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Loretta Malintoppi

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2009

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CRIO PAPERS NO. 1/2009

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Loretta Malintoppi

ISSN 2037-6006

University of Catania
School of Law
CRIO Centre of Research on International Organizations
Villa Cerami
I – 95124 Catania
Italy

(http://www.lex.unict.it/crio/criopapers.asp)

METHODS OF DISPUTE RESOLUTION IN INTER-STATE LITIGATION: WHEN STATES GO TO ARBITRATION RATHER THAN ADJUDICATION

Loretta Malintoppi[1]

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[1] Of counsel, Eversheds LLP, Paris. Lecture delivered on May, 21 at the Closing Ceremony of the STiPIL Course 2008/2009 in Catania. This paper is largely based on an article published in the volume *New International Tribunals and New International Proceedings*, edited by A. Del Vecchio, Giuffré, 2006.

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A. Introduction

1. Disputes between States give rise to a variety of options for settlement. Before resorting to arbitration or judicial settlement of disputes "the continuance of which is likely to endanger the maintenance of international peace and security", Article 33(1) of the United Nations Charter presents States with a series of alternatives, such as negotiation, enquiry, mediation and conciliation. In addition, States can resort to "regional agencies or arrangements, or other peaceful means of their own choice."

2. However, despite the fact that today's world is characterized by growing litigiousness and by the multiplication of permanent international courts and tribunals, the number of State to State disputes which are actually litