, which has been addressed by a British Court,[330] and on the possibility to set aside or declare null and void the award. Iran invoked such position before the District Court of The Hague ,[331] but withdrew it later, probably because challenging the award out of the prescribed system would have triggered the US to seek enforcement abroad on assets different from the escrow account.[332]

While the decisions of the Iran-US tribunal has brought practical results for the stakeholders, the Claim Commission poses a concrete problem: in its 15 final awards on liability, [333] the ultimate balance established was 13 millions $ in favour

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[326] Partial Award, *Jus Ad Bellum, Ethiopia's Claims 1–8* Between the Federal Democratic Republic of Ethiopia and the State of Eritrea (December 19, 2005), para. 4.

[327] Article 32(5) Tribunal Rules and Article IV(1) Claims Settlement Declaration.

[328] While Iran has established a Security account an amount of 1 billion dollars to secure payments to American nationals, but USA has just a duty to ensure the respect of jurisdiction and authority of the Tribunal by enforcing its decision. See Iran- United States Claims Tribunal, decision Case No. A/21, 4 May 1987 (1987) 26 ILM, p. 1594 para. 2. Available at < https://iusct.com/cases/ >.

[329] The Security Account contains a portion of the Iranian assets that the United States have previously frozen as a consequence of domestic proceedings against Iran after the Hostage crisis. The Algerian Government acts as escrow agent for the Security Account pursuant to the Tribunal's instructions, ensuring the account is available to satisfy most awards of the Tribunal, although only limited to the decisions in favour of American nationals. See Declaration of the Government of the Democratic and Popular Republic of Algeria, para. 7 (*"All funds in the Security Account are to be used for the sole purpose of the payments of . . . claims against Iran").*

[330] *Mark Dallal v. Bank Mellat*, [1986] 1 Q.B. 441, 2 W.L.R. 745, 1 All E.R. 239, noted in Fin. Times (London), Aug. 21, 1985,

[331] Iran Appeals Raygo Wagner, Rexnord Awards to Dutch Court, I.A.L.R., Apr. 15, 1983, para. 6,330. Available at < https://iusct.com/cases/ >.

[332] This possibility would be technically lawful in relation to Articles II-III New York Convention 1958.

[333] Commission issued its Final Awards, which ordered the payment of compensation by each side to the other for the violations of law previously found in the partial awards, as the parties had failed to negotiate the specific amount of compensation. This procedure is based on the jurisprudence of the ICJ, which established that the calculation of an amount of money to be given as compensation must be calculated by the court only if the parties have not reached an agreement by negotiation. This happened also in the Iran-Us Tribunal, where the amount was established by a specific commission. Se *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda),*(Merits), Judgment of 19 December 2005, para. 435; and G. ALDRICH, *The Jurisprudence of the Iran-U.S. Claims Tribunal,* Oxford, 1996, 34.

of Ethiopia,[334] but there were neither automatic sources of funding nor specific recipients as the money is supposed to be given by Eritrea, despite its limited economical resources,[335] to Ethiopia that has discretion on how to allocate them, leaving satisfaction conditioned.[336] The bilateral compensation was the result of the recognition of unlawful invasion by Eritrea of the Ethiopian-controlled territory, and the subsequent decisions to hold both states responsible for perpetration of atrocities on the property of the other nationals,[337] however to facilitate transaction, compensation was mathematically calculated. Theoretically the only guarantees citizens may have are that the parties agreed to honour all decisions and to pay any monetary awards rendered against them promptly,[338] making them final and binding, and that if they are not promptly paid, the other party can proceed with the enforcement in jurisdiction where the loosing party has assets, when a mutually acceptable offset lacks.[339]

Conclusively, the Iran-United States Claims Tribunal signified the quick acceptance by States of municipally enforceable arbitration in the last century, after

[334] The last award was rendered on17 August 2009, after which we can count that the Commission awarded about $161 million to the Government of Eritrea and about $174 million to the Government of Ethiopia. See A. DYBNIS, *Was the Eritrea-Ethiopia Claims Commission merely a Zero-Sum game?: Exposing the Limits of Arbitration in Resolving Violent Transnational conflict,* Loyola International and Comparative law Review, 2011 Vol. 33(2), 255s.

[335] The financial burden imposed on Eritrea was desired not to be excessive, given Eritrea's economic condition and its capacity to pay See *Ethiopia's Damages Claims,* para. 312.

[336] The government technically would have discretion as to whether to keep the funds, provide them to affected individuals, or use them for alternative forms of assistance or relief to the affected population groups. See Final Award: *Ethiopia ™s Damages Claims (Erit.-Eth.*), (Aug. 17, 2009), at 397, 400, 402, 409, 425 (Aug. 17, 2009); Final Award: *Eritrea ™s Damages Claims (Erit.-Eth.),* (Aug. 17, 2009), at 9. Available at < https://pca-cpa.org/en/cases/71/#:~:text=The%20Claims%20Commission%20was%20established,Conventions%2C%20or%20other%20violations%20of >.

[337] On the unlawful invasion see Partial Award, Jus ad Bellum, Ethiopia's Claims 1–8, 19 December 2005; on the economic frustration sustained by the Ethiopian citizens. See Partial Award, *Western and Eastern Fronts, Ethiopia's Claims 1 and 3*, 19 December 2005 and Partial Award, *Central Front, Ethiopia's Claim* 2, 28 April 2004. For the claims acknowledged in the other sense, see Partial Award, *Central Front, Eritrea's Claims 2, 4, 6, 7, 8 and 22*, 28 April 2004; Partial Award, *Western Front, Aerial Bombardment and Related Claims, Eritrea's Claims 1, 3, 5, 9–13,14, 21, 25 and 26*, 19 December 2005. Available at < https://pca-cpa.org/en/cases/71/#:~:text=The%20Claims%20Commission%20was%20established,Conventions%2C%20or%20other%20violations%20of >.

[338] Article 5(17) Agreement signed in Algiers on 12 December 2000 between the Governments of the State of Eritrea and the Federal Democratic Republic of Ethiopia.

[339] M.J. MATHESON, *The Damage Awards of the Eritrea-Ethiopia Claims Commission*, The Law and Practice of International Courts and Tribunals, 2010 Vol. 9, 5ss.

the top-downs mechanisms of public international arbitration inadequately responded to the needs of the international community. However, together with the Claim Commission, this experiment in international dispute settlement is not likely to be replicated elsewhere,[340] due to its costs and relative effectiveness on the development of international law,[341] represented by the chaotic conditions of the conflict, and constraints of time and resources that left no choice but to render rough and subjective estimates due to the lack of evidence. It is extremely unlikely for such Courts to develop, as regional mechanisms take steps, regulating dispute settlement among fewer countries more easily and with deeper and better results.

6 Regional Courts

Regional arrangements can perform a valuable role in peaceful settlement of disputes, considering the importance of the Chapter VIII UN Charter, and the fact that the same president of the UNSC has incentivised States to conclude them for this common purpose.[342] However, the global reality of the United Nations must be differentiated at the phase of the organization of dispute settlement systems,[343] and at the phase of enforcement, because no enforcement action shall be taken under regional arrangements without the authorization of the UNSC.[344] Regional action was also addressed by the Declaration on the Prevention and Removal of Disputes1988, where it was considered a mean to deepen the sense of participation, consensus and democratisation in international affairs, although it negatively facilitates decentralisation, delegation, and narrower cooperation.[345]

But, only after the constitution of WTO in 1994 and the advancement of the European integration process, the phenomenon spread on a worldwide scale, leading to the era of regionalism, with its pros and cons.[346] Below, there is an assessment of the current main regional treaties, with their dispute settlement

[340] D.D. CARON at 69, 108.
[341] Article 5 Algiers Agreement 2000.
[342] Statement by UNSC President, S/PRST/2011/18, 22 September 2011, 2.
[343] Article 52(1) UN Charter recognizes autonomy to regional arrangements on the settlement of international disputes.
[344] Article 53(1) UN Charter.
[345] 1988 Declaration on the Prevention and Removal of Disputes, paras. 13-17.
[346] E. MANSFIELS AND E. REINHARDT, *Multilateral Determinants of Regionalism: The Effects of GATT/WTO on the formation of Preferential Trade Arrangements*, International Organizations, 2003 Vol 57, 829s.

systems, that have an impact on the development and the maintenance of international economic law.[347]

The reason for this assertion is that Regional trade agreements (RTAs) are generally expected to offer more advantages because they permit deeper economic integration, as two neighbour States may have similar needs, and with a faster decision making process that is more flexible toward different positions, due to the limited number of parties. If these systems may seem tailored on their users, however, they are more dependent on regional funding and restricted resources, as well as they may offer geographically limited satisfaction.[348] In this sense, these regional systems may have a limited effect, because international economic disputes are more likely to rise inter-regionally and not intra-regionally, although there is the possibility to face controversies on the achievement of "real" common interests between two State parties integrated in the same system.[349]

What is peculiar and has both advantages, such as the similarity and comparativeness, and disadvantages, increasing fragmentation and ineffectiveness on the global scale, is that regional economic courts are based on the phenomenon of legal transplants that lead to the categorization in legal families.[350] Specifically, in international economic law, the two basic models are the ECJ and the GATT/WTO one, although there are also hybrid mechanisms. While the first allows larger number of stakeholders to file complaints and relies on permanent supranational court, the second deals only with States complaints, i.e. governmental

[347] Currently, there are 12 Courts of regional economic and political integration, and, every regional has developed its own approach, but some of the mechanisms are too new or have produced practically no jurisprudence on the matter, therefore the dissertation will not concentrate on them: Benelux Court, Caribbean Court of Justice (CCJ), Andean Tribunal of Justice, OHADA Court, East African Economic community, Economic Community of West African States (ECOWAS) Court of Justice, the court of Southern African Development Community (SADC), and the one for the Common Market for Eastern and Southern Africa (COMESA). On the contrary, we will focus on the integration supported in in Western Countries, South America and South-East Asian ones, that have established effective mechanisms with their peculiarities.

[348] P.I. LEVY AND T.N. SRINIVASAN, *Regionalism and the Disadvantage of Dispute Settlement*, The American Economic Review, 1996 Vol. 86(2), 95ss; R. MCDOUGALL, *Regional Trade Agreement Dispute Settlement Mechanisms: Modes, Challenges and Options for Effective Dispute Resolution*, Geneva, International Centre for Trade and Sustainable Development (ICTSD) Paper 2018, 11.

[349] Y. TANAKA at 26, 103s.

[350] D. BERKOVITZ, K. PISTOR, J-F. RICHARD, *Economic Development, Legality and the Transplant effect*, European Economic Review, 2003 Vol. 47(1), 165ss; and A. WATSON, *Legal Transplants: An approach to Comparative Law*, 2nd edn., Georgia, 1993.

affairs, and adopt a compulsory jurisdiction that requires firstly consultation then the establishment of a panel.[351]

6.1 **Regional permanent courts**

It is possible to consider to fall within this first category those mechanisms that are based on the model of European Court of Justice (ECJ),[352] indeed, they are referred to as Deeply Integrating Regional Courts (DIRCs), because they are regulated by regional agreements with the purpose of regulating economic activity within the region.[353]

The ECJ itself deserves a brief assessment,[354] because the European Union has been the most successful custom union, before reaching the monetary union and deep political-economic integration, with a set of special features.[355] Consequently, the ECJ has always been seen as the legitimate and authoritative judicial body that could solve effectively inter-state disputes in the context of economic integration within the EU, among the many other competences.[356] Despite its broader scope than the WTO DSS, the jurisdiction is compulsory for failures to fulfil such special

[351] K.J. ALTER, *The multiplication of International Courts and Tribunals after the end of the Cold War*, in C.P.R. ROMANO, K.J. ALTER AND Y. SHANY (eds) at 232, 68.
[352] R. MACKENZIE AND OTHERS at 165, 250.
[353] C. BAUDENBACHER AND M-J. CLIFTON, *Courts of Regional Economic and Political Integration Agreements*, in C.P.R. ROMANO, K.J. ALTER AND Y. SHANY at 232, 252.
[354] Article 19(1) TEU states that the ECJ "*shall include the Court of Justice, the General Court and specialized Tribunals*". The Court of Justice and the General Court are composed by one judge per each member of the EU who has been appointed through common agreement by all MSs governments, but they are expected to be independent and impartial. Moreover, they are assisted by 8 advocates-general with their legal opinions before any decision, which is however deliberated secretly. See Article 252-253 TFEU; Article 47 ECJ Statute; Article 32 Rules of procedures of the ECJ.
[355] The EU represents about one fifth of the world trade (import and export), and within its borders, the Member States accomplished the elimination of tariffs and non-tariffs measures, border controls and the production of a supra-national system with a European Law that has its primacy and dominates many areas of economic integration of the States. See C-106/77, judgment of the Court, *amministrazione delle Finanze dello Stat v. Simmenthal S.p.A, Simmenthal* case [1978] ECR 629. Available at < https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61977CJ0106 >.
[356] M. SHAPIRO, *The European Court of Justice*, in P. CRAIG AND G. DE BURCA (eds), *The Evolution of EU Law*, 3rd edn, Oxford, 2021, 328. This idea is supported by scholars that argue the traditional commitment to the rule of law, which is not comparable with the countries of other regions, and has produced a structured legal environment. See D. A. GANTZ, *Assessing the impact of WTO and Regional Dispute Resolution mechanism on the World Trading system*, in J. JEMIELNIAK, L. NIELSEN AND H.P. OLSEN (eds) at 7, 62.

obligations,[357] nevertheless due to the high and effective political and economic integration started in the last century, those disputes are extremely rare.

Close to this reality is the Court of the European Free Trade Area (EFTA),[358] basically extending the EU Single market to Norway, Iceland and Liechtenstein, and all the relevant dispositions on the management of dispute settlement. Particularly, the most common actions are brought for infringement procedures by States or the EFTA Surveillance Authority, although the global number of claims has been limited due to the general scope of the constituting treaty.[359] But what is important in the economic perspective of the region is the relation between the ECJ and the EFTACJ jurisprudence, which is bilaterally relevant and has provided steps forward towards stability.[360]

A geographical neighbour of these first two Courts has been the Court of the Commonwealth of Independent States (CIS),[361] the predecessor of the Court of the Euro-Asiatic Economic Community (EurAsEC)[362] and the Euro-Asian Economic Union (EAEU),[363] whose jurisdiction is limited to disputes on economic obligations

[357] As prescribed under Article XXIV GATT, obligations under FTAs can conditionally derogate the general obligations of the WTO, with their own, that are presumed to be modelled on the exigencies of the interested region. In the EU, the disposition regarding the breach of commitments is Article 259 Treaty on the Functioning of the European Union (TFEU).

[358] It consists of three judges and six ad hoc judges that work in three-judge formation to decide a case, with the same prerogatives of judges of the ECJ. See Article 30 Agreement between EFTA States on the Establishment of the Surveillance Authority and a Court of Justice (SCA 1992).

[359] Among the total 291 EFTA Court cases, The Court has decided 107 infringements cases, among which only 22 were contested and 4 are pending. See < https://eftacourt.int/wpcontent/uploads/2018/12/Statistics_EFTA_Court__as_of_October_2017__004_.pdf >.

[360] EFTA Court must follow relevant pre-EEA ECJ jurisprudence, and pay due attention to post-EEA one. The ECJ has adopted the interpretation of EFTA Court on principles of EEA Law that were relevant for economic relations between the EU and EEA States, such as the principle of homogeneity, the almost direct effect of EEA-Law and the possible recognition of States liability in breach of EEA Law. See Article 3(2) SCA Agreement 1992; and C. BAUDENBACHER AND M-J. CLIFTON at 353, 258s-276.

[361] Russian Federation, Belarus, Armenia, Moldova, Kazakhstan, Kyrgyzstan, Uzbekistan, Tajikistan, Azerbaijan, Georgia and Turkmenistan are parties to organization, whose constitution was held in 1991, with the signature of the Minsk Agreements and the Alma Ata Declaration and Protocol. Additionally, on 6 June 1992 the Statute of the Economic Court of CIS was approved. See Charter of the Commonwealth of Independent States, adopted 22 January 1993, and entered into force 22 January 1994, 1819 UNTS 37.

[362] After the foundation of the Euro-Asiatic Economic Community (EAEC), and the institution of the autonomous Court, the competence over the economic controversies among members have shifted to this second body, in the context of the economic Custom Union. See Articles 3-8 Constitutive Treaty of the Eurasian Economic Community, 10 October 2000 (as amended on 6 October 2007) < https://cis-legislation.com/document.fwx?rgn=3864 >.

[363] Euro-Asiatic Economic Union, constituted in 2015 after the signature in Astana of the Treaty of Euro-Asiatic Economic Union in 2014.

among members states and between a member State and a third Member[364] under the treaties signed in the CIS legal framework.[365] the jurisprudence of the Court firstly concentrated on the concept of economic obligations,[366] thus defining appropriately its jurisdiction. What is interesting is that once the EurAsEc court has been constituted it has been empowered with the same jurisdiction *ratione materiae* adjourned with an extension to new members and new treaties.[367] Only with the third EAEU Court, the jurisdiction was extended, providing a compulsory jurisdiction over all disputes between member States of the Euro-Asiatic Economic Union, between its members and the Union and between institutions of the EAEU.[368]

While all three these eastern tribunals applied their respective treaties, it is important to underline the strange and excessively rapid succession of the three, in order to clear the relationship of ex URSS States with the rule of law and with inter-State adjudication. In fact, the CIS Court was adhered only 13 times and decided only 5 admissible cases, but because its main goal was to mitigate the effect of the collapse of Soviet Union, it had the possibility to deal with the cession of assets, property and debts of the former USSR.[369] Unfortunately, the binding force of its decision has not been clear in the exercise of its function defined clearly, reducing the effectiveness of the entire mechanism and making State parties reluctant to

[364] The jurisdiction of the court can be defined by these two dispositions: Article 3 CIS Court Statute; Article 32 Charter of the Commonwealth of Independent States, adopted at Minsk on 22 January 1993.

[365] There are around 30 treaties that deal with technical-scientific exchange of information, application of income tax, on import and export, on services.

[366] in the C-/1-97 CASE The court recognized as an economic obligation all the obligations that are concerned with tangible benefits that have monetary value. See G.M. DANILENKO, *The Economic Court of the Commonwealth of Independent States,* NYU Journal of International Law and Politics, 1999 Vol. 31(4), 893.

[367] Article 13(2) Statute of the Court of Eurasian Economic Community considers "*disputes of an economic character between EurAsEC members 'concerning fulfilment by the Parties of decisions taken by the EurAsEC institutions and international treaties concluded within EurAsEC".*

[368] Para 2 EAEU Court Statute.

[369] Interpretation of Articles 1-2 of Agreement on the recognition of rights and regulation of property relations, Decision No. 14/95/S-1/7-96, 14th March 1996, Economic Court [ECCIS]; Interpretation of Agreement on mutual recognition of rights and regulation of property relations, Decision No. C-1/10-96, 22 May 1996, Economic Court [ECCIS]; Advisory Opinion on the Jurisdiction of the ECCIS, disputes over the compensation of legal and natural persons – owner of foreign currency deposits with Vnesheconombank of USSR and its affiliate, Advisory Opinion 10/95/s-1/3-96, 23 May 1996, [ECCIS].

adhere it.[370] Since 2015 the Court of EurAsEc started functioning, thus leaving Economic Court of CIS (ECCIS) to its original scope, the objective was to propose a EUCJ equal court in Asia, however the result was rapidly discarded after the Court decided to issue decisions binding *erga omnes* and subject to strict enforcement.[371] It seemed that the Community was not ready for a Court exercising its function with peculiarities of judicial activism. Indeed, with the foundation of the last EAEU Court, modifications were implemented on the jurisdiction, which was extended, and on the role of the Court, who could not modify, override or create new rules within the Economic Union.[372] Moreover, specifically in relation with the parties, measures were adopted to increase the dependence of judges[373] and the restrictions on the Court, by requiring initial consultations and opening up the possibility for mutual agreements on the interpretation of the treaties and on the execution of the judicial decisions.[374]

From an external view, the confusion created from 1993 with the commonwealth to the Economic union in 2014, it seems that Eastern States are not willing to concede themselves to the application of a supranational rule of law exercised by a Court, although the organization may resemble the one constructed in the EU.[375] What is surely remarkable and needs to be appreciated is the integration among these economies that may lead one day to a more reasonable acceptance of an effective international adjudicative system.[376]

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[370] A. DOUHAN, *Economic Court of the Commonwealth of Independent States* (*Max Planck Encyclopedias of International Law*, July 2017), para. 20. See < https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e2110?prd=OPIL&q=Economic+Court+of+the+Commonwealth+of+Independent+States > accessed 4 June 2021.

[371] *Kuzbass case*, Resolution of the Grand Chamber of the EURASEC Court, 8 April 2013, Biulleten' Suda Evraziiskogo ekonomicheskogo soobshchestva, (2013) No.1, 47-52; and M. KARLIUK, *The Limits of the Judiciary within the Eurasian Integration Process* (November 2, 2016). Higher School of Economics Research Paper No. WP BRP 69/LAW/2016, 8.

[372] Paras. 101-102 EAEU Court Statute.

[373] Indeed, States were given the possibility to appoint new judges or to revoke the appointment of judges of their nationality during the exercise of their mandate. See paras. 7-13 EAEU Court Statute.

[374] Paras. 43-44-103 EAEU Court Statute.

[375] A. DI GREGORIO, *The Eurasian Economic Union: Origin and Development of a New Integration Format Compared with That of the EU*, in A DI GREGORIO AND A. ANGELI (eds), *The Eurasian Economic Union and the European Union Moving Toward a Greater Understanding*, The Hague, 2017, 3–26.

[376] There is a theory supported by many scholars that links the respect of human rights, market, and democratic process to a higher likeliness to reach deeper integration and consequently, more effective dispute settlement procedures, with compulsory jurisdiction and real enforcement. See C.P.R. ROMANO, *The Shadow Zones of International Judicialization*, in C.P.R. ROMANO, K.J.

6.2 Regional Arbitral Models

The second model was based more on the WTO DSS, rather than the EU, as there is no hint of supra-nationality. The most explanatory example of this model is the North American Free Trade Agreement (NAFTA).

NAFTA was built upon the Canada–United States Free Trade Agreement (CUSFTA) 1989,[377] and was negotiated during the latter stages of the Uruguay Round of Multilateral Trade Negotiations, which is the reason why it provides strong evidence of RTAs that allow parties to proceed more quickly and more flexibly than at the multilateral level.[378] However, NAFTA is based on the principles of WTO law, and every chapter of the agreement asserts the compatibility of the agreement with the law of the WTO.[379] Thus we can assert that there is a favourable presumption regarding substantial law, but the same is not totally true for procedural law as many procedures exist and interweave under NAFTA. Precisely, there are seven procedures,[380] some of which are based on the WTO DSS model, some other on bi-national panels, Specialized Commissions and other Alternative Dispute Resolution mechanisms. Among all these possibility, we shall stop on the one provided by Chapter 20, as it deals uniquely with inter-State disputes settlement procedure, that is governed by the NAFTA Free Trade Commission[381] and in which individuals have no right to stand. Under this chapter,

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ALTER, AND Y. SHANY at 232, 96s; and A-M. Slaughter, *International law in a World of Liberal States*, European Journal of International Law, 1995 Vol. 6, 503.

[377] Canada–US Free Trade Agreement (the CUSFTA Agreement), signed 2 January 1988.

[378] As matter of fact, NAFTA was negotiated in 1991-1992, when the negotiations at Uruguay Round were stuck, so it appeared to the parties that it was more favourable to keep on negotiations with smaller number of parties, that had a common idea that third-party binding mechanisms for prompt resolutions were fundamental. See A. DE MESTRAL, *NAFTA Dispute Settlement: Creative Experiment or Confusion*?, in L. BARTELS AND F. ORTINO (eds.), *Regional Trade Agreements and the WTO Legal System*, Oxford, 2006, 361.

[379] Articles 102, 103, 301, 409, and 315 NAFTA

[380] They are provided by different chapters of NAFTA and its two parallel agreements. For Intergovernmental disputes, we shall refer to chapter 20, for ISDS to chapter 11, for AD/CV measure to chapter 19 and specific disputes on labour and environment to the two specific disciplines of the agreements. See Chapters 11-11B-19-20 NAFTA; and D. A. GANTZ, *Assessing the impact of WTO and Regional Dispute Resolution mechanism on the World Trading system*, in J. JEMIELNIAK, L. NIELSEN AND H.P. OLSEN (eds) *Establishing Judicial Authority in International Economic Law, Cambridge*, 2016, 43.

[381] The commission is composed of the three Ministers of International Trade of the Member states to the Agreement which are Canada, Mexico and the United States.

a government can file an application against another member if it considers that a measure causes nullification or impairment to the advantages granted under NAFTA, and sometimes it is considered a residual procedure.[382] Article 2003 does not pose a preliminary condition, but mentions the possibility for the parties to settle controversies amicably with a mutually satisfactory solution through cooperation, before and after the demand for a panel.

The scope of NAFTA is wider than the one of the WTO Agreements, as it include also dispositions on the environment, Financial Services, investments, intellectual property and SPS (Sanitary and Phyto-Sanitary measures), some of which have been extended time-to-time in the world organization.[383] In case a legal interest is raised under both NAFTA and WTO rules, the dispute may be referred to either forum which is adhered by the complainant, but for specific matters access to the WTO is precluded,[384] therefore challenging the primacy of the DSU, since it does not include a *forum non conveniens* rule.

Once bilateral consultations have resulted ineffective, the applicant can require the Free Trade Commission to facilitate settlement by good offices, conciliation or mediation, otherwise it can request to the Commission the establishment of an ad hoc arbitration panel, as no permanent judicial body exists.[385] The panel is composed by 5 members appointed from a roster of experts[386] with the singular mechanism of reverse selection process,[387] which has indeed slowed down proceedings due to the political infringement in the selection process.

When the panel is commissioned with the dispute, it shall follow the procedure under NAFTA, because parties' pleas are usually based on NAFTA provisions, that can not be brought before the WTO DSS.[388] Undoubtedly, this is an element that

[382] Article 2004 NAFTA.
[383] Chapters 7-9-14-17 NAFTA.
[384] Article 2005(1) NAFTA
[385] Articles 2007-2008 NAFTA.
[386] The roster is composed by 10 experts per each state, however, their names are not published, so it is difficult to establish ex ante who they are, giving the possibility to change the list frequently. See D. A. GANTZ, at 380, 47.
[387] Each party chooses two national arbitrators from the list proposed by the other party, and both must agree on the chairperson. The real problem is the length of the appointing process, because usually parties are not capable of quickly agree on 5 names, often fro political reasons. See Article 2011 NAFTA; and D. A. GANTZ,*Dispute Settlement under the NAFTA and the WTO: Choice of Forum Opportunities and Risks for the NAFTA Parties*, American University International Law Review, 1999 Vol 4, 1084.
[388] See A. DE MESTRAL at 378, 365.

suggests a weaker position of NAFTA system in comparison with WTO DSS, which is central in the interpretation of any free trade agreement.[389]

Regarding the result that the applicant may seek, we can affirm that it would be unilaterally satisfactory when the existing measure object of the proceedings is upheld and no changes are required,[390] because the system lacks enforcement procedures, appeal possibilities,[391] and an independent international organization guaranteeing the fairness of the process in the background.[392] These absences make the WTO more attractive as NAFTA members often prefer not to adhere this specific mechanism[393] while looking for a proceeding where delays are under control and enforcement of Panels decisions is easier to accomplish.[394] One further element that makes NAFTA less appealing to sovereign States is that it also offers investor-State procedures, because in the region the onus of economic integration is upon the private sector, who has always been its driving force, shadowing the old main characters of the international community. The future may bring changes in this preference, as the three parties have negotiated a new regional agreement, the USMCA-FTA, which has not entered in force yet but when it will, US, Mexico and Canada will be subjected to more and better suited commitments.

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[389] WTO Panel Report, Canada—Periodicals, WT/DS31/R, adopted 30 July 1997. Available at < https://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm >.

[390] Re *Tariffs Applied by Canada to Certain US-Origin Agricultural Products (United States v Canada*) (1996) CDA-95–2008–01 (Ch 20 Panel). Available at < http://www.sice.oas.org/dispute/nafta/english/Ca950801e.asp >.

[391] A theoretical alternative to propose an appeal would be the famous "*Dunkel Draft*" of 191 proposed by the director of GATT to reach a conclusion in Uruguay Round. See J.H. JACKSON, *The Jurisprudence of GATT and the WTO*, Cambridge, 2000, 440.

[392] NAFTA does not have an institutional seat, but it is organized in national sections that are present in the member states, so we re-find the inter-government character rather than the supra-national one. See Article 2002 NAFTA.

[393] Up to 2016, there have had only 3 cases decided, which were *Dairy product 1996, Broom Corn Brooms 1998, and Trucking Services 2001*. See *Tariffs Applied by Canada to certain US-Origin Agricultural Products*, Case no. CDA-95-2008.01 (2 December 1996); *US Safeguard Action taken on Broomcorn Brooms from Mexico*, Case No. USA-97-2008-01 (30 January 1998); *Cross-Border Trucking Services*, Case no. USA-MEX-1998-2008-01 (6 February 2001). Available at < https://www.worldtradelaw.net/databases/nafta20.php >.

[394] Indeed, in the total 31 inter-State disputes, NAFTA members have filed claims 3 times before NAFTA and 45 times under WTO procedures. Some disputes have also used the WTO to review AD/CV decisions which might otherwise have been run under Chapter 19. See for example WTO Doc. WT/DS281/1, *United States—Anti-Dumping Measures on Cement from Mexico* (Complaint by Mexico) (2003) (pending Panel Report); and WTO, The Dispute Chronologically, available at < www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm >.

6.3 Hybrid mechanisms

Hybrid solutions are mechanisms that take elements from both models, sometimes prescribing two instances with different deciding bodies some other with third options. The most important case of regional hybrid is the Mercado Comun del Sur (MERCOSUR) System, which constitutes an important market full of resources where to invest.

MERCOSUR is an economic and political integration process set up by states of the Latin American Southern Cone in 1991,[395] with political, social and cultural objectives: to strengthen of democracy, to enhance the regional GDP, and an to gain more equal redistribution of the wealth. The initial idea was to establish a common market, similar to the European one, with the 4 freedoms of circulation, common external tariffs, coordination on trade and macroeconomics policy, and harmonization of domestic legislations, but they never went further than the creation of a custom union which was more practicable.[396] Similarly to NAFTA, MERCOSUR is an intergovernmental organization and not supranational as the EU, which means that officials represent their governments and are not independent officers, and that States commit to comply with regional law, which does not have direct applicability.[397]

Dispute settlement in MERCOSUR is disciplined by Brasilia Protocol for Dispute Settlement 17 December 1991, and amended by the Protocol 1994, that established a two-tiers system, where the first is conducted by a non-permanent arbitration tribunal (ad hoc)[398] and the second, in case of persistence of the dispute, by a Permanent Review Tribunal.[399] Before the Ad Hoc arbitration tribunals the parties may agree to settle partly or entirely the dispute by direct negotiation, however, the

[395] MERCOSUR was founded with the signature by Argentina, Brazil, Paraguay, and Uruguay of the Treaty of Asuncion on 23 March1991 and the Protocol of Ouro Preto 1994.

[396] Cronograma de las Lenas, adopted by RES. CMC No. 1/92. The foundation of the Custom Union still established a free trade zone with the elimination of tariffs and non-tariffs barriers and a common external tariff for third countries.

[397] Article 38 Protocol of Ouro Preto.

[398] Arbitral Tribunals are composed by three members chosen by the parties (one each and one with mutual agreement) from a list who has been deposited at the Administrative Secretariat. See Chapter VI Olivos Protocol.

[399] There is a permanent seating tribunal, where each dispute is decided by 5 members, 4 of which are appointed by their national States, and the fifth is elected unanimously. The permanent nature of the Tribunal is debatable in the sense that it is convened every time a dispute is brought before it, but does not stall inactive. See Article 18 Olivos Protocol

entire process is supervised by the executive body which is the Common Market Group, and whose recommendations are binding upon the parties.

The jurisdiction we are interested in is limited to inter-State disputes, that are filed before the Tribunal when there is a controversial application, interpretation or non-compliance with community Law.[400] As for the WTO, member States can file unilateral application due to the mandatory jurisdiction of the system, and only within MERCOSUR, States can mutually decide to recourse to the *per saltum action* and initiate the proceeding directly from the tribunal, creating an interesting alternative to the WTO DSS.[401] When there is a dispute that can be brought before both WTO DSS and MERCOSUR, it is the applicant that decides the forum.[402]

Despite the organizational differences, the panels take into consideration the treaties within MERCOSUR. In the consideration of these accords by the Tribunal, States cannot base claims or positions on WTO case Law, as the different objectives of the two organizations preclude such possibility.[403] Ad Hoc Arbitral Tribunals announce their decisions within 60 days from the application, and loosing States have 15 days for appealing the decision demanding the review of solely points of law. In such case, the tribunal would decide within 30 days and issue a final binding decision on the legal basis of the first judgement with *res judicata* effectiveness.[404]

By now, this system has been adhered only three times after 2000, when an economic crisis caused weaknesses in trade flow, for which important States, such as Brazil and Argentina decided to be more involved. The only three disputes dealt specifically with non-tariffs measures, export subsidies and safeguards which are intrinsically opposed to trade liberalization and integration.[405]

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[400] Article 1 Brasilia Protocol for Dispute Settlement.

[401] C. BAUDENBACHER AND M-J. CLIFTON, at 353, 267.

[402] Olivos Protocol, 18 February 2002, 42ILM 2(2003) ARTICLE 2,

[403] The Permanent Review Tribunal stated that while the WTO facilitates trade, MERCOSUR seeks the establishment of a community of interest, and as such the positions of WTO DSS loses authority. See Permanent Review Tribunal [2007] Order 01/07, Para. 7.2.

[404] Also the Arbitral Panel's decisions become binding, if the term for appeal expires without initiative of the other party. See Article 26 Olivos Protocol.

[405] E. J. CARDENAS, *MERCOSUR's Fragile Dispute Resolution System at Work: First Decision ever made by an Arbitral Panel in a Dispute arising among Sovereign Parties*, in M. BRONCKERS AND R. QUICK (eds), *New Directions in International Economic Law,* Amsterdam, 2000, 281.

Overall, such system may be favourable because it is flexible, with its interaction of different institutional subjects with different powers and roles,[406] its speed, because similarly to the WTO, there are strict timeframes,[407] and with its mandatory jurisdiction, because of the *ipso facto* acceptance of the arbitration clause by all members.[408] Nevertheless, similarly to the WTO, there is a political body: the Common Market Group (GMC), which holds a relevant role in the process with its intervention for conciliatory tries and its supervisor mandate, which means that the general process does not follow a judicialized and de-politicized procedure, so, similarly to ECCIS, there may be a lack of confidence in the rule of law.

One system that has a totally different approaches the Association of Southeast Asian Nations (ASEAN), which is an agreement between 10 States of South-East Asia. They found a least common denominator in this project,[409] as differently from the other examples each member kept its sovereignty and its decision-making power.[410] Indeed, their initial idea of dispute settlement relied on voluntary and politically oriented solutions,[411] but after the institution of WTO, they signed a Protocol on Dispute Settlement,[412] whose discipline prescribed the possibility to adhere panels, that would follow the dispositions of DSU, if consultations, good offices, conciliation and mediation failed. The real innovation, was the establishment of an appeal organism, particularly political, who was composed by the economic ministers of MSs, the ASEAN Economic Ministers

[406] E. J. CARDENAS AND G. TEMPESTA, *Arbitral Awards under MERCOSUR's Dispute Settlement Mechanism*, Journal of International Economic Law, 2001 Vol. 4(2), 342
[407] For Negotiations are prescribed 15 days, while for the trial of conciliation 30, however both are non-binding means, therefore a dispute may stay till the arbitral procedure.
[408] Article 8 Brasilia Protocol for Dispute Settlement.
[409] The State parties that signed the ASEAN FTA in 1994 are Singapore, Malaysia, Thailand, Indonesia, Vietnam, Brunei, Cambodia, Indonesia.
[410] T. FULLER, 'Wary Neighbours turn into Partners in a quickly Developing Southeast Asia', The New York Times, July 5, 2012. See < https://www.nytimes.com/2012/07/06/world/asia/asean-nations-become-more-integrated.html >.
[411] Article 9 Economic Cooperation Framework Agreement states "*Any differences between the member States concerning the interpretation or the application of this agreement shall…be settled amicably between the parties".*
[412] Protocol On Dispute Settlement mechanism 1996

(AEM),[413] which was transformed according to the WTO Model of the AB in two successive protocols in 2004 and 2010.[414]

Nevertheless, no efforts were made on the aspect of voluntary jurisdiction and on measures to avoid or prevent non-compliance of loosing parties,[415] which make the compliance to this system incredibly inefficient in comparison to the multilateral one.

In conclusion, regional mechanisms represent the new horizon of economic dispute settlement, although they still need amelioration, as currently none of them guarantees a system as efficient as the one represented by the WTO, and its partial de-politicization of disputes. Surely, regional systems cover for some flaws of the universal one, whose compliance procedures protract the timeframe of the dispute[416] and prohibitive costs of adjudication before WTO DSS ,[417] which are worsened by the panels inability to decide in favour of a monetary compensative payment.[418] Not only the regional mechanisms supply in these elements, but they also permit a more rapid evolution in international agreements, such as the introduction of exchange rates and macroscopic economic issues under section 33

[413] The ASEAN Economic Ministers, which was a council that decided on the decisions of the panels by majority.

[414] A system that appears to be rule-based because of the openness to expert of international trade and international law. ASEAN Protocol on Enhanced Dispute Settlement Mechanism of 29 November 2004 and Protocol on the ASEAN Charter on Dispute Settlement Mechanism of 8 April 2010.

[415] Moreover, there is the possibility that a Coordinating Council direct the parties toward arbitration, but the parties should address their dispute to this council first, so practically there is no big difference. Articles 8-9-10-12 Protocol on the ASEAN Charter on Dispute Settlement Mechanism of 8 April 2010.

[416] Especially when parties adhere a second time the Panel with the requests under Article 21.5-6 DSU.

[417] Proceedings before WTO panels are costly, moreover the "winning party" does not receive any reimbursement from the other side for its legal expenses, differently form many national courts, and this can be preclusive. This is particularly true when developing countries exercise their right to hear a case, indeed, it is likely for them to lack human resources to focus on a case, so they hire law firms specialized in WTO Law that, however, have seats in developed countries, and therefore are costly and stress also the monetary resources of the parties. See Appellate Body Report, EC — Bananas III, para. 12; and see < https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c11s2p2_e.htm >.

[418] In this sense, we shall add that when a State files an application, there are no interim measures and the eventual trade sanctions that may be authorized by the DSB shall not be retroactive, but proactive, meaning that the respondent can/could have kept on with its inconsistent behaviour for the entire proceedings, creating an important economic damage. Moreover, developing countries may also find useless to start trade sanctions, because they would be more harmful for their economy, rather than the one of the respondent (that may be a developed country.

USMCA.[419] In this specific reality, arbitration style models are better suited to satisfy the political ambitions of regional bodies outside Europe,[420] but unfortunately they are not efficient enough since States prefer to settle trade disputes before the WTO DSS. In fact, the DSS is more reliable and guarantees higher legal certainty (quicker proceedings, independent secretariat, judicial AB), predictability, and a higher degree of consistency.[421] In addition it permits to file applications against a larger number of respondents, neither limited by a specific region nor by a certain influence and it admits interested third parties, and lastly provides sanctions in case of non-compliance with the decisions. Taking into consideration these pros, it is evident that no RTA has reached the advantageous standards granted by the DSU, i.e. the likeliness to have an easily enforceable decision on the merits, despite the current AB crisis.[422] However, today regional mechanism are partly successful, because they are specialized, independent and deliver formally impartial judgements quickly.[423] Additionally, despite the economic and political globalization, problems with worldwide dimensions may find easier and more effective solution regionally,[424] because regional mechanisms offer a closer relation with the member States, who are known to prefer to keep a certain degree of control, such as in the politically determined access for judges, [425] and to exclude individuals' *locus standi* precluding or limiting judicial review of

[419] The section 33 establishes the prerequisites of currency and macroeconomic transparency. See S. SEGAL, *USMCA Currency Provisions Set a New Precedent* (Centre for Strategic and international Studies, 5 October) <https://www.csis.org/analysis/usmca-currency-provisions-set-new-precedent> accessed 1 June 2021

[420] Court of Eurasian Economic Community, press release on Cas No 1-7/1-2012, June 26 2012.

[421] Practice, instead, has underlined this peculiarity, and as an example of this consistency, we can consider three cases on Alcoholic Beverages, with different disputing parties every time: *Japan-Alcoholic Beverages 1996, Korea –Alcoholic Beverages 1999* and *Chile – Alcoholic Beverages 2000.* See Appellate Body Report *Japan-Alcoholic Beverages cit.;* Appellate Body Report, *Korea – Alcoholic Beverages*, WT/DS75, DS84/AB/R, adopted on 17 February *1999;* Appellate Body Report *Chile – Alcoholic Beverages*, WT/DS87, DS109, DS110/AB/R, adopted on 12 January 2000. Available at < https://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm >.

[422] Indeed, although the AB current crisis could be seen as an incentive to look for regional dispute settlement solutions, it is extremely unlikely that a judgement issued by a regional body on the merit may be enforceable with the same easiness of a DSB Report, backed by all the 162 members of the WTO. See A. DE MESTRAL AT 378, p. 379.

[423] E. POSNER, *Diplomacy, Arbitration and International Courts,* in C. BAUDENBACHER AND E. BUSEK (eds) *The Role of International Courts*, Stuttgart, 2008, 59.

[424] C. BRETHERTON AND G. PONTON, *Global Politics: An Introduction*, Hoboken, 1995, 8.

[425] T. DANNERBAUM, *Nationality and the international Judge: the Nationalist Presumption governing the international judiciary and why it must reversed*, Cornell International Law Journal, 2012, Vol. 45(77), 25ss.

the legislature pressured by citizens. Nevertheless, what is seen is that regional agreements are still heavily subjected to political interference, so we could conclude that they are still at an embryonic level of application for what concerns international adjudication.

Conclusive Remarks

Ultimately, the horizon of inter-State economic disputes is narrower than in the past, because international adjudication has taken disputes with private stakeholders,[426] that in the last century were usually shifted to political litigation through diplomatic protection,[427] but this has not precluded proliferation of international Tribunals and Courts, and an apparent increasing legalization of international disputes.[428] Generally, proliferation is believed to be beneficial for international law,[429] although, without an explicit hierarchy among them, there is a concrete possibility to face problems of conflict of jurisdiction or conflicting jurisprudence, due to the lack of a central authority ensuring unity and harmony internationally.[430] Every time a tribunal, regional or universal, interpret a disposition in a decision, that interpretation is extremely likely to develop indirectly an effectiveness which is *erga omnes partes contractantes*,[431] so conflicts can be expected under the macro category of fragmentation of international law.[432] Yet, dealing with economic disputes, international courts face more an institutional

[426] This trend is desirable from a political and economic points of view. Firstly, it reduces the intervention of State actors in areas where State sensitiveness should not be involved, and secondly, it avoids the escalation of private disputes to international diplomatic crises.

[427] The community of commercial actors operating internationally demanded a more efficient and enforceable system than traditional interstate arbitration, because the strong tendency to limit private standing in interstate arbitration did not satisfy the concerns of the growing number of private international actors, that were subjected to numerous conditions in the exercise of Diplomatic Protection. See I.F.I. SHIHATA, *Towards a Greater De-politicization of Investment Disputes: The Roles of ICSID and MIGA*, ICSID Review - Foreign Investment Law Journal, 1986, Vol. 1

[428] R.O. KEOHANE, A. MORAVCSIK, AND A-M. SLAUGHTER, at 223, 457.

[429] I. CHARNEY, *International Law Threatened by Multiple International Tribunals?* in Recueils des Cours de l'Académie de Droit International, 1998 IV, 137.

[430] H. THIRLWAY, *The Proliferation of International Judicial Organs and the Formation of International Law*, in W.P. Here (ed.), *International Law and the Hague's 750th Anniversary*, The Hague, 1999, 434s.

[431] T. TREVES, *Judicial Law-Making in a Era of Proliferation of International Courts: Development or Fragmentation of International Law? in* R. WOLFRUM (eds), *Development of International law in Treaty making*, Berlin 2005, 587.

[432] Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law –Report of the Study Group of the International Law Commission: Finalized by Martti Koskenniemi [UN DOC A/CN.4/L.682, UN Doc A/61/10, 400].

problem in the interaction of the systems, rather than a conflict on the substantial disciplines to be applied.[433]

These assertions must be considered together with an oriented approach toward new international tribunals, both because they have gained trust of international actors and because sovereignty is not considered an obstacle as much as it was in the past, mainly because international relations do not find only States as important actors.[434] Practically, controversies on economic matters were expected between the ICJ, with its general jurisdiction, and special bodies that cover specific subjects, such as the WTO DSS or ITLOS, but practice proved differently.[435] Currently, States seem to have lost interests in adjudication before the ICJ or universal Courts,[436] and they are looking forward to solutions that are better suited to their needs. These solutions have been explained to be either new mechanisms, whose activity is closer to the reality of the States, or new trends experienced in already existing ones, such as the process of "arbitralisation" before the ICJ.[437] The consequence of this development is the concrete risk that States seek *Forums Coveniens,* looking for the forum where the applicant is more likely to obtain a favourable decision,[438] or a more effective

[433] We have seen that there is a redistribution *ratione materiae* of the types of claims that can be brought before the various economic courts.

[434] H. LAUTERPACHT, at 54, 255.

[435] No state has ever brought a trade dispute before the ICJ.

[436] L. CONDORELLi, *La Cour international de Justice : 50 ans et (pour l'heure) pas une ride*, in European Journal of International Law, 1995, 393.

[437] Frequent composition of Ad-Hoc chambers in the ICJ structure to deal with cases. However, The ICJ remains a permanent Court, without the possibility to appoint the judges that decide a case, as the members of Ad hoc Chambers are nominated among the judges whose mandate is being exercised at the moment of the dispute. French Society for International Law (SFDI), *La Juridiction Internationale Permanente*, Colloque de Lyon, Paris, 1987.

[438] This theory found an example in the dispute between Georgia and Russian Federation, that was brought by the first before both the ICJ and the ECtHR for certain violation of human rights committed in Abkhazia and South Ossetia. Notwithstanding the object, the is a concrete risk to have overlaps between the general jurisdiction of a Universal Court, i.e. ICJ, and that of a Regional one when it is wide enough, such as in the case of the ECJ in matters of trade and environment.
In the mentioned case, the ICJ decided only on the Preliminary Objections, where it asserted not to be competent, while the ECtHR arrived to decide on the merits of the case, precisely in January 2021. The idea is based on the fact that an applicant is likely to decide before which Court it has more chance to receive a faovurable final judgement. See A. DEL VECCHIO, *Globalizzazione e Tribunali Internazionali Universali*, 321; *Application of the international Convention on the Elimination of all the forms of Racial Discrimination (Georgia v. Russian Federation),* Preliminary Objection, Judgement of 1 April 2011, I.C.J. Reports 2011, p.70; and *Georgia V. Russian Federation*, App. No. 38263/08 (ECtHR Grand Chamber, decision of 21 January 2021). Available at < https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-207757%22]} >.

process,[439] without necessarily bringing on the table jurisdictional overlaps. The international community experienced such reality in *Swordfish case* (WTO DSS V. ITLOS),[440] *Atlanto Scanidan Herring Arbitration* (WTO DSS v. ECJ),[441] *MOX Plant Case* (ITLOS v. ECJ),[442] and in *Mexico – Soft Drinks* (NAFTA v. WTO DSS),[443] demonstrating that economic disputes are more likely to be subject to forum shopping, particularly when they deal with complex mechanics that can be assessed by different bodies.

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[439] It is expectable that for two States that are members of the EU, despite the exclusive jurisdiction of the ECJ, they may really have an interest in receiving a decision from the regional court, whose decisions are quicker, more likely to be enforced and therefore effective.

[440] While EU filed a claim against Chile for a violation of GATT1994, due to Chile exclusion of EU fishing vessels from Chilean ports, Chile filed a claim before ITLOS for EU standards for conservation of swordfishes alleged inconsistent with LOSC. The question of which Court should await the other was likely avoided because both parties agreed to an extra-judicial solution and withdrew the cases from both institutions, however it seems that a criteria of familiarity with the disputed subject could have been followed. See B.H. OXMAN, *Courts and Tribunals: the ICJ, ITLOS, and Arbitral Tribunals*, in D.R. ROTHWEL, A.G. OUDE ELFERINK, K. SCOTT AND T. STEPHENS (eds.) at 176, 409; *Conservation and Sustainable Exploitation of Swordfish Stocks* (Chile/European Union), Order of 16 December 2009, ITLOS Reports 2008-2010, p. 18; *Chile – Measures affecting the Transit and Importing of Swordfish*, Arrangement between the European Communities and Chile, WT/DS193/3, Document of 6 April 2001, p. 2.

[441] This case involved Denmark application with regard to the use of coercive economic measures by the European Union in relation to Atlanto-Scandian Herring and Northeast Atlantic Mackerel before WTO DSS, and over the application of Article 63(1) of the Convention in relation to the shared stock of Atlanto-Scandian herring. This seemed to open the way for overlapping jurisdiction, but in 2014, disputing parties withdrew both proceedings in favour of an extra-judicial joint agreement. See PCA Case Nº 2013-30, *Atlanto-Scanidan Herring Arbitration (Denmark in respect of Faroe Islands v. EU)*, Termination Order, 23 September 2014; *European Union – Measures on Atlanto-Scandian Herring, Join Communication by Denmark in respect of Faroe Islands and EU*, 25 August 2014. Available at < https://pca-cpa.org/cases/ >.

[442] The arbitral tribunal under Annex VII stated that it was better to suspend the proceedings on jurisdiction because it was highly likely for the ECJ to be seised on the topic, with its exclusive jurisdiction on disputes between its member states, and because of the competence acquired by European Community on the matter of the convention. The tribunal recognized the need to define the dispute also within the smaller framework of European Law, about which only the ECJ is competent. Indeed, later the ECJ recognized the violation of Ireland's obligations under Article 226-227-292 EC and Article 193 EA, because it submitted the dispute before a mechanism provided by UNCLOS. See *Mox Plant Arbitration (Ireland v. United Kingdom)*, Suspension of Proceedings On Jurisdiction and Merits, And Request for Further Provisional Measures, Procedural Order No. 3 of the Arbitral Tribunal (24 June 2003), p. 7-8, paras. 21-24. Available at < https://pca-cpa.org/cases/ >. ; *Commission v Ireland* (Case C-459/03) [2006] ECR I-4635, paras. 128-141-171. Available at < https://curia.europa.eu/juris/liste.jsf?num=C-459/03 >.

[443] The *Mexico – Soft Drinks* case arose out of a larger dispute between the United States and Mexico concerning the market for sweeteners in North America. The Mexico filed a claim against US before NAFTA Panel, but US refusal to appoint members blocked the proceedings. Contemporarily, Mexico imposed Anti-Dumping duties on US because of its dangerous exports, and the United States challenged the measures under WTO Law, requesting a proceeding to the DSB. See W.J. DAVEY AND A. SAPIR, *The Soft Drinks Case: The WTO and Regional Agreements*, World Trade Review, 2009 Vol 8(1), 6ss; and Appellate Body Report, *Mexico – Tax measures on Soft Drinks and other beverages*, WTO Document WT/308/AB/R, adopted on 6 March 2006. Available at < https://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm >.

This discussion would open three questions regarding overlapping jurisdiction, *lis pendens*, and conflicting or inconsistent judgements. If the first can be avoided by the adoption of mutual jurisdictional limitations, or by the recognition of a preferential and residual choice,[444] there is no discipline for forcing any international tribunal to decline its jurisdiction, however sometimes Tribunals may delay their decision while waiting for another Court to pronounce on the question. This approach is also accompanied by another unwritten practice, for which tribunals consider the interpretation issued by other Courts on specific topics that may or may not belong to their competence, strengthening their legal reasoning and the validity of their decision.[445] Finally, on inconsistent rulings, there is nothing that can be done to solve this problem without providing a systemic reform of the public international adjudication, either establishing a world appeal court or enhancing the process of constitutionalization in international law, which is not something foreseeable in the close term future.[446]

The only alternative that would avoid these problems would be Ad-Hoc Arbitration, because it would entirely rely on parties will, interests and good faith, but as we have seen above, this would imply questions of different nature, underlining that there exists no flawless adjudicative system for dispute settlement in inter-State Economic Disputes.

[444] For example, Section 6(1)(b) Implementation Agreement to UNCLOS 1994 has a reference to GATT 1947, its relevant codes and its successor, but in S. 6(1)(f) it also states that disputes concerning their provisions shall be handled by the dispute settlement system provided by them.

[445] H-U. PETERSMANN, *Strengthening the UN Dispute Settlement System*, in *Max Planch Yearbook of United Nations Law*, 1999, 118. Two cases are the Appellate body of the WTO that adopts principles of international law that have been declared and interpreted by the ICJ in its decisions and the various regional integration courts that usually cite as relevant precedents the decisions of the ECJ, although there is no hierarchy.

[446] A. FISCHER-LESCANO AND G. TEUBNER, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, Michigan Journal of International Law, 2004 Vol 25(4), 1017; and Jonathan I. CHARNEY, *The Impact on the International Legal System of the Growth of International Courts and Tribunals*, NYU Journal of International Law & Policy, 1999 Vol 31(4), 705.

Chapter III Landmark cases in International Economic Law

Despite all the problems of the system constituting international economic dispute settlement, it must be said that adjudicative means have produced a set of precedents that have laid the basis for the development of pillars of international economic law. in this chapter, the analysis will be firstly focused on the reality of the relationship between international law and judicial activism, in the sense that it will assess if there is the possibility to call certain important decisions "precedents" or a more correct formal label should be "landmarks", due to the particular relationship between international law and the precedent as it is known in municipal law.

Subsequently, the focus will shift on some cases that have effectively contributed to the development of the various sectors of international economic law: monetary law, investment law and trade law. Basically, since the formalisation and the practice of economic interests staking through trade disputes and investment arbitration, international adjudication in the *fora* discussed in chapter II has contributed in the creation of legal concepts and law.[1]

In this context, "law" identifies a system of rules that is characterized by a precise set of features,[2] among which some are indispensable for law-making function (precedents and law) of international economic adjudication.[3] Surely, the multilingual and multicultural environment of economic disputes produce concepts that are re-contextualised and adapted to the different national and international settings. As matter of fact, nowadays the majority of economic disputes involve

[1] D.W. RIVKIN, *The Impact of International Arbitration on the Rule of law,* Arbitration International, 2013 Vol. 29, 328.

[2] Usually the philosopher L.L. Fuller recognized eight principles that defined the possibility to be recognized as law, and they were: governance by general norms, public ascertainability, perspicuity, non-contradictoriness. See M.H. Kramer, *Objectivity and the Rule of Law*, 1st, Cambridge, 2007, 104ss.

[3] In the complex analysis we need to consider States interests and principle-needs in: consistent decisions in a single environment, public access to proceedings (this is not an absolute principle) and reasoned awards, and an appeal mechanism. See T. SCHULTZ, *The Concept of Law in Transnational Arbitral Legal Orders and Some of its Consequences,* Journal of International Dispute Settlement 2011 Vol. 2, 72.

non-state actors and contractual claims, interpreted under some municipal law. However, the current interpretation by adjudicators has sometimes roots in decisions made by international tribunals on multi-national controversies with more authoritative sources of law.[4]

1 Judicial activism in international economic law? Precedents and Landmarks

There is no formally binding precedent in international law,[5] in the sense that there is no formal authority of precedent. Some scholars argue that this aspect is due the co-existence of common law systems and civil law systems.[6] However, irrespectively of these theories, a *de facto stare decisis*, or an influential precedent mechanism, still operates in the system,[7] concretely in the words of the Courts judgements and in the behaviour of State actors during and after the proceedings.[8] Paradoxically, States may have an interest in the tacit acceptance of a binding precedent because it may be less costly than a formal judicial deference, especially in relation to the credibility of international commitments. This is why such acceptance is foreseen by far-sighted strategic States, for example major powers, who reject the idea of a formal binding precedent, despite their residual recourse to judicial authority in case of unsuccessful negotiations, to avoid the enhancement of the system credibility at the expense of their political influence.[9]

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[4] G. B. BORN, *International Commercial Arbitration*, 3rd Edn, Alphen aan den Rijn, 2001, 2967. On the topic, it is comprehensible that an arbitral a tribunal, which is empowered on an ad hoc basis to decide a dispute between two parties, is unlikely to decide numerous times on the same issue, differently from international tribunals, whose mandate is clear and whose permanent nature increases the possibility to depict a development of an institute or of a question.

[5] Both Article 59 Statute of the International Court of Justice and Article 3.2 Dispute Settlement Understanding are both clear that international legal rulings out of their cases and the specific disputing parties.

[6] R.H. STEINBERG, *Judicial Law-making at the WTO: Discursive, Constitutional, and Political Constraints*, American Journal of International Law, 2004 98(2), 254.

[7] A quarter of ICJ cases cites past ICJ rulings, and the WTO DSB stated (in *Japan - Alcoholic Beverages II case*) that past rulings constituted subsequent practice under VCLT. See K.J. PELC, *The Welfare Implications of Precedent in International Law*, in J. JEMIELNIAK, L. NIELSEN, H.P. OLSEN, *Establishing Judicial Authority in International Economic Law*, Cambridge, 2016, 173-176.

[8] The two opposing interests are the possibility for Judicial Activism to ease the development of law and the related fear experienced by States, who see their legislative authority reduced.

[9] Important Actors could easily manipulate litigation to achieve their interests, as the United States or the European Union in the context of the WTO.

During the proceedings and in the pre-phase, it is expectable that all possible litigants will bet on the precedent that is favourable to them, resulting in a first assessment of the convenience of an application.[10] Practically, this phenomenon produces also a higher likeliness that the applicants are more favoured by precedential benefits than the respondent.[11] Accordingly, a binding precedent can be considered a threat, raising the real question on how is it possible that precisely due to the lack of formal recognition, States have not boycotted the legal instrument of the binding precedent.

The answer to this question lays on the fact that judges value continuity as it is an element connected to the rule of law and to the legal environment, therefore the respect of precedents leads contemporarily to an increase in predictability, legal certainty, adjudicatory harmonization and fairness.[12] This does not exclude that in the adoption of a decision a judge will take into account the precedents that bolster the position of the deciding panel, and will ignore those that invalidate it.[13]

Subsequently, the focus of interest should shift on why and how precedents and law are so connected, and what is the interest behind such choice. Advantages are two-folds, because a strategy of the international community may be to have Courts and Tribunals to fill the legislative gaps when the right majority or consensus lacks,[14] and consequently to empower these adjudicative authorities against political actors, to ensure that any breach of an international obligation within a certain international institutionalized system is settled by peaceful judicial process. Naturally,

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[10] K.J. PELC, *The politics of Precedent in international law: A social network Application,* American Political Science Review, 2014 Vol. 108(3), 553ss.

[11] Sometimes States adopt a peculiar strategy with which they proceed from low commercial stake cases to high ones. It means that they may consider taking a tangible loss to obtain a rule that will positively affect a subsequent claim with higher commercial value. One historical example of this technique has been the series of disputes where the European Union, before the European Communities, took part on the issue of safeguard measures where it obtained and complied with the first less important decisions of WTO AB to shape the proceeding and the result of two consequent disputes: *Korea – Dairy 1997* and *Argentina – Footwear 1997*, and later *US – Pipeline 2002* and *US – Steel Safeguards 2003.* See A. PORGES, *Settling WTO Disputes: What do Litigation Models Tell Us?,* Ohio State Journal on Dispute Resolution, 2003 Vol. 19, 145ss.

[12] See K.J. PELC AT 7, 181.

[13] This does not mean that a judge changes its decision relying on precedents, but that it chooses the precedents to support the decision he is willing to adopt. See J. KNIGHT AND L. EPSTEIN, *The Norm of Stare Decisis,* American Journal of Political Science, 1996 Vol. 40(4), 1018s.

[14] This is specifically the case of the WTO, where a panel decision will avoid political conflicted in the DSB or during Negotiation Rounds taking from politics and making independent the effectiveness of law.

international tribunals are prone to political pressure,[15] but the existence of precedents to rely on counters the political bias infringing the judicial role.[16]

On the behaviour of international actors after the settlement of a specific dispute, the main index is how practice is affected by decisions. Although we should avoid to commit the mistake to think that only States are influenced by the judgements, ignoring how markets react, this chapter is intended to provide a sample of conceptual and procedural basis for the development of international economic law, thus starting from inter-state disputes settlement to consider what has been relevantly found and transmitted, providing proofs of a concrete relevance of Inter-State economic disputes. Relevantly, State actors now tolerate this authority of precedent as a politically untenable concession to international institutions (tribunals and courts),[17] permitting the development of a *de facto stare decisis* principle and the formation of legitimate expectations in most of international economic systems.[18] This choice is strategically advantageous because the absence of a formal recognition disavows the need for a formal contestation, which would block the entire system of international dispute settlement, due to the lack of delegation of power to an international judicial authority.

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[15] The European Court of Justice is unlikely to take decisions that are going to be disapproved by the European community, as well as NAFTA Panels have avoided to issue reports that would have spread anti-NAFTA opinion, especially in the US, for the fear of withdrawal from the section dedicated to Dispute Settlement. Similarly, the International Court of Justice risks the withdrawal of the optional Clause every time it issues a decision that negatively affects the position and interests of one disputing party, and here we have already experienced the case of the United States and France. See G. GARRETT, R.D. KELEMAN, H. SHULZ, *The European Court of Justice, National Governments, and the Legal Interpretation in the European Union*, International Organization, 1998 Vol. 52, 150ss; and C.J. CARRUBA, M. GABEL, C. HANKLA, *Judicial behaviour under Political Constraints: Evidence from the European Court of Justice*, American Political Science Review, 2008 Vol. 102(4), 436; Practical examples that can be enlisted are *Loewen Case* for NAFTA, *Nicaragua Case* for ICJ.

[16] The precedent has a blame shifting function, because it allows Courts to assert against States interference that previous verdicts dictate more heavily than any political pressure may do. See G. GARRETT, R.D. KELEMAN, H. SHULZ, *ivi*, 150ss.

[17] Indeed, there is the possibility of a foreign judge (individual) ruling a case with the following modification of rules of the agreements to which States, either disputing parties or not, may have committed to. Consequently, this could be seen as undemocratic decision-making process, although the de facto acceptance of binding precedents often is a strategic response to the weakness of International Tribunals, who are expected to have less power than their domestic counterparts, in the insurance of parties' commitments. See R.H. STEINBERG at 6.

[18] R. BHALA, *Myth about Stare Decisis and International Trade Law (Part one of a Trilogy)*, American University International Law Review, 1998 Vol. 14, 845.

So, having confirmed the presence of a *de facto stare decisis* principle, we will now proceed to discuss some landmark cases, whose reputation as legal artefacts in the production of fundamental bases of the modern and current reality of economic institutes has constituted a solid reference for following decisions and doctrinal debates.

Given the label of these important cases, it must be remembered that tribunals do not decide on hypothetical disputes, so the disagreement on points of fact or of law is mirrored in the external relevance of the judgement,[19] that is not just the resolution of an assertion or of discretionary choice.[20]
Indeed, we analyse the practical relevance of these economic disputes, that have posed the pillars for past, present and future critical questions on some key economic subjects: contract obligations to pay Loans, protection of foreign owned assets, and the National Security exception to block trade and investments.

2 Public debt obligations: loans, interests and succession

On the first subject, the obligation to pay a debt under international contract, the PCIJ was adhered more than its successor, so, relevant cases were decided during the League of Nations period. Relevantly, the Court intervened in *Brazilian Loans* and *Serbian Loans cases* on the obligation to pay loans and their interests that had arisen in loan contracts agreed between sovereign States and foreign creditors, precisely. In both, the Court assessed the contractual fulfilment of the obligations derived from loans agreements regulated by municipal law,[21] particularly in case of the exception of *force majeure,* and the related possibility for other States to intervene in the proceedings to protect their nationals on civil matters.[22] Particularly, when an international contract is not signed between two

[19] *Mavrommatis Palestine Concessions (Greece v United Kingdom)*, (1924) PCIJ Ser A No. 2, 11.
[20] O. SPIERMANN, *International Legal Argument in the Permanent Court of International Justice: The Rise of International Judiciary*, Cambridge, 2004, 196s.
[21] GERALD G SANDER, *Brazilian Loans Case and Serbian Loans Case* (*Max Planck Encyclopedias of International Law*, June 2014) <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e103?rskey=PXzTly&result=5&prd=OPIL> accessed 4 June 2021
[22] Actually the PCIJ confirmed that diplomatic protection, or taking a case on behalf of its nationals, fell within the rights of a State, more precisely the right to ensure respect for rules of international

sovereign States in the vests of subjects of international law, it is disciplined by municipal law, with the further consequence that the international court must consider also municipal law and municipal jurisprudence.[23]

In the first case, *Serbian Loans* regarded the Serbian government agreeing the issuance of 5 different loans with groups of banks,[24] which were mainly bought by French investors, the yield of which was credited to the Serbian governments in French francs at the current value. However from 1924, after an important depreciation of the currency,[25] loans bearers started to refuse the payment in paper-francs, requiring the service on gold basis as manifested in the "golden clauses" of the agreements.[26]

The court interpreted the language of the contracts in their overall content, specifically where the document mentioned only the payment in francs, and recognized the validity of the golden payments possibility as not impaired by the circumstances or other issues.[27]

Despite the absence of a real international gold franc, the question focused on the reference of such index, because the French franc was made of silver and thus a gold franc did not actually exist, but the Court recognized as unreasonable the reference to gold just as a modality of payment [gold coin or gold specie] without

law in the person of its subjects, respect for the rules of international law. See *Payment of Various Serbian Loans Issued in France (France v. Kingdom of the Serbs, Croats and Slovenes)*, Judgment of 12 July 1929, 1929 P.C.I.J. (ser. A) No. 20 (July 12), para. 26.

[23] Article 38 PCIJ Statue did not exclude from the Court's jurisdiction those disputes that did not demand the application of solely international law, although these latter are expected to happen more frequently because international law is the law disciplining the relationship between the actors that are entitled to appear before the Court. See *Ivi*, para. 31.

[24] The bonds included 5 different loans: (i) 1895 Loans with a nominal capital of francs. 355,292,000 with 4% annual interest; (ii) 1902 loans with a nominal capital of 60 million gold francs with an annual interest of 5 %; (iii) 1906 with a nominal capital of of 95 million gold francs an annual interest of 4½ %; (iv) 1909 Loans with a nominal value of 150 million gold francs with an annual interest of 4½ %; (v) 1913 Loans with a nominal value of 250 million gold francs with an annual interest of 5%.

In all cases the bonds to the bearers represented the title to bear 500 gold francs (over which interest shall be calculated), which was guaranteed by the Royal Serbian Government and by the Autonomous Administration of Monopolies (payable out of the surplus of net revenue and free of all present and future taxes and duties). See *Serbian Loans case cit., Judgment* 1929, paras. 18-33.

[25] The reduction of the metallic value of the franc, as newly defined, to about one-fifth of its original value.

[26] The bonds all included gold clauses although they were worded differently: 1902 loan contained the possibility of the payment in gold, while 1906, 1909, 1913 proposed the wording "…% gold loans". See See *Serbian Loans case cit., Judgment* 1929, paras. 31-32.

[27] *Ivi*, paras. 39-45.

making reference to the gold standard of value, which is used to guard the bearers against fluctuations of the domestic currency [Serbian dinar in the case]. So the Court assessed the existence of a consideration of the gold franc as an international standard, and it found that there were more countries [3] that adopted the franc as monetary unit,[28] and that considered the monetary value to be adopted often in loans contracts for providing a "sound and stable basis for repayment", so a relevant standard for the computation of the value.[29] Consequently, it could not be considered admissible the defense, raised by Serbian Kingdom, for which the standard should not be applied because the depreciation was not foreseen at the signature of the contract.[30]

A second element linked to the first one was the adoption of such standard in international contracts, because legal obligations depended on the interpretation of that standard. While before and during WWI the coupons of the bonds were paid in bank-notes in substitution to gold francs, because there was a slight difference in value, after 1919 and the depreciation of the franc [down to 1/5 of the value] the same execution constituted a substantive loss for creditors. In its assessment, the Court considered that the fact that *gold* francs were not paid before did not result in the fact that they were not promised after, and completed its analysis under the consideration of the impairment caused to the parties' rights, and not of the contract terms, by adopting the estoppel legal institute.[31] In the case, there was no unequivocal representation, so the Serbian State was recognized to have concretely paid but less than the amount due, thus remaining labelled as an incompliant debtor. Of no use was the exception based on *force majeure* and the grave economic consequences of war, as they were not recognized to affect the contractual

[28] Gold piece = 20 Francs in weight and fineness, in the sense that a gold franc was the equivalence of the twentieth part of a piece of gold weighing 6.45161 grams with a fineness of nine-tenths. The relevant law that established this unit consisted in Article 262 Treaty of Versailles, Article 214 Treaty of Saint Germain, and Article 197 Treaty of Trianon.

[29] See *Serbian Loans case cit.*, Judgment 1929, para. 48-49. Indeed, the value can always be fixed in comparison with exchange rates of currency of a country or with the price of a gold bullion, but in both cases, the payment is due the equivalent in money in circulation.

[30] To safeguard the repayment of the loans, they provided for payment in gold value having reference to a recognized standard, although the Serbian Kingdom asserted that that the payment was to be made on the basis of French francs, or French paper francs. See *Serbian Loans case cit., Judgment* 1929, para 55.

[31] *Ivi*, paras. 60-61. As matter of fact, the analysis for the estoppel, requires the unilateral representation by one party to rely on the unequivocal fact that the other party agrees to a pejorative modification of the terms of the agreement.

obligations, which were not released in substance. However, the Court stated that while the respondent could not oppose the impossibility to execute the contract due to *force majeure*, this exception would operate merely on the method of the performance, and not on its non-vitiated source [contract], requiring therefore the debtor to adopt alternative solutions [payments].[32]

The last relevant point of the decision dealt with the municipal law applicable and applied to the case, and the following behaviour of the Court in front of it. Given that any contract that is not signed between two Sovereign States is not a treaty and it is subject to municipal law with the application of private international law and its discipline of conflict of laws, the choice of the applicable law is strictly linked with the nature of the obligations contained in the contract.[33] Concretely, the Court opposed the idea laid by the claimant, proclaiming that, particularly due to the nature of the obligations and a concrete risk of use of public policy exception, the terms of the contract should be subjected to Serbian law.[34] The reason asserted is that a sovereign State cannot be presumed to have agreed to be subjected in the substance of its foreign debt and the validity of the clauses defining it to any law "*different from its own*".[35] Nevertheless, the PCIJ recognized and confirmed that it is a generally accepted principle of international law that every State is entitled to regulate its own currency within the limit of no influence or no conflict on the substance of the debt itself. The result in the judgement was that while Serbian law disciplined the agreement, French law disciplined the currency of the payment, with the consequence that the Court adopted the position held by domestic courts in relation to the value of the gold franc mentioned in the loans.[36]

Particularly, a very similar factual background characterizes the *Brazilian Loans case*, where a judicial controversy between France and Brazil on the surface

[32] In the case, as the gold francs were no longer obtainable, the State would have the possibility to re-pay the sum in the equivalent value with the new currency.
[33] See *Serbian Loanscase cit.*, *Judgment* 1929, paras. 68-69-70.
[34] *Ivi*, para. 72-73.
[35] *Ibidem.*
[36] The PCIJ mentioned that many domestic courts had had that gold clauses stipulated before the war had to be considered ineffective in domestic contracts but the same treatment was not extended to international obligations that, then, remained valid with the application of the previous monetary unit, which not obtainable, led to the payment of the same value due. See *Serbian Loans case cit.*, *Judgment* 1929, paras. 89ss.

covers the real nexus standing on the relation between the State debtor [Brazil] and the municipal law of the loans bearers [again French nationals] after the depreciation of the metallic value of the franc.[37] Similarly to the previous case, the PCIJ interpreted the contract, by adopting *contra proferentem* rule,[38] and considered the issues related to estoppel, force majeure and the applicable law taking into account domestic jurisprudence.

The first knot in the *ratio decidendi* dealt with the contradictory wording of the various loans where not always the "payment in gold" appeared,[39] but was untied with an overall interpretation of the ambiguous texts of loans contracts, some of which provided for the redemption [Loan 1910 and 1911] and others for the payment of interests in gold [Loan 1909], and with the interpretation of the prospectus issued by the Brazilian government to incentive investors.[40] Thanks to its precedent case law, not only the Court of the League of Nations expressed that the reference to gold franc was not only a literal reference a method of execution of the obligation to pay back the promised amount,[41] but it additionally indicated that it was a well-known standard that could not be disregarded, when considered the promise of payment made through foreign loans.[42] Indeed, the use of gold was precisely a guarantee against a possible depreciation of the currency that would have made the debtor discharge the debt in a very favourable way (para. 48), with

[37] The dispute arose when the loans under the special regime for the improvement of ports in Brazil kept being re-paid in the depreciated paper currency and not in valuable gold. Specifically, we deal with three loans: (i) Loans for the Recife Port (Penambuco) for a nominal value of 60 Mln francs with an annual interest of 5%; (ii) Loans for the construction of certain railways for a nominal value of 100 Mln francs with an annual interest of 4%; (iii) Loans for railways in Bahia region for a nominal value of 60 Mln francs with an annual interest of 4%. See *Payment in Gold of the Brazilian Federal Loans contracted in France (Brazil v. France)* (*1929*) *P.C.I.J., Ser. A, No. 21*. By the Special Agreement of 27 August 1927 (*75 L.N.T.S. 91*), paras. 17-19

[38] The *Contra Proferentem* rule states that if the meaning of a contractual provision is ambiguous, the preferred meaning is the one which operates against the party who drafted the contract or supplied the particular provision.

[39] Usually the loans contained a clause referred to the paper francs as the compulsory tender currency.

[40] See *Brazilian Federal Loans case cit.*, PCIJ Judgement 1929. By the Special Agreement of 27 August 1927 (*75 L.N.T.S. 91*), paras. 35-37. Not only it would be debatable that under the prospectus, and its text proposing alternatively gold to francs, an assumption could be forwarded on the basis that investors would accept such diminishment, but it would be strange that part of the money could be repaid in gold and others not.

[41] That was Brazilian defence, based on a distinction of obligations (either money or gold) under the domestic decree, but the Court recognized that gold must not be considered merely as a method of payment, because it refers to a standard.

[42] See *Brazilian Federal Loans case cit.*, PCIJ Judgement, paras. 45-46.

the result that the standard to maintain unvarying the monetary obligation and the right of the bondholders to receive payments was gold franc.[43]

Accordingly, the Court remained of its idea developed in *Serbian Loans case* that economic dislocation cannot affect legal obligations, thus additionally rejected the application of both estoppel in defense of the assumption made by Brazilian government and the force majeure despite being pleaded by a Sovereign State during in post-war period. The legal obligations were not released and were not made impossible by the material impossibility to provide a payment in gold francs, because the alternative of the equivalent sum was easily reachable.[44]

The last element discussed concerned the applicable law of the contract, as the PCIJ found itself to approach its role in relation to the municipal law governing the contract. Considering that France was a common party to the previous case, the Court easily addressed the question, by reference to the nature of the obligations and to the circumstances related to the currency (para. 61). Therefore, the Court recognized that the contract shall be subjected to Brazilian law as the loans constituted *"a direct debt of the Government of the United States of Brazil"*,[45] but according to domestic French jurisprudence that affected the French monetary units staking,[46] the gold clause shall be considered valid in international contracts.[47] In fact, the PCIJ, as an international tribunal, recognized to be bound by municipal law when particular circumstances occur and demand so, after having gained the

[43] A single gold franc was considered the twentieth part of a piece of gold weighing …6 *gr.* 45161, *au titre de* 900/1000 *d'or fin*". This was specified in the Special Agreement of the disputing parties, citing the law of the 17th Germinal, year Eleven.

[44] See *Brazilian Federal* Loans case cit., PCIJ Judgement, by the Special Agreement of 27 August 1927 (*75 L.N.T.S. 91*), para. 58.

[45] It is indisputable that a Sovereign State is bound only and solely by its national law, thus the contract, the obligations and the conditions of the loans cannot be subjected to a different domestic law than Brazilian, especially if we considered the option of changing law in relation to the nationality of the bearer or the jurisdiction where the bond i restored. See *Brazilian Federal Loans case cit*., PCIJ Judgement, para. 62.

[46] Despite the ambiguity of the contract, it cannot be prevented that the currency in which payment must or may be made in France from being governed by French law, due to the generally accepted right to regulate its own currency, as long as there is no infringement in the substance of the debt or with the law governing the debt. See *Brazilian Federal Loans case cit.*, PCIJ Judgement, para. 66.

[47] The Court had already established the importance of French jurisprudence in *Serbian Loans case*, specifically on the validity of the gold clause in contract obligations after the change in the monetary unit change and here it recognized them equally good, without nothing adduced to weaken their validity. See *Brazilian Federal Loans case cit.*, PCIJ Judgement 1929, para. 75.

necessary knowledge regarding the applicable rules,[48] despite the fact that the Court is not obliged to know the municipal laws of the disputing parties.[49] Further, in subsequent decisions the court manifested also the different degree of importance evaluated by the international tribunal of some matters in municipal law, which deepens a different mentality.[50]

Therefore, the result of these cases was the strengthening of the golden clause in international loans contracts, with the consequence that also in contracts involving sovereign States, the PCIJ underlined the importance of the *pacta servanda sunt* principle.[51] The importance of these decisions is greater when we consider that in the first decades of the twentieth century there was an important financial instability, especially after the World War I, and when the cases have been discussed, States had increased consistently their sovereign debts due to the importance of financial impact on international security.[52]

If above it has been agreed that a State who is obliged to pay under a loan contract cannot invoke any economic situation to block its legal obligations, we shall now refer to the hypothesis where the monetary obligations are transferred in the succession between States under the conditions agreed at the time of issuance.

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[48] What the Court meant, and was later interpreted as such also in *Barcelona Traction case*, was that where the determination of a question of municipal law is essential for the settlement of the case, the international Court shall weight the domestic jurisprudence, and in case of uncertainty it shall have the final word on the interpretation which is the most in conformity with that municipal law. See *Brazilian Federal Loans case cit.*, PCIJ Judgement 1929, para. 124; and *Case concerning the Barcelona Traction, Light, Power Company, Limited (Belgium v Spain),* Second Phase, [1970] ICJ Rep 3, 34-37, para. 62.

[49] See *Brazilian Federal Loans case cit.*, PCIJ Judgement 1929., *Ser. A, No. 21*, paras. 70-71.

[50] The Court addressed a matter of form, specifically a question of non-retroactivity of a measure, to sidestep a domestic excuse on the application of a disposition. See *Mavrommatis Palestine Concessions cit.*, (1924) PCIJ Ser A. No. 2, 34.

[51] It is important to cite that the PCIJ did not oppose its case law in another following dispute: *Societé Commerciale Belgique*, where Greece claimed that because of its budgetary and monetary situation, the execution of the awards was materially impossible. There the Court avoided the question because the parties did not empower the Court to decide on this specific element, but it left the assumption that due to the practical consequences of economic emergencies, it would be difficult to delete sovereign debts on such a defence. See *Societe Commerciale De Belgique (Belgium. v. Greece)*, 1939 P.C.I.J. (ser. A/B) No. 78 (June 15), paras. 69-70; and D.A. DESIERTO, *Necessity and National Emergency Clauses: Sovereignty in Modern Treaty Interpretation*, Leiden, 2012, 155.

[52] Considered that the decisions took place ten years before the Great Depression, it is fascinating to see the interest of the international community in the risk of default by States. See E. CASTELLARIN, *International Loans Tribunal* (*Max Planck Encyclopaedias of International Law*, May 2018) para, 2 < https://opil.ouplaw.com/view/10.1093/law-mpeipro/e3346.013.3346/law-mpeipro-e3346?rskey=PXzTly&result=1&prd=OPIL >.

A relevant case which was also settled by Inter-State Arbitration was the *Ottoman Debt Arbitration,* where after the dissolution of the Ottoman Empire in 1919 the new emerging powers entered in a dispute on the shares of the public debt derived from the succession.[53] While there was a theoretical link between the portion of debt to be sustained and the total revenue gained by a specific territory assigned, the Council of Ottoman Debt who was theorized under the Treaty of Lausanne to be responsible to apportion the shares referred the subject to arbitration.[54] The arbitrator recognized the absence of any customary international law relevant on State's succession in public debt, and thus relied on the text of the multilateral agreement. The arbitration foresaw two problems: firstly, the complex establishment of distribution criteria, especially when no distinction is made among the usage and the beneficiaries of the various loans; and secondly, the easier reliance on international agreements rather than treaties. Indeed, the arbitrator considered deductions granted in the public accounts of several territories and in the end recognized the entire debt to be a burden on the shoulder of Turkey. Nevertheless, the decision opened the path for scholars' study on determining criteria categorizing debts, such as the value of the assets in the territories, the geographical extent of the territory, taxable value and the actual revenue contributions,[55] and on the exigency of resolving these sensitive issues by agreements.[56]

This arbitration was one of the reason for which the international community decided to negotiate the Vienna Convention on Succession of States in Respect of State Property, Archives and Debts 1983, although this latter explicitly refers to a

[53] There had been many factors [warfare, monetary policy, economical critical state] that led to the capitulations between Ottoman Empire and European States, where favourable privileges were accorded to European traders and loans were issued to cover some expenses of the empire.
Affaire de la Dette publique Ottomane (1925) I RIAA 529, 18th April 1925, Arbitration. Available at < https://legal.un.org/riaa/cases/vol_I/529-614.pdf >.

[54] Article 47(4) Treaty of Lausanne explicitly considered the possibility to defer the question of the distribution of public debt to arbitration in case of any dispute.

[55] D.P. O'CONNELL, *State Succession in Municipal Law and International Law, Internal Relations* Cambridge, 1967, 454; and E.H. FEILCHENFELD, *Public Debts and State Succession*, New York 1972, 852ss.

[56] MORITZ HOLM-HADULLA, O*ttoman Debt Arbitration, (Max Planck Encyclopaedias of International Law*, May 2018), para. 15-16. < https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e190 >.

preferable choice in favour of bilateral agreements.[57] together with the case that will be discussed below [Mavromantis], the Court addressed for the first times current issues such as contractual obligations in State Succession, which are discussed today in the more modern context of investment disputes where change of circumstances are alleged to frustrate earlier contracts.[58]

3 Protection of foreign owned assets and contractual rights

With the modern globalization, that led to a dissipation of the ownership in various jurisdictions, the need to guarantee a certain protection of the private ownership on the opposite side of the public one has become crucial. Surprisingly, some fundamental issues have been laid since the beginning of the XX century, with many disputes intervening on this issue when there were no multilateral agreements guaranteeing the consumers.

In *Mavromantis case 1924,*[59] the PCIJ decided a case that influenced particularly the sector of public international law, but despite the relevance on the definition of dispute,[60] and on the institute of Diplomatic Protection,[61] it laid the basis for the interesting topic of "*public ownership and control*".

The facts developed on the conflicting concessions granted to a Greek entrepreneur (Mavromantis) by the Ottoman Empire before its fall[62] and those ensured by Great Britain to a Jewish one (Rutenberg) after the end of the World War I during its

[57] Article 38(1) Vienna Convention 1983 states "*When the successor State is a newly independent State, no State debt of the predecessor State shall pass to the newly independent State, unless an agreement between them provides otherwise …"* in the respect of sovereignty on wealth, natural resources and the interest in the economic stability of the new independent State.

[58] C.J. TAMS, *State Succession to Investment Treaties: Mapping the* Issues, ICSID Review - Foreign Investment Law Journal, 2016 Vol 31(2), 315-340.

[59] *Mavrommatis Palestine Concessions cit.* (1924) PCIJ Ser A No 2; (1925) Ser A No 5; (1927) Ser A No 10.

[60] See Chapter I of this Dissertation.

[61] The case is famous for the *Mavromantis Fiction,* under which a State asserts its own right to ensure the respect of the rules of international law in the person of its subjects, in the moment it decides to take a dispute of one of its subjects (citizens) either by the diplomatic action or by international judicial proceedings on his/her behalf. See *Mavromantis case cit.,* PCIJ Judgement 1924, Ser A No.2, 12.

[62] Permission involved the distribution of electric lights and drinking water in Jerusalem and in Jaffa; and the irrigation of the Jordan Valley. See *Ivi,* 8.

mandate over Palestinian territory.[63] The dispute evolved because the Great Britain (GB) opposed the arguments of the Greek entrepreneur,[64] that later asked the Greek Government to intervene in the exercise of Diplomatic Protection,[65] to settle this important dispute that would have resulted in a landmark position for the economic development of the region. At the centre of the dispute, the Court was addressed to decide about English obligations in relation to a specific Article of its Mandate, regarding the provision for public ownership and control of the natural resources of Palestine.[66] Relevantly, after an evaluation of the dual interpretation under French[67] and English approaches,[68] the Court proposed a compromised solution extending the concept of public control to all those activities where the exercise of public authority was directly or subordinated to private parties.[69] So, the applicable dispositions[70] were interpreted in a sense for which the new administration was bound to honour contracts [concessionary rights] agreed by preceding regimes, in the phenomenon recognized as subrogation in States succession.[71] This is relevant because an overlap of concessions resulted in an expropriation of Mavromantis contractual rights because if the interference with these latters, however,

[63] The Great Britain granted exclusive rights to provide water and electric light in Jaffa and to build a hydroelectric irrigation scheme near the Jordan river. See B.J. SMITH, *The Roots of Separatism in Palestine: British Economic Policy 1920-1929*, Syracuse, 1993, 119.

[64] At the time of the facts, the State was still named Great Britain, as it was only after the end of the Irish independence war that (1922) the actual Untied Kingdom was born.

[65] See M. WAIBEL, *Mavrommatis Palestine Concessions (Greece v Great Britain) (1924-1927)*, in E. BJORGE AND C. MILES (eds), *Landmark Cases in Public International Law*, Oxford, 2017, 34s.

[66] Article 11 Palestine Mandate states "*The Administration, subject to any international obligations accepted by the mandatory […] shall have full power to provide for public ownership or control of any of the natural resources of the country, public works, utilities and services established or to be established therein*".

[67] For French Doctrine "Contrôle Publique" refers to the right to grant, annul, or cancel concessions with a view to the development of natural resources of the country or of public works, services, utilities. See M. WAIBEL AT 65, 43.

[68] The opinion sustained by the Great Britain is based on the restricted concept of "control", which distinguishes the governmental ownership by the possibility to grant private actors' concessions. See E. BORCHARD, *The Mavromantis Concession Cases*, American Journal of International Law, 1925 Vol. 19, 731.

[69] See *Mavromantis casecit.*, PCIJ Judgement 1924, Ser A No.2, 18.

[70] Protocol XII of the Treaty of Lausanne disciplined specifically the concessions, with a principle of maintenance of Ottoman concessions contracts, while the formal British Mandate did not, indeed Great Britain opposed that the object of the dispute was the latter and not the former.

[71] The law of States succession was therefore applied to State contracts, with the prevalence of economic agreements with private actors over the passing of territory sovereignty. See *Mavromantis Palestine Concessions (Greece v United Kingdom)*, (1924) PCIJ Ser A No. 2, 28; and R. UERPMANN-WITTZACK, *Mavrommatis Concession Cases*, Max Planch Encyclopaedia of International Law, 2013, para. 14 < https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e168 >.

notwithstanding the breach of Protocol of Lausanne the Court did not find any loss when addressing the extent of the compensation.[72]

In this case, relevance was brought to the consequences of expropriation, for which at the time there were no contractual clauses prescribing a re-adaptation of the contractual situation of the damaged, yet the Court recognized an exceptional intervention of international adjudicative authority in case of measures affecting concessions[73] and ex-post measures as guarantee to the infringed contractual rights, which were recognized valid against the successor State despite the circumstances.[74]

The same topic of domestic measures affecting foreign-held contractual rights was re-proposed in *Norwegian Shipowners Claims case,* where a dispute raised between the Kingdom of Norway and the United States of America after these latter entered in war and expropriated ships and materials under contracts stipulated between American shipyards and Norwegian owners.[75] The rentable opportunity of shipbuilding in the USA lasted only two years, from July 1915 when there was an overall shortage of shipping to April 1917 when US Shipping Board Emergency Fleet Corporation[76] proceeded with the requisition of those.[77] In this

[72] There was no inhibition in the execution and no limit in the tangible benefits gained by the concessions. The only consequence of the judgement was the re-adaptation of the concessions which was negotiated with a special agreement. See *Mavrommatis Palestine Concessions case cit.*, (1925) Ser A No 5, 44.

[73] N. BENTWICH, *The Jurisdiction of the International Court of Justice over Concessions in a Mandated Territory,* LQR, 1928 Vol. 44, 462; and M. BURGIS, *Transforming Private Rights through Public International Law: Readings on a Strange and Painful Odyssey in PCIJ Mavromantis Case,* Leiden Journal of International Law, 2011 Vol 24(4), 873.

[74] The Court affirmed that private rights acquired under the existing law do not cease on a change of sovereignty, furthermore, that private rights are valid against the State successor even if transferred as owned by State. This position was the result of a positive consideration of a precedent decision where the Court had already stated this assertion. See *German Settlers in Poland,* Series B, No 6 (1923), 36.

[75] *Norwegian shipowners Claims (Norway v United States of America),* Award, Permanent Court of Arbitration (13 October 1922) (1922) I RIAA, 314. Available at < https://legal.un.org/riaa/cases/vol_I/307-346.pdf >.

[76] The United States Shipping Board had been established by the United States Shipping Act of September 1916 "*for the purpose of encouraging, developing and creating a naval auxiliary and naval reserve […] to meet the requirements of the commerce of the United States with its territories and possessions and with foreign countries*". See *Norwegian shipowners Claims cit.,* Award 1922, RIAA, 314.

[77] The Fleet Corporation sent a general order of requisition by telegram to almost all the shipyards of the United States on August 3rd and 4th, 1917, and exploited the legal instrument of the bill of sale, which in the US is considered an official instrument of transfer of property, especially

case, the governmental corporation acquired the foreign potential-assets in order to meet the new needs for belligerent interests, so it also recognized "just" compensation to the damaged, in the amount framed by the US president,[78] for this takeover of contractual rights of and duties towards shipbuilders, according to the discipline of expropriation (and the consequent restitution).[79]

Firstly, the Court established the expropriation of Norwegian citizens' property by US through the exercise of the power of eminent domain, and recognized the claim of a higher value in times of war till the status of war remained pending, however it recognized the measures unreasonably damaging the right of friendly alien property after the signature of Treaty of Versailles 1919 and the end of hostilities (ratio of necessity).[80] In this analysis, the Court provided for a different definition of property to be safeguarded in international economic relations, including extensively the *ius in rem* and the *iura in personam*,[81] although considering determined conditions when the other party in the contract could take possession lawfully.[82] Conditions that were not respected in the case at hand, where the US proceeded with the complete cancellation of the *jura in rem*,[83] breaching the principle of Equality between States under international law and justice, for which, the Court stated that no State can exercise towards the citizens of another civilised State the "power of eminent domain" without respecting the property of such

considering that ships were special goods subject to special regime. See *Norwegian shipowners Claims cit*., Award 1922, RIAA, 321.

[78] Article 7 United States Shipping Act of September 1916 explicitly disposed that "*Whenever the United States shall cancel, modify, suspend or requisition any contract, make use of, assume, occupy, requisition, acquire or take over any plant or part thereof, or any ship, charter or material in accordance with the provisions hereof, it shall make just compensation therefor, to be determined by the President."*

[79] See *Norwegian shipowners Claims cit., PCA Award 1922*, 307.

[80] Indeed, the inviolability of the private property of a foreign citizen is a question of public policy, requiring a domestic balance with the power of a sovereign state to expropriate, take or authorize the taking of any property within its jurisdiction which may be required for the "public good or for the "general welfare". See *Norwegian shipowners Claims cit.*, PCA Award 1922, 330ss.

[81] The American interpretation, used in the case, starts from the jus in rem arising from the contract, but it includes also all kinds of personal property, "choses in action" including "liens, rights and equities" for the additional benefit and protection of the owner. The "physical property" is only one of the elements or aspects of the "property" under the Municipal law of the United States, as well as under the law of Norway and other States. See *Norwegian shipowners Claims cit.*, Award 1922, 332, para. 105.

[82] "*Should the builders…fail continuously to proceed with the work and to complete the vessel, her machinery etc., unless prevented by acts of the Purchaser or strikes or non-delivery of material beyond the reasonable control of the Builder, or other unavoidable causes beyond their reasonable control.*" See *Columbia River Shipbuilding Co.'s contract with W. GILBERT* (Claim 6).

[83] See *Norwegian shipowners Claims cit*., PCA Award 1922, 331.

foreign citizens,[84] or without paying just compensation as determinable by an impartial tribunal.[85]

Consequently, after having appreciated the domestic and international sources of law concerning the protection of private property, it shifted its attention on the calculation of compensation, that had been recognized as due.[86] In the assessment of the "just compensation", the arbitral tribunal established a set of questions to be answered, which focused on the public use justification of the expropriation,[87] and in the consequent necessary application of the measure during the period of the exceptional necessity [expropriation].[88]

Once the Court established that compensation was a lawful claim, it remembered that compensation implies a *complete restitution of the status quo ante*, based upon the loss of profits sustained by the damaged in comparison with similar owners.[89] In the calculation of the "just" sum, the arbitral panel examined the fair actual value of the property taken in view of all the surrounding circumstances under three elements to consider.[90] Moreover, the bench elaborated that while during the war the claimants would have been entitled to the restitution in kind of the property, after the end of the emergency, the judgement should comply with the claim filed, that focused only on compensation in money, including the fair value of the asset,

[84] This theory thus rejected the principle of "restraint of princes", which refers to the exercise of power by government or the executive power that causes damages and losses, by the commission of acts by individuals or legal persons (it is a claim applicable only in disputes between private parties). See *Norwegian shipowners Claims* cit., Award 1922, 338, para. 136; and Oxford Reference at < https://www.oxfordreference.com/view/10.1093/oi/authority.20110803100416285 >.

[85] Actually, according to the 5th amendment of the Constitution of the USA, the absence of just compensation would be firstly in breach Constitution, thus making the requisition totally unlawful and ineffective, so contrary to domestic law as well.

[86] See *Norwegian shipowners Claims cit.*, Award 1922, *RIAA*,334.

[87] It is not disputable that in turn of just compensation, a State is fully entitled during war to command the yards and the factories of its jurisdiction, disposing the labour and resources for public use during the special emergency, as the USA did. See *Norwegian shipowners Claims, PCA Award 1922, RIAA*, 337, para 128.

[88] In the case, the arbitral tribunal decided in favour of Norway because the taking was not considered to respond to the necessity after the situation of emergency, war, had passed.

[89] See *Norwegian shipowners Claims cit.*, Award 1922, 337, para. 133.

[90] The fair value should be evaluated in relation to the fair market price for: (i) its use during the war without damages; (ii) its use after the end of the emergency, in other words its unlawful retaining; and (iii) the eventual full compensation for the destruction of the property. In the computation, the legal basis should not be formed by abnormal circumstances and speculative prices that artificially and unequally create a burden on the paying party, nor should consider those actions that fall under the dictum *res inter alios acta*. See *Norwegian shipowners Claims cit., Award 1922,* 340, paras. 146-148-149-153-154.

the loss of use and profits derived from the expropriation,[91] and the interests matured since the day the compensation should have been paid fully *ex aequo et bono*.[92] Additionally, the Court established different degrees of interests for those owners who were awarded special compensation by the American Requisition Claim Committee but had not been practically paid (para. 158).

Conclusively, while the inviolability of private property of foreign citizens is a question of public policy, which therefore must be assessed by domestic courts in the balance between the public and private staking interests, the sovereign power to expropriate assets for the public good or the general welfare must give in turn a just compensation (paras. 102-116), that can be evaluated by an international Court in defence of private property.

In the wider jurisprudence of International Courts' landmark decisions, the protection of foreign-owned assets was defended and discussed in two consequential cases between Germany and Poland, that particularly had started from the same factual background,: *Certain German Interests in Polish Upper Silesia* and *Factory at Chorzow cases.*[93] From 1925 to 1928 in the area of the Polish Upper Silesia, two German enterprises, namely *Oberschlesische AG* and *Bayerische Stickstoffwerke AG* had signed a contract for the management of the nitrate factory of Chorzow,[94] which was later expropriated by the Polish

[91] The just compensation the claimants are entitled includes not only the items which have been duly proved, but also those which could have been proved and estimated if the officials of the belligerent State had, in the interest of both parties, paid or offered payment, or at least required contradictory expert valuation and inventory, of the neutral property taken. Overall, Just Compensation implies a complete restitution of the status quo ante.

[92] The Tribunal was competent to allow interests if it considered the circumstances justified it, which was the case. The circumstances should be evaluated as suggested in the study by Nichols on the damage on the constitutional right of property See *Norwegian shipowners Claims*, *PCA Award 1922, RIAA*, 340s, paras. 147-155-156; and P. NICHOLS, *The Law of Eminent Domain*, Albany (N.Y.), 1917, 216.

[93] In this period of time Germany filed many applications against Poland, in direct diplomatic protection cases, dealing with economic measures, or expropriation of German nationals' factories, and many others. See *Certain German Interests in Polish Upper Silesia (Preliminary Objections) (Germany v Poland),* Series A (No 6) (Judgement of 25 August 1925); *Certain German Interests in Polish Upper Silesia (Merits) (Germany v Poland),* Series A (No 7) (Judgement of 25 May 1926); *Factory at Chorzow (Jurisdiction) (Germany v Poland),* Series A (No 9) (Judgement of 26 July 1927); *Factory at Chorzow (Interim Measures of Protection) (Germany v Poland),* Series A (No 12) (Order of 21 November 1927); *Factory at Chorzow (Merits) (Germany v Poland),* Series A (No. 17) 5 (Judgement of 13 September 1928).

[94] In 1919, the German Reich sold the Chorzow Factory (the lands, buildings, installations, raw materials and equipment) to *Oberschlesische AG*, while the management remained in charge of *Bayerische AG*. See *Certain German Interests in Polish Upper Silesia cit., (Preliminary Objections),* Series A No. 6 1925, 8-9.

government.[95] The particularity of this case is that the factual framework led to more disputes dealing with Polish obligations to repair the damage both under the 1922 Geneva Convention between Germany and Poland [96] and the other post-World War I Agreements.[97]

This case is a landmark because it has the famous *dictum* asserting the principle that reparation, either as restitution in kind or payment of the beard value, is due after a wrongful act in order to "*wipe out all the consequences of the illegal act and to re-establish the situation that would have existed if the act had not been committed*".[98] Particularly, this *dictum* was inserted in the text of the Judgement on the merits of the case, which however, never had the possibility to be implemented by further assertions or references to practical elements, because the *Chorzow Factory* dispute was settled by mutual agreement terminating the proceedings before the last step, an expert enquiry, concluded.[99]

In the decision on jurisdiction, the Court stated that Poland's act resulted in an unlawful expropriation of the contractual rights of the two German enterprises,

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[95] The Polish Law that was passed in 1920 specifically stated that all the real rights owned by German nationals shall be ceded and registered in the name of the Polish Treasury, as a measure of liquidation with the possibility to evict those people that remain in occupation of these assets. See C. BROWN, *Factory at Chorzow (Germany v Poland) (1927-1928),* in E. BJORGE AND C. MILES at 65, 66ss.

In fact, the court recognized that this was not an expropriation, but a seizure of property, rights, and interests, because these assets could have not been expropriated even though Poland decided to grant a fair compensation. See *Factory at Chorzow cit., (Merits),* Series A (Nos. 9-12-17) 5 (Judgement of 13 September 1928), 46.

[96] Specifically, Article 6 of the Geneva Convention permitted the expropriation of undertakings of major industries (mineral deposits and rural estates) without liquidation in Polish Upper Silesia according to the other dispositions of the treaty. Such disposition was interpreted by the Court in the sense that expropriation was accorded under the generally accepted principles of international law, and had to be considered lawful only in relation to the positive assessment of the conditions enlisted in Article 7 of the same Convention. See Articles 6-7 Geneva Convention, signed on 15 May 1922; and *Certain German Interests in Polish Upper Silesia cit., (Merits),* Series A (No 7) (Judgement of 25 May 1926), 21-24.

[97] The other treaties were invoked by Poland as defence because their content opposed the Geneva Convention on the treatment of German Nationals' assets and the eventual cession and dissipation of the possessions, but permitted the acquisition of all the property and possessions in case of cession of former German territories to other States. However, the Court stated that they were not applicable because Poland had not been a status of war with Germany and because it did not adhere later to the Armistice Convention and its Protocol of Spa. See *Certain German Interests in Polish Upper Silesia (Merits) (Germany v Poland),* Series A (No 7) (Judgement of 25 May 1926), 31; and Armistice Convention of 11 November 1918, Article 1 Protocol of Spa of 1 December 1918 and Article 256 (1) Treaty of Versailles of 28 June 1919.

[98] *Factory at Chorzow cit. (Merits),* Series A (No. 17) 5 (Judgement of 13 September 1928), 47.

[99] *Factory at Chorzow Indemnities cit.,* Series A (No 19), 12 (Order of 25 May 1929), 13.

which was an act in violation of Geneva Convention.[100] Relevantly, the bench excluded the lawfulness that may derive from the fact that the same treatment had been reserved to the nationals of the same State,[101] and confirmed that the breach of an engagement involves an obligation to make reparation in adequate form since it is an indispensable complement of the failure to comply with a commitment.[102]

The reparation must refer to a figure, esteemed considering the value of the property expropriated, the rights and interests that have been affected and the eventual damage to the owner or to whom is to serve the asset.[103] This assessment cannot be carried on limitedly on the damage for loss sustained, but, when it refers to lawful expropriations, it must undertake the value at the moment of the dispossession plus any interest matured till the day of payment,[104] otherwise, it could consider also the loss of profits claimed by the entitled damaged.[105] Unfortunately, for the practical settlement of the monetary compensation in favour of Germany at the time, the Court suggested to negotiate an amicable settlement, and in case of an unsuccessful result to file a separate proceeding.[106] The choice of the Court underlined a preference for a mutual solution in the interests of the parties, although the mathematical task could be easily deferred by the Court to an expert enquiry, as in *Chorzow Factory case,*[107] in spite of the later solution found extra-judicially.

The relevance of this landmark was not only mirrored into doctrinal discussions that led to the incorporation of these rules into the Draft Articles on State

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[100] *Certain German Interests in Polish Upper Silesiacit., (Merits),* Series A (No 7) (Judgement of 25 May 1926), 44.

[101] *Ivi,* 33.

[102] *Factory at Chorzowcit., (Claim for Indemnity) (Jurisdiction),* Series a (No 19), 12 (Order OF 25 May 1929), 21.

[103] In this evaluation, the Court explicitly excluded the possibility to count in the estimate the result of damages to third parties. See *Factory at Chorzow cit., (Merits),* Series A (Nos. 9-12-17) 5 (Judgement of 13 September 1928), 31.

[104] In that case the procedure would merely regard the fair/just price of the indemnity, for the expropriation. *Ivi,* 47-48.

[105] This is the case when a seizure is unlawful, therefore puts the damaged in a more unfavourable position rather than that of a lawfully expropriated owner that would seek the right amount of money he is entitled to. In some way, this is a further guarantee for foreign investors against unlawful measures of Sovereign States. *Ibidem;* and J. CRAWFORD, *The International Law Commission's Articles on State Responsibility,* Cambridge, 2002, 228 (specifically the Commentary to Article 36(2)).

[106] In the case, Germany did not seek only the payment of an indemnity, but also the re-entry in the real rights and the restoration of the factory as a industrial enterprise. However, this request was not accepted and resulted in a new proceeding. See *Factory at Chorzow (Claim for Indemnity) (Jurisdiction) cit.,* Series A (No 19), 12 (Order of 25 May 1929), 15.

[107] *Factory at Chorzow (Merits),* Series A (Nos. 9-12-17) 5 (Judgement of 13 September 1928), 51.

Responsibility,[108] but also into those that organized the principles (conditions and calculation) of compensation for unlawful expropriation in consequent investment arbitrations.[109] On the one hand, the principle clears that out of an international wrong a wronged State is entitled to exercise a right to request reparation from the wrong-doing State, by all the necessary acts under the guiding principle of Chorzow Factory.[110]

On the other hand, *Chorzow Factory precedent* has developed a particular relation with investment arbitration cases, particularly because it has gained a general relevance on expropriation of contractual interests and has opened the discussion on unlawful seizure, while the modern investor-State disputes concern more the circumstances of a lawful expropriation, with the application of a different regime under the rule of *lex specialis derogat lex generali*.[111] Indeed, current scenarios are more likely to include a regulatory interference that decreases the value of the asset,

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[108] Article 31 ILC Articles explicitly states that "*The responsible State is under an obligation to make full preparation for the injury caused by the internationally wrongful act."* Moreover, in the commentary of the ILC Articles the wording of *The Chorzow Factory* is exactly copied and referred. See INTERNATIONAL LAW COMMISSION, *Draft Articles on Responsibility of States for International Wrongful Acts, with Commentaries*, (2001) ILC Yearbook, Vol. II pt II, 91.

[109] The reason is that in many Bilateral Investment Treaties (BITs), parties negotiate a provision on the conditions of expropriation. Usually they include the lawfulness of the procedure, the payment of a prompt, adequate and effective compensation based on the Hull Formula, representing the fair market value. See C. BROWN, *Factory at Chorzow (Germany v Poland) (1927-1928),* in E. BJORGE AND C. MILES (eds) at 65, 86.

[110] This precedent was used to establish the basis for the claim of reparation, it has been referred to in other important cases where the bench has demonstrated the positions of rights and duties arising from a wrongful act. In the latest *LaGrand case,* it also added that when a restitution in kind is not available, the payment of the corresponding value should be provided. See R. JENNINGS AND A. WATTS, *Oppenheim's International Law*, 9th ed, oxford, 2008, 528s; *Case concerning Gabcíkovo-Nagymaros Project, (Hungary v. Slovakia),* Judgement (Merits) 25 September 1997, 1997 I.C.J. Report, 81, para. 152; *LaGrand Case, (Germany. v. United States of America*), Judgement (Merits) 27 June 2001, 2001 I.C.J. Reports, p. 513, para. 125. Available both at < https://www.icj-cij.org/en/list-of-all-cases >.

[111] When ICSID tribunals concerned on the matter, have explained that *Chorzow factory* had laid customary international law standards on expropriation of foreign owned assets underlining their vitality to the cause. See *ADC Affiliate Ltd and ADMC& ADC Management Ltd v Republic of Hungary* (ICSID Case No ARB/03/16, Award OF 2 October 2006), paras. 484-486; *S.D. Myers, Inc. v. Canada, UNICTRAL (NAFTA)* Award (Merits), 13 November 2000, para.311; *Metalclad Corporation v. Mexico*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, para. 122; *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Award, Case No. ARB/01/8, 12 May 2005, para. 400; *Petrobart Limited v. The Kyrgyz Republic*, Arbitration No. 126/2003, Arbitration Institute of the Stockholm Chamber of Commerce (Energy Charter Treaty), 29 March 2005, 77s; *Amoco International Finance Corporation v. Iran*, 15 IRAN–U.S. C.T.R. p. 246, paras.191-194; *MTD Equity Sdn Bhd and MTD Chile SA v. Chile*, ICSID Case No. ARB/01/7, 25 May 2004, para. 238. All available at < https://www.italaw.com/ >.

as explained in *ADC & ADMC v Hungary*[112] and *Siemens AG v Argentine Republic.*[113] In both these cases, the legal question on reparation was led to a different level, because in the example of Budapest Airport the value of the asset increased, posing great importance on the precise moment to consider for the assessment of the reparation.[114]

The latest case on the topic is undoubtedly *Certain Iranian Assets case*, whose judgement on Preliminary objections was published in 2019, and dealt with the adoption of a series of measures, based on the presidential Executive Order 13599 that resulted in adverse impact on Iranian state-Owned Enterprises, and their rights to control and enjoy their property on American territory.[115] After the Hostage crisis in Teheran the US had designated Iran "State Sponsor of Terrorism", and subsequently in 1996 and in 2002 had adopted the Foreign Sovereign Immunity (FSIA) and the Terrorism Risk insurance Acts (TRIA), depriving Iran of the jurisdictional immunities normally recognized, and specifically in prescribing the exception to the immunity from execution of domestic judgements for both blocked and non-blocked assets of sovereign States.[116]

In the preliminary objections judgement, The Court assessed some stimulating points raising from the question on the protection of companies' ownership under international law in the context of the freedom of commerce under the bilateral treaty of Amity between US and Iran.

Starting from the definition of *company*, the bench assessed Article III(1) Treaty and affirmed that a company is an entity that must have its own legal personality which is conferred by the law of the State where it was created and where it acquired

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[112] *ADC Affiliate Ltd and ADMC& ADC Management Ltd v Republic of Hungary cit.,* Award 2006, para. 493.

[113] *Siemens AG v Argentine Republic* (ICSID Case No ARB/02/8, Award of 6 February 2007), para. 352.

[114] *ADC Affiliate Ltd and ADMC& ADC cit.,* Award 2006, para. 493.

[115] The order in 2012 disposed the freezing and the blockade of assets belonging to the Iranian Government or Iranian Financial Institutions. It practically involved State-owned enterprises and famous was the case of Bank Markazi. See *Certain Iranian Assets (Islamic Republic of Iran v. United States of America),* Preliminary Objections, Judgment, I.C.J. Reports 2019. Available at < https://www.icj-cij.org/en/list-of-all-cases >.

[116] Section 201 TRIA that integrated the regime of legal disputes under the scope of Section 1605(a)(7) FSIA between American nationals and labelled States for damages arising from deaths and injuries caused by terrorist acts allegedly supported, including financially, by certain States [Iran]. See *Ivi*, para. 21.

legal status. More specifically, "*the term companies means corporations, partnerships, companies and other associations, whether or not with limited liability and whether or not for pecuniary profit*",[117] that can be indistinctively private or public (state partial ownership), with an engagement in activities of commercial or industrial nature.[118]

On the question of protection, Article IV(2) Treaty stated that "*property and interests in property, shall receive the most constant protection and security […] in no case less than that required by international law*", so the Court questioned the minimum standard of protection for property belonging to "nationals" and "companies" of one Party engaging in economic activities within the territory of other States taking into consideration the rules of international law. The judges balanced the two opinions that considered rules on sovereign immunities and investment protection,[119] but sentenced that immunities did not enter the scope of the treaty, which in the case focused on tightening bilateral economic relations and investments.[120] So, in consideration of the overall provisions, the purpose of Article IV in guaranteeing protection of certain rights to legal persons cannot be interpreted as incorporating, by reference, the customary rules on sovereign immunities.[121]

Lastly, the context and the scope of *freedom of commerce* was interpreted under the text of Article X(1) of the bilateral treaty, with the result that the Court said that the disposition refers to commercial exchanges in general, because the word "commerce", both in its ordinary legal meanings, is not limited to the mere acts of

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[117] *Ivi*, para 86.

[118] The Court specified that while there is the possibility that a company carries on both commercial activities and sovereign functions, because there is nothing that preclude a prior this possibility, although the entity would be deprived of its immunities under Article XI(4) US-Iran Treaty during commercial activities. However, an entity cannot be recognized as a company if the activities fall solely under the category of sovereign functions. See *Certain Iranian Assets cit.,, (*Preliminary Objections), paras. 90ss.

[119] The United States claimed that the discipline to apply was the protection of aliens under international investment law, while Iran supported the idea that entities of third States performing sovereign functions, particularly banks, are able to avail themselves of their immunity before United States courts. *Ivi*, paras. 54-57.

[120] The Court referred to a precedent, which was applied by analogy. *Ivi*, paras. 57, citing *Immunities and Criminal Proceedings (Equatorial Guinea v. France),* Preliminary Objections, Judgment, I.C.J. Reports 2018 (I), pp. 321-322, para. 95.

[121] Additionally, the Court stated that Article XI (4) US-Iran Treaty excludes SOEs engaged in commercial activities from all immunities, because they enjoy immunities under customary international law when work with activities *jure imperii*. See *Certain Iranian Assets*, Preliminary Objections, p. 28, paras. 58.

purchase and sale but cover a wide range of matters ancillary to commerce, with the only limit of matters not connected or have a too tenuous link with the bilateral commercial relations.[122] In this framework, there is no way that the violation of such sovereign immunities cannot impede the freedom of commerce that regard also non sovereign activities.[123]

In conclusion, we have established that there is a need of reparation when foreign assets are expropriated or damaged, and a set of rules shall be applied and a set of values should be considered to wipe out the impairment sustained by the damaged owner of an asset or of a contractual right. Surely, the abovementioned injuries have referred strictly to economic losses and have avoided environmental or Human Rights issues, because they may lead to compensation and satisfaction claims that need a different discussion and different frameworks. Still, in the touched area the problem becomes more delicate when a State expropriates foreign companies, or minority shares held by foreign investors within those, because the treatment of the so called Foreign Direct Investments (FDIs) pose new questions that are going to be discussed in the next paragraph.

4 Treatment of shareholders in expropriated foreign direct investments

In consideration of foreign direct investments there are new questions to be considered such as the entity of the person, physical or legal, subjected to the damage and consequently entitled to the reparation, and to the eventual claim before an international Court in case of incompliance, with all due consequences. The ICJ has predominantly laid the foundation for a structured answer to many of the aspects that derive in this practice.

[122] *Oil Platforms (Islamic Republic of Iran v. United States of America)* (Preliminary Objection, Judgment, I.C.J. Reports 1996 (II), p. 818-819, paras. 45-46; and *Certain Iranian Assets*, Preliminary Objections, Judgment 2019, p. 34, para. 78-79.

[123] The violation of the sovereign immunities to which certain State entities are said to be entitled under international law in the exercise of their activities *jure imperii* is not capable of impeding freedom of commerce, that regards different activities. See *Certain Iranian Assets cit.,* Preliminary Objections, p. 34s, para. 80.

Strictly linked to the reality of the expropriation of foreign owned investment is the case of *Barcelona Traction, Light, Power Company,* in which some Spanish electricity production companies, subsidiaries controlled by a Canadian Holding, whose shares belonged to Belgium nationals, failed to pay the interests on some English bonds, thus were pushed to declare bankruptcy and as a consequence were forced to transfer these subsidiaries to a Spanish Public owned counterpart.[124] The reason behind international litigation was that Spain was suspected to have forced the bankruptcy and not to have granted the right to a fair and due process to the multinational company,[125] with the consequence that its shareholders, Belgian individuals and legal persons, had sustained a damage for which they had received no reparation. Therefore, Belgium as the State of the shareholders commenced proceedings under the institute of diplomatic protection to support its nationals.

This decision is seriously one of the most re-proposed in the history of international law due to the topics touched. The Court was adhered twice, but only in the second round it concretely issued a judgement, both on the preliminary objections, where it stated its nature as the successor of the PCIJ,[126] and on the merits, where the innovation was brought on the topic of right of the company and of shareholders, and on the consequent effect of such choice on the institute of diplomatic protection. In the case, the second order of problems had its roots on the fact that the applicant was Belgium, which was not the State of the directly damaged subject, which was the Canadian holding, thus the *ius standi* of the applicant was contested. Despite the final judgement, that considered Belgium not to be entitled to sue Spain according to diplomatic protection in defence of the real interests of the indirectly damaged shareholders, the bench faced an intense discussion on the distinction

[124] *Case concerning the Barcelona Traction, Light, Power Company, Limited (Belgium v Spain),* Preliminary Objections [1964] ICJ Rep 6; and *Case concerning the Barcelona Traction, Light, Power Company, Limited (Belgium v Spain),* Second Phase, [1970] ICJ Rep 3.

[125] As matter of fact, it happened that the bankruptcy proceeding was held without hearings of the Canadian company, although that is not so rare in European civil law countries.

[126] The Court stated that all the matters that under the dispositions of treaties were to be referenced to the PCIJ, should be now referred to the ICJ, also because the dissolution of the PCIJ should not be considered as a cause of abrogation of jurisdictional clauses. See *Case concerning the Barcelona Traction, Light, Power Company, Limited (Belgium v Spain),* Preliminary Objections [1964] ICJ Rep 6, 34.

between the rights of the company and those of the shareholders.[127] While some judges held different views discussing on the relevance of the protection of nationals and the general economic interest of the State [Belgium] in companies working abroad,[128] the entire case was decided on evidence of nationality of the shareholders that was different than the one of the corporation. Relevantly on the topic, the ICJ found itself to rely on the rules generally accepted by municipal legal systems because international law had not disciplined the matter,[129] and looked at the domestic regulation on the institution and private law consequences of the corporate entity as separated from that of shareholders. There, it posed a firm distinction between the entity of the corporation and that of the shareholders, with the consequence that responsibility of a wrongful act committed by a State raised responsibility toward the company for the infringement on its right, but not toward shareholders, whose economic interests had been affected.[130] It is fair to say that the centre of the question was the diplomatic protection of corporations, over which the Court found easier and faster solution, detaching from the *Nottebohm rule,*[131] by requiring a close and permanent connection with a territory which was met, without analysing deeply Belgian arguments.[132]

This approach, where States were averted from the legitimate exercise of diplomatic protection of shareholders, was intended by the Court to prevent confusion and insecurity in international economic relations, due to the complexity in the

[127] *Ivi,* 34.

[128] Judge Jessup and Judge Gros held that the bench should have paid attention to the interest of a State in protecting the FDIs of its nationals abroad, also because there may be a link between a specific FDI and national economy. See *Ivi,* 196s, para. 61; and 283, para. 27.
It must be said that despite the final judgement, these separate opinions gained great importance in the world of international economic law.

[129] The Court argued that it had to refer to relevant rules of municipal law, but the it did not focus on any municipal law, but rather remained general. This approach can be explained because in its politicised role, it did not want to pronounce itself on the sensitive topic of the conflict of laws, in relation to the possible applicable one. See *Barcelona Traction cit.*, Second Phase, [1970] ICJ Rep 3, 34-37, paras. 41-50.

[130] In this sense, the Court underlined the fact that shareholders' interests were not to include the financial losses consequent to the situation of the company, but the more administrative right to vote and the right to dividends. See *Barcelona Traction cit.*, Second Phase, [1970] ICJ Rep 3, 36 paras. 46-47.

[131] The Nottebohm Rule was consisted in the approach, for which the State of incorporation and of a registered office of a company was entitled to exercise diplomatic protection in case of a genuine connection between the two. See *Nottebohm Case (Liechtenstein v Guatemala),* Judgement (Second phase) of 6 April 1955, ICJ Reports 1953, 22ss.

[132] See *Barcelona Traction cit.*, Second Phase, [1970] ICJ Rep 3, para. 71.

determination of the entitled State in current times when shares are transferred constantly without any registry to be informed.[133] It is not truly surprising that customary international law has conformed to this approach, with the practical example of the explicit mention in the ILC Draft Articles on Diplomatic Protection.[134]

Nevertheless, the same Court reformed the approach in a subsequent decision, *Elettronica Sicula* SpA *ELSI Case,*[135] where an Italian company, totally owned by two US Corporations,[136] was subjected to temporary requisition by the Italian Government after the intention to close the plant and dismiss the workforce subsequent to accumulated losses that were not offset by profits.[137] The measure resulted in the bankruptcy of the Company with the American legal shareholders that asked the US to intervene in diplomatic protection alleging the sustained damage of the requisition at a lower price than the market value and the impossibility to avail immediate liquid funds to balance the economic problems. There, the United States acted strategically because they based the claims on a bilateral treaty signed between the two State parties,[138] limiting the jurisdiction of the Court in the examination of provisions in the context of international custom due to the composition of the bench deciding on the case.[139]

Considering the claims that dealt with the effects of the requisition of the plant, that deprived shareholders of the right to liquidate the assets under the normal course of

[133] it would be problematic for States to defend against applications in relation to shareholders they may have no information about. See *Barcelona Traction,* Second Phase, [1970] ICJ Rep 3, 49 paras. 96.

[134] Article 9 states that "*For the purpose of the Diplomatic Protection of a corporation, the State of nationality means the State under whose law the corporation was incorporated. However, when the corporation is controlled by nationals of another State […]and the seat of management and the financial control of the corporation are both located in another State, that State shall be regarded as the State of nationality".*

[135] *Elettronica Sicula SpA (United States of America v Italy)* [1989] ICJ Rep 15.

[136] Raytheon owned 99,16% and Machlen owned the rest 0,84% of shares of this Elettronica Sicula SpA, which produced electronic components in its site in Palermo, Italy.

[137] An order of the mayor of Palermo, after several meetings with the representatives of the corporation looking for State support to face the critical debt, disposed the expropriation with immediate efficacy. See *Elsi Case cit.,* [1989] ICJ Rep 15, paras. 26ss.

[138] Specifically, in the US-Italy BIT Treaty of Friendship, Commerce and Navigation there were two relevant dispositions: (i) Article V(2) which extended the payment of compensation to the interests damaged by nationals both directly and indirectly; and (ii) Article VII entitling shareholders to own and dispose of immovable property or linked interests.

[139] Moreover, the case was not decided by the Full Court, but only by one of its chambers.

actions, and the subsequent purchase during the bankruptcy proceedings at a lower price, the Court assessed the *ius standi* of the US on the basis of diplomatic protection and accepted it.

The reason for such choice was entirely based on the text of the FCN Treaty between Italy and the US, whose text guaranteed the protection and security of foreign owned property on the partners' territories.[140]

Before considering the significance of the term property, the discussion stalled on the exhaustion of local remedies as requirement for diplomatic protection, where the Court gave importance to the Parties will at the moment of the negotiation of the treaty discussing about the absence of express reference to this requirement.[141] Although a decision could not be based on the relevance of the absence of an explicit reference to a principle of customary international law, the Chamber found the parties free to modify these requirement by agreement.[142]

Secondly but still relevantly, the term "property" was interpreted not as referred to any plants or assets but to the legal entity itself beyond the economic value of the shares. Dealing with the reparation question, the Court took into consideration also the financial situation of the American owned company, and because of the precarious status for which bankruptcy was inevitable,[143] it rejected any claims for reparation made by the applicant because of no breach of the treaty by the respondent.[144] Once the reparation claim was answered negatively, the fact that the ICJ had further assessed the question on protection of corporation and shareholders had little practical importance. In fact, in *ELSI Case* the bench repeated the importance of the test of incorporation and registration, recognizing it the status of general rule of customary international law, but it also allowed for exceptions, based either on municipal legislation, or on Investor-State contracts, or FCN treaties

[140] An international standard for this protection was agreed in the term of the principles of national treatment and most-favourable nations. See *Elsi Case cit.,* [1989] ICJ Rep 15, paras. 106-111.
[141] *Ivi*, para. 50
[142] ibidem.
[143] The state of the company as a result of circumstances of a functional-economic and market nature, was such as not to permit of the continuation of its activity. See *Elsi Case cit.,* [1989] ICJ Rep 15, para. 126.
[144] Found that the Respondent has not violated the FCN Treaty in the manner asserted by the Applicant, the Chamber rejects the reparation claim. *Ivi*, para. 136.

[as in the case].[145] This has anticipated a trend, for which investment treaties today provide for a special clause that discipline the treatment of shares in the Bilateral Investment Treaties.

The trilogy of the cases on shareholders protection must be completed with *Diallo case,* where a Guinean investor that took part (unipersonal ownership) in two Congolese corporations (SRPLs)[146] was arrested for his debts due to his businesses, then he was also despoiled of its investments, properties and bank account and finally expelled.[147] In the case, the ICJ went further, because in considering the claims of Guinea made a specific categorization of the claims, recognizing the admissibility of the majority of them,[148] except for those that had Mr Diallo as an indirect victim for the damages sustained by the companies.[149] The reason was explained by the Court stating that what amounts to the internationally wrongful act, is the violation by a State of the direct rights of *associés* or shareholders, as defined by the domestic law of that State and accepted by both Parties.[150] Indeed, it reaffirmed the principle for which under domestic law the company has separate personality distinct from that of shareholders

After all these cases, it is clear that under international law the protection of shareholders has an exceptional nature compared with that of corporations, yet lifting the veil in their interests' is still an available option,[151] although such protection cannot be conditioned or graduated in relation to the percentage of shares

[145] See *Elsi Case* [1989] ICJ Rep 15, para. 62s. One important reason for which the deciding judges have not considered Barcelona Traction precedent was that they decided the case in an Ad Hoc Chamber, with the consequence that they could hardly decide on legal questions affecting customary law with such wide scope of application.
[146] Société privées à Responsabilité Limitée, which in the case were Africom-Zaire and Africontainers-Zaire
[147] *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of Congo),* Preliminary Objections [2007] ICJ Rep 599.
[148] The claims admitted were those for the damaged sustained as manager of the companies and as an individual, who was jailed and expelled.
[149] The Court instead recognized admissible those claims that found Mr Diallo directly damaged as an individual, and as a shareholder, in relation to his direct rights as an "associé". See *Ahmadou Sadio Diallo cit.,* Preliminary Objections [2007] ICJ Rep 617s., para. 98.
[150] *Ivi*, paras. 64-66, and the quotation of *Barcelona Traction,* Second Phase, [1970] ICJ Rep 3, 33s, para. 38.
[151] See *Barcelona Traction case cit.,,* Second Phase, [1970] ICJ Rep 3, 39, para. 58.

owned.[152] In all the three landmarks cases, the Court considered the possibility to apply these exceptions, and despite leaving little space for shareholders' protection, it did not preclude entirely a diplomatic protection based on their nationality, which still remains a more complex issue due to the absence of an equivalent of the genuine connection rule in rendering effective the nationality.[153] Indeed, ICJ explicated some typical hypotheses.

One of the most common exception, that results in the modern reality of investor-state dispute settlement is the protection offered to foreign investments, when FDIs are shares of companies in host states, whose nationality is conferred according to municipal law, basically resulting in the diplomatic protection of the State of the national individual investor against the State of nationality of the Company. This particular hypothesis, labelled as Protection by Substitution, has been further organized by the ILC in Draft Articles on Diplomatic Protection Article 11, because the disposition recognizes the possibility to exercise diplomatic protection when the corporation has the nationality of the state causing the injury and incorporation of the company was required to do business on the territory of such state.[154] Specifically, in *Diallo case* the Court considered this exception, which had been raised by the applicant [Guinea], and stated that there was neither state practice nor international judgement sustaining this theoretical possibility,[155] but only arbitrations based on special bilateral agreements.[156] Additionally, the deciding bench explicitly avoided the analysis of the exception under Article 11, because it

[152] *Ivi*, para. 94.

[153] The question still needs an answer to be found in municipal law, so international law must refer to relevant rules in domestic jurisdictions. For example, a genuine connection must be established, but there is no limit in the development of commercial activities abroad. See A. GIANELLI, *La Protezione Diplomatica DI Società dopo la sentenza concernente la Barcelona Traction,* Rivista di Diritto internazionale, 1986 Vol. 69, 768.

[154] This hypothesis was written down as a consequence for the assumption that Host states required the incorporation of companies in their territory in order to avoid the exercise of diplomatic protection by States of nationality. See *Commentary to Draft Articles on Diplomatic Protection*, Article 11, ILC Yearbook 2006/II(2), 39-42.

[155] See *Diallo case cit.,* Preliminary Objections [2007] ICJ Rep 613-615, paras. 83-89.

[156] This is a factor that has consistently influenced the development of the protection of shareholders through diplomatic protection, because too many investment treaties have influenced limited the formation of a common practice. See F. ORREGO VICUNA, *International dispute Settlement in an Evolving Global Society: Constitutionalization, Accessibility and Privatisation,* Cambridge, 2004, 42.

did not recognize the conditions prescribed in the disposition in the facts of the case.[157]

Other two exceptions that were considered in the *Barcelona Traction cas*e, were: the extinction of company, that would open the legal demise to shareholders who could not rely on the action by the Company,[158] although this was recognized not to be the case; and the "lack of capacity of the company's national State to exercise diplomatic protection", because if the State of the company was not entitled, shareholders would again remain without legal remedy.[159]

Surely, all these consideration must be considered in the overall framework of the discipline of diplomatic protection which is an action where a sovereign state is the sole judge in the decision on whether, how and when the protection will be granted,[160]

In conclusion, it is undoubted that nationality is central in international investment law, although nowadays investment protection operates outside the exercise of diplomatic protection, indeed in the field since 1960s ICSID system operates continually, despite the current debate on possible ameliorations. However, the majority of the guarantees today find their foundation in these ICJ judgements, where States must comply to avoid awards and judgements against their interests.

[157] The two corporations did not fall into the scope of Article 11 because of the requirement relying on the conditioned incorporation, which did not occur. See *Diallo case cit.*, Preliminary Objections [2007] ICJ Rep 616, para. 93.

[158] Normally, the nationality of shareholders would give the State the power to exercise diplomatic protection, after the corporation had ceased to exist under the law of incorporation because it would take out the possibility to look for a judicial remedy for shareholders through it. In the case, under Spanish law the company had not ceased to exist, thus making useless this exception. See *Commentary to Draft Articles on Diplomatic Protection* at 154, 39. See *Barcelona Traction case cit.*,, Second Phase, [1970] ICJ Rep 3, 40s, para. 64-66.

[159] It refers to the impossibility to indirectly defend their interest through the company and tis national State. Yet, again, this was not the case in *Barcelona Traction because* Canadian government that were recognized exercise of diplomatic protection.

[160] It is a discretionary power, that fall within the scope of the Sovereign State's rights, influenced by political and economic considerations, for which the responsibility of another State is claimed for the injury caused by an internationally wrongful act to a national of the applicant. See *Barcelona Traction case*, Second Phase, [1970] ICJ Rep 3, 44, para. 79; and *Ahmadou Sadio Diallo case cit.*, Preliminary Objections [2007] ICJ Rep 599, para. 39.

5 Security exception to foreign investment and trade

The last issue to consider in this dissertation is National Security, because it is an important escape clause, that has found great relevance in the last two years, after the WTO DSB published a report on the issue. Despite the exceptions regime used to interfere with States' economic interests under GATT or other WTO agreements is limited to the reality of the WTO, relevant case law has deeper and older roots, with PCIJ and ICJ judgements that have laid the basis for the current discussion on the topic. Essentially, Security Interests constitute a tool a State could appeal to in order to counter the breach of international obligations, but the evolution of the interpretation of this escape clause has experienced the approach of many international adjudicative bodies, although it first appeared in a written text in 1947.[161]

The first case is *S.S. Wimbledon case 1923,* where the adjudicative authority of the PCIJ decided on a dispute that arose between Germany and other European Countries [UK, France, Italy] after the first prohibited the right of passage through the Kiel Canal of a British steamship chartered by French company whose cargo consisted in munitions and artillery to bring to Poland.[162] The factual opposition relied on a conflict of dispositions: Article 380 Treaty of Versailles 1919 that disciplined specifically the passage by the Kiel Canal,[163] and German Neutrality Orders of 25th and 30th July 1920 that prohibited certain cargos destined to Poland and Russia.

Despite the overall judgement, the Court stated that States are entitled to adopt the course considered best suited for its security exigencies and integrity maintenance, and in the exercise of such an important right, conflicting international treaties

[161] GATT 1947 was the first multilateral treaty to comprehend such a disposition, while the United States had already included in their bilateral Friendship, Commerce and Navigation treaties (FCNs) a disposition resembling Article XXI GATT. See K.J. VANDEVELDE, *The first Bilateral Investment Treaties: U.S. Post-war Friendship, Commerce and Navigation Treaties,* 1st edn, Oxford-New York, 2017, 510s.

[162] *S.S. Wimbledon (United Kingdom, France, Italy and Japan v Germany)*, 1923 PCIJ (ser. A) No. 1, Judgement, paras. 13-15.

[163] The Article stated that "*The Kiel Canal and its approaches shall be maintained free and open to the vessels of commerce and of war of all nations at peace with Germany on terms of entire equality."*

could not be interpreted as limiting it.[164] In the case, the bench was divided in the decision, as it developed the dispositive distinguishing time of peace and of war, recognizing the liability of Germany for its opposition. Furthermore, there were two dissenting opinions that paid attention to the fact that international conventions on trade and commerce are usually concluded in peace periods, while belligerent States in post-war periods may feel the necessity to adopt extraordinary measures affecting these conventions. It was debated, and there was no consensus on it, if such an agreement could lose its *raison d'être* for these exceptional abuses.[165] Relevantly, it is foreseeable that the freedom in canal navigation may be restricted in time of war by belligerents, States but it cannot be interpreted equally in time of peace.[166]

The first revolutionary landmark case that analysed this question not in a *dictum* was *Military and Paramilitary Activities in Nicaragua Case 1986,*[167] where the ICJ was adhered to decide on a bigger conflict that had brought on the table a dispute on many aspects of international law, both procedurally and substantially[168]. Indeed, we may remember among the many: the prohibition of the use of force, the principles of sovereignty and of non-intervention in internal affairs, the transfer of jurisdiction form the PCIJ and the ICJ, with the consequential relevance of its jurisdiction under compromissory clauses and optional clauses. However, among the various arguments adopted by the US to counter the jurisdiction of the Court

[164] *S.S. Wimbledon case*, 1923 Judgement PCIJ (ser. A) No. 1, para. 72.
[165] *S.S. Wimbledon case cit.*, (ser. A) No. 1 - Dissenting Opinion by Judges Anzilotti and Huber, para. 69.
[166] *Ivi*, para. 80.
[167] The case involved the alleged responsibility of the United States for direct action, through the CIA, and indirect one, by supporting the local contras, for military and paramilitary activities whose aim was to oppose the governing communist regime of Jose Santos Zelaya. See R. KOLB, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (1984 to 1986)*, in E. BJORGE AND C. MILES at 65, 351s.
[168] The entire case had the ICJ decide in four occasions: *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America),* Provisional Measures [1984], Order of 10 May 1984, ICJ Rep 169; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America),* Declaration of intervention, Order of 4 October 1984, [1984], ICJ Rep 215; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America),* Jurisdiction and Admissibility, judgement of 26 November 1984, [1984] ICJ Rep 392; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America),* Merits, Judgement of 28 June 1986, [1986] ICJ Rep 14. Available at < https://www.icj-cij.org/en/list-of-all-cases >.

there is one based on the saving clause expressed in Article XXI(d) US-Nicaragua FCN, and its self-judging construction according to the United States.[169]

Focusing on this last element, the clause provided for the objective formula for which State could invoke essential security interests to adopt the necessary measure in breach of the agreement and the respective obligations.[170] Specifically, the objectivity of this disposition permitted the ICJ to take an historical position, because interpreting the text, the Court was empowered to determine if the measures proposed had been designed to protect such interests, which is not foreseeable today in any ratified treaty. Therefore, not only did the Court establish, not unanimously,[171] that there were no jurisdictional issues on bringing the specific question of the violation and exception under FCN treaty before the Court,[172] but it also considered the measures adopted by the US not "necessary" but merely "useful" to national security and foreign interests, thus rejecting the defence of the respondent.[173] The standard adopted in 1986 appraised the argument in relation to the reasonableness of the measure, with the unpretentious aim just to avoid the abuses of authority in the determination of essential security interests.[174]

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[169] The relevance of the treaty of Friendship, Commerce, and Navigation between the US and Nicaragua 1956 has been raised because the jurisdiction of the ICJ was based on the one hand, on the common optional clause of the two countries, and on the other hand, on a compromissory clause agreed in this specific bilateral treaty (that provided also the exceptional disposition on national security).

[170] The text of Article XXI(d) US-Nicaragua FCN states "*El presente Tratado no impedirá la aplicaci6n de medidas que… fueren necesarios para dar cumplimiento a las obligaciones de cualquiera de las Partes para mantener o restaurar la paz y seguridad internacionales, o necesarias para proteger sus intereses esenciales y seguridad;"*. The Objective formula comes from the absence of any "it considers" proposition introducing the essential security interests.

[171] There was the American judge (Stephen Schwebel) who rendered dissenting opinions both in occasion of the judgement on jurisdiction and the one of merits, where he supported the idea that the national security exception under Article XXI was self-judging, despite the absence of "*it considers"* in the text of the disposition and that Article XXIV (2) US-Nicaragua FCN recognized ICJ jurisdiction on the interpretation of the entire agreement. See *Nicaragua* Case cit., Judgement on Jurisdiction - Dissenting opinion of Judge Schwebel (26 November 1984), [1984] ICJ Report 558, 635, para. 128; and *Nicaragua case cit.*, Merits – Dissenting opinion of Judge Schwebel (27 June 1986), ICJ Report 259, 307, paras. 103ss.

[172] See *Nicaragua Case cit.*, Merits, Judgement [1986], ICJ Report 14, 116-117, paras. 222-225.

[173] *Ivi*, 117, para. 224.

[174] At the time, assessments that resulted patently unreasonable would be considered abuses of authority, thus rejected. This reasonability test was less strict than the current necessity test, which has modern origins and permits a deeper intrusion of the Courts. *Case Concerning Oil Platforms*, Judgement – Separate Opinion of Judge Owada (6 November 2003) [2003] ICJ Rep 246, 259, para. 55.

Despite the lenient approach, on the merits the Court adopted a wider scope because the ICJ did not want to turn the compromissory clause into a second *forum prorogatum,* where States could determine discretionally with their appreciation the limits of the jurisdiction of the court after the rise of the dispute.[175] This decision found a precedent in *Tehran Hostage crisis 1980,* when the Court remembered that a compromissory clause covers also eventual saving clauses contained within a treaty, with the consequence that judicial review would be ensured on the conditions prescribed by the disposition for the invocation of the saving clause.[176] In fact, the case law of Iran v. US has confirmed numerous times that the exception of national security has effects only on the merit of the decision, because it require the non-compliance with International law of the behaviour of one state that is excused by this exception, and in no way it is a clause limiting or affecting the jurisdiction of the Courts.[177]

As a matter of fact, the second time the question was directly assessed by the ICJ was in *Oil Platform case*, when Iran filed a complaint against the US for the destruction of some Iranian Oil Platforms for alleged security reasons.[178]
Not only the Court decided to have jurisdiction on a question regarding the protection of the freedom of commerce and navigation under Article X Treaty of Amity 1955, but it concentrated on the specific provision under Article XX(1)(d) that introduced the justification based on essential security interests, adduced by the US for their measures.[179] The assessment of the Court deserved particular importance because it interpreted the legal text in light of the relevant rules of

[175] See *Nicaragua Case cit.,* (Merits) ICJ Report [1986], 117.
[176] *United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* [1980] ICJ Rep 3, 28.
[177] After *Oil Platform case*, this assertion was repeated in *Violations of 1955 Treaty of Amenity, Economic Relations and Consular Rights 2018* and *Certain Iranian Assets 2019.* See *Case concerning Violations of 1955 Treaty of Amenity, Economic Relations and Consular Rights (Iran v. United States),* Order on Provisional measures, General List No. 175 (3 October 2018), 12, paras. 41-42; and *Certain Iranian Assets*, Judgement on preliminary Objections (13 February 2019), General List 164, 19, para. 45.
[178] *Case Concerning Oil Platforms,* Judgement – Separate Opinion of Judge Owada (6 November 2003) [2003] ICJ Rep 246, paras. 10-15.
[179] The United States adopted this exception claiming that this justification operated by not constituting a breach of the treaty, as Article XX constituted a derogation of the treaty obligations. See *Ivi*, para 32-36.

international law,[180] realizing that Court's jurisdiction is not affected by the National Security exception, and that the assessment of Article XX was strictly connected to external conditions established in International Law, in the case the discipline of self-defence (para. 40). Particularly, if a measure is necessary it is considered to be a sensitive topic for the subjective assessment of one of the disputing parties which is better considered objectively by the Court, without leaving room for measures of discretion.[181] In the specific case, the Court denied the application of such powerful clause, but particularly because it referred to the recourse to armed force, not complying with the obligations of the treaty and not falling within the hypotheses of self-defence under international law (para 78).

While these first decisions were held by the universal Court with plenary jurisdiction, the latest relevant case law refers to a decision in 2019 by the WTO Dispute Settlement Body, in the historical landmark case of *Russia –Traffic In transit.*[182] The factual background here involved many measures, published and administered, that Russian Federation adopted to block the road and rail transit routes across Ukraine-Russian border for all those Ukrainian goods that were destined to Kazakhstan, Tajikistan, Turkmenistan and Uzbekistan, and fell within special categories mention in the Resolution No. 778 of the Russian Government (in the framework of the Ukraine crisis in 2014).[183]

This dispute was leading on two aspects of the practical reality of the application of the Security exception: firstly, it was the first time that the matter was subjected within the system of the WTO, with the consequence that there was not a bilateral treaty and the interpretation of the exception has a much wider relevance, before all

[180] The Treaty was not intended to be interpreted as isolated from the rest of principles and customs of international law. See *Ivi*, 180, para. 41.

[181] This position interpreted and kept as support the precedent of *Nicaragua case*, where the same words were used opening for the consideration of necessity and proportionality. See *Nicaragua case cit.*, Merits, [1986] ICJ Report 14, 117, paras. 225; and *Case Concerning Oil Platforms*, Judgement (6 November 2003) [2003] ICJ Rep 161, 183, paras. 43-73.

[182] *Case Russia –Traffic In transit,* DSB Report WT/DS512/R adopted on 5 April 2019 (Hereafter *Russia –Traffic In transit,* Panel Report WT/DS512/R). Available at < https://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm >.

[183] While Ukraine claimed a breach of the obligations under the WTO Agreements, interpreted accordingly Russia Accession Protocol, and the CIS-FTA that bound merely the ex-satellite countries and Russian Federation, this latter opposed the seriousness and the nature of the staking interests contending the jurisdiction of WTO on those. See *ivi*, paras. 7.1-7.2-7.22.

the members of the World Trade Organization (para. 7.20); secondly, Article XXI GATT has a peculiarity in the text, because it adds the wording "it considers", therefore revolutionizing previous decisions.

Addressing the entire question, the Body rejected the defence of Russia, and recalled that as an adjudicative tribunal it possesses inherent jurisdiction derived from its adjudicative function on all the matters arising from its substantive jurisdiction [WTO Legal framework].[184] Consequently, it gave high importance to the power to judicially review the conditions posed in Article XXI, paragraph (b), without leaving it to the absolute discretion of the invoking party (para. 7.5.3.1). In fact, the core of the decision was that Article XXI is not a self-judging clause, in other words part of the exception was subjected to objective determination. Precisely, the invoking State is left discretion to define what falls within its national security interests, thanks to the wording "*it considers",* while the DSB has the power and the title to review the *chapeau* of the article and the conditions where and with which the interests are safeguarded by measures in breach of the spirit of the WTO Agreements.[185] The importance of this decision was augmented by two set of elements: the fact that international community discussed the question at the same time of the panel, and many States intervened with third-party statement,[186] and secondly, that the DSB took into consideration previous practice and an enormous amount of precedent practice of the GATT1947 and of other similar cases.

As a consequence of all the above mentioned decisions, the idea of wide discretion of States in assessing their needs to protect strategic interests has been reflected in

[184] S*ee ivi* para. 7.53, referring to the kompetenz-kompetenz principle as already stated in previous decisions of the ICJ (*Nuclear Test Case* and *Northern Cameroons case*) and of its precedent case law (*US- 1916 Act* and *Mexico – Corn Syrup (Article 21.5)*). See *Nuclear Tests Case cit.*, Judgement (Jurisdiction and Admissibility), (1974) ICJ Reports, pp. 259-260*; Case Concerning the Northern Cameroons (Cameroon v. United Kingdom),* Judgement (Jurisdiction and Admissibility), (1963) ICJ Reports, pp. 29-31; and Appellate Body Report, *US - 1916 Act,* WT/DS136/AB/R adopted on 26 September 2000, para. 54; and Appellate Body Report, *Mexico – Corn Syrup (Article 21.5),* WT/DS132/AB/R adopted on 21 November 2001, para 36. Available at < https://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm >.

[185] *Case Russia –Traffic In transit cit.,* Panel Report, para. 7.102.

[186] the most important are the Intervention of the US supporting the position of the Russian Federation claiming the absolute self-judging nature of the disposition, and the European Union one, that asserted the opposite. See attachments to the Panel Report WT/DS512/R in *Case Russia –Traffic In transit.*

non-interstate disputes such as *Fiocci Munizioni case 2003*[187] and many others. Indeed, during the Argentinian crisis, ICSID Arbitrators have faced the question of the possibility to raise the security exception in case of economic emergency[188] in a number of cases that has made Article XI Argentina-US BIT the most litigated disposition on the matter. The result on whether the treaty shall not preclude the application of measures necessary for its own essential security interests was discussed in *CMS v Argentina,*[189] *Continental Casualty v Argentina,*[190] *El Paso v Argentina,*[191] *Enron v Argentina,*[192] *LG&E v Argentina,*[193] *Sempra v Argentina,*[194] *Mobil v Argentina.*[195]

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[187] The case involved an Italian company filing a claim against the EC Commission because it failed to bring the Kingdom of Spain before the ECJ for certain subsidies granted to Spanish companies involved in the production of arms. After the invocation by Spain of Article 296(1.b) EC Treaty, alleging such measures as granted in the interest of the Kingdom's national defence, and to beneficiaries that were factories owned by the Ministry of defence, the Commission accepted such justification on a preliminary analysis and did not consider these measures unlawful. Finally, the Tribunal decided that when there are measures protecting national security interests, Member-States are particularly empowered with a wide discretion in assessing which needs deserve that protection. See *Fiocci Munizioni SpA v. Commission of the European Communities,* Judgement of the Court of First Instance (30 September 2003) Case T-26/01, para. 58; and LEXXION VERLAGSGELLSCHAFT MBH, *Fiocci Munizioni v. Commission,* European State Aid Law Quarterly, 2003 Vol. 2(4), 774s.

[188] D.A. DESIERTO, *Necessity and National Security Clauses: Sovereignty in Modern Treaty Interpretation,* Leiden, 2012, 171 ss.

[189] *CMS Gas Transmission Company v Argentina,* Award (12 May 2005), Case No. ARB/01/8. The case regarded an American shareholder in local subsidiary dealing with gas transportation activities that saw its right to calculate tariffs in US dollars and to make inflation adjustments terminated by Argentinian Republic, after the enactment of the Emergency Law to counter the economic crisis in 2001-2002. Available at < https://www.italaw.com/ >.

[190] *Continental Casualty Co. v Argentina,* Award (5 September 2008), Case No. ARB/03/9. The case dealt with an American investor that owned an insurance company incorporated in Argentina, maintaining investment securities portfolio, who saw its investment and possibility to balance the risk of the devaluation of Argentinian currency after the enactment of various decrees by Argentinian government during the crisis.

[191] *El Paso Energy International Co. v Argentina,* Award (31 October 2011), Case No. ARB/03/5. Here, an American investor claimed its shareholding minority rights in various Argentinian companies to be frustrated by a set of Argentinian decrees adopted during the economic crisis that did not permit to hedge against the risk of the devaluation of pesos.

[192] *Enron Corp. and Ponderosa Assets L.P. v Argentina,* Award (22 May 2007) ICSID Case No. ARB/01/3. The case dealt with an American investor who had contractual rights in gas transportation companies under technical assistance agreements and operation licence, and who saw suspended tariffs adjustments with US indexes. Accessible at < https://www.italaw.com/ >.

[193] *LG&E Energy Corp and others v Argentina,* Award (3 October 2006) ICSID Case No. ARB/02/1. The case dealt with an American investor who participated in three Argentinian subsidiaries that detained licence agreements rights on gas distribution, that saw their regulatory framework totally modified by the Emergency law enacted by Argentinian government in 2002.

[194] *Sempra Energy International v Argentina,* Award (28 September 2007) ICSID Case No. ARB/02/16. Here, an American investor with equity interests in Argentinian companies who saw suspended its rights in relation to the US price indexes by the measures proposing the pesification of these latters. Accessible at < https://www.italaw.com/ >.

[195] *Mobil Exploration and Development Inc. Suc. Argentina and Mobil Argentina S.A. v Argentina*, Decision on Jurisdiction and Liability (10 April 2013) Case No. ARB/04/16. An American investor

In *Continental Casualty v Argentina*, for example, the arbitral tribunal took the position that a security exception could not be regarded as self-judging, unless contracting parties stated so, because a unilateral way-out from multilateral treaty obligations deserved great caution if not written in any clear statement,[196] due to the fact that they are not necessarily self-judging.[197] There, similarly to the *Mobil case,* the arbitral panel referred to the fact that the treaty was signed after the *Nicaragua Case,* that had demonstrated an approach toward the clarity and of the appropriate language of a self-judging clauses.[198] Further, in *Enron* and *Sempra* cases, the decisional bodies took precisely in consideration the judgements in *Oil Platforms* and *Nicaragua* cases to conclude that self-judging provisions which have an exceptional nature must be drafted in a clear and express way.[199]

In considering other disputes different from the Argentinian crisis that have given importance to the mentioned cases, there are *Mitchell v Congo,*[200] *Telekom v India,*[201] *and CC/Devas v India.* Specifically this latter is very significant, because it cleared the dictum for which unless a treaty contains an explicit wording empowering States with full discretion in the determination of what is necessary for the protection of security interests, escaping security clauses are to be considered non-self-judging.[202]

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who was granted rights under gas production concession with its contractual rights affected by emergency measures adopted by Argentinian government. Accessible at < https://www.italaw.com/ >.

[196] *Continental Casualty Co. v Argentina cit.,* Award 2008, para 187.

[197] Particularly, the Arbitral panel recognized that States have the knowhow to negotiate and ratify a self-judging clause, and if they did not explicit so, it is reasonable to think that they did not expect this type of effectiveness. See *El Paso Energy International Co. v Argentina cit.,* Award 2011, paras. 597-598.

[198] *Mobil Exploration and Development Inc. Suc. Argentina and Mobil Argentina S.A. v Argentina cit.* 2013, paras. 1041-1055.

[199] *Enron Corp. and Ponderosa Assets L.P. v Argentina cit.,* Award 2007, paras. 335-336; *Sempra Energy International v Argentina cit.,* Award 2007, para. 379.

[200] *Patrick Mitchell v. Democratic Republic of Congo,* award (9 February 2004), ICSID Case No. ARB/99/7. The owner of a legal consulting firm that saw its enterprise seized by Congolese military forces and unlawfully expropriated. Accessible at < https://www.italaw.com/ >.

[201] *Deutsche Telekom v. India,* Interim Award (13 December 2017), PCA Case No. 2014-10. a german undirect shareholder of an Indian company that saw annulled by the government a contract with a related Indian space research Organization, where it held interests on broadband service provision to Indian consumers. Accessible at < https://pca-cpa.org/cases/ >.

[202] *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Ltd. and Telecomm Devas Mauritius Ltd. v. India,* Award on Jurisdiction and Merits (25 July 2016) PCA Case No. 2013-09, para. 219. Accessible at < https://pca-cpa.org/cases/>.

This may be the reason why, many States have started to explicit the willingness to have the National Security provision be self-judging,[203] as it had already started happening after the Argentinian Crisis, when the absence of an explicit clause, the invoking party should be deprived by this exceptional escape door.[204] This aspect is contested yet, indeed in *El Paso* and *Mobil* cases the arbitrators decided that subsequent negotiations were not relevant to the question,[205] and did not support the other case law. Surely, the *Russia- Measures in Transit* has not sorted this effect yet, but the DSB has composed two panels dealing with the same subject in the context of *US – Measures on Steel and Aluminium Products,*[206] and *Qatar – Measures concerning goods from UAE,*[207] that will give a proper shape to this discipline as the other landmarks have done up to this moment.

Conclusive Remarks

To sum up, this chapter has demonstrated that many disputes today adopt approaches or interpretation that were laid down in precedent cases. However, it is important to note how these landmark cases do not operate as precedents, yet as steps in the bigger evolution of international law, specifically international economic law. It fell within the goal of the chapter to insist on the fact that despite the current reality is dominated by private dispute settlement systems and regards mostly Investor-States disputes, where the most valuable economic interests stake, international law relies on interstate adjudication for the bases of its disciplines and doctrines. The result is that behind almost any Treaty or international regulation or legal institute, there is an interstate dispute that has brought the problem under the spotlight to the attention of the eminent judicial experts creating the law that is and will be applied in all those trans-borders circumstances, irrespectively of the

[203] On the point, an important example is the US-Russia BIT 1992, where an article explicitly states "*whether a measure is taken by a party to protect its essential security interests is self-judging",* but we may consider further such as US-Ecuador BIT and in all the other US Model BITs, where there are explicit understandings on the topic. See Article 8 Protocol of the Treaty between the United States of America and the Russian Federation concerning the encouragement and reciprocal protection of Investment (17 June 1992); Article 18(2) US Model BIT (2012).
[204] See *LG&E Energy Corp and others v Argentina,* Award 2006, para. 213.
[205] *El Paso Energy International Co. v Argentina,* Award 2011, para. 609; and *Mobil Exploration and Development Inc. Suc. Argentina and Mobil Argentina S.A. v Argentina*, Decision on Jurisdiction and Liability 2013, para. 1038.
[206] WT/DS548/15 adopted on 28 January 2019 regarding the Constitution of the Panel.
[207] WT/DS576/2 adopted on 16 April 2019 regarding the request for the constitution of the Panel.

participation of state-actors to the dispute. There are no doubts about it: International law is a legal system, which however remains reliant on the practice and consent of States who move as main actors the its legal development.

Conclusions

Conclusively, this dissertation aimed to conduct a proper analysis on the relevance of inter-State adjudication related to economic matters and its current trends, as resulted from the evolution of practice and staking interests of the disputing parties during the course of time. Positively, in all the three stages of this investigation we have answered the question posed and achieved our goals after proper reflection and considerations. Firstly, we have established a framework of inter-State economic disputes, defining them as legal dispute on economic matters, and limiting its scope in the current times, after having considered proofs provided by case law. Additionally, it has been expressed precaution in relation to the particular principles and balances derived from the fact that States are challenging other sovereign equals, and as such the system require particular principles and must be aware of certain risks, mainly residing in sovereignty.

Secondly, in the fragmented reality of international law, we have assessed the *fora* States can adhere and why they may find preferable to file applications or commencing proceedings there. We have seen that there is no Court that is absolutely preferred, due to the various interests and preferences of States in international community, and often these are based on political rather than legal concerns. In this discussion, we have avoided the spectrum enlarged by diplomatic means, where the supremacy of politics over law is taken for granted, and we have confirmed that there is still space for law and for the rule of law in international economic disputes, despite the possible flaws of either the procedures or of the institutions.

Lastly, we have seen through past cases, decided by the PCIJ, its successor ICJ, by arbitral tribunals, and the WTO DSS, that the interpretation of law and the application of certain legal institutes have resulted from inter-State decisions. Particularly, the application of principles in recent crises has benefited from the evolution of the interpretation of authoritative voices expressed through international adjudicative bodies, and it is really fascinating to demonstrate that decisions held by arbitral tribunals in the XXI century have roots in judicial decisions accumulated in the first half of the XX one, i.e. *Chorzow factory case*

and the duty to give a just compensation, we have demonstrated that, in the formation of legal pillars, inter-state disputes have played an important role and are likely to keep this trend, especially on topics where States' conduct is at the centre of the judicial review, such as the case of national security exception to trade and investments.

Conclusively, current society is likely to undermine the practice and the importance of inter-State economic adjudication, due to the presence of economic sanctions, countervailing measures and unilateral political actions, taken to defend economic interests. However, it is absolutely wrong to presume that adjudicative means are useless or irrelevant in the settlement of controversies, where economic positions stake, because they still remain a tangible and plausible alternative to State traditional diplomatic ones, with the additional potential that they provide a third and neutral forum for the resolution of disputes under the law, and not just based on economic or political power. Hence, although law intervened later in the history of dispute settlement, since the institutionalization of international law, in our case international economic law, and of international adjudication, everything has changed. Currently, law plays a double significant role both as the substantial framework where inter-State disputes rise, and as the procedural and merits benchmark with which third adjudicative parties assess them. This is something that cannot be left out of the spotlight, because in the future there is a concrete possibility to experience a further transition from warfare to "Lawfare" in the reality of international disputes settled in what is a rule-based international order.

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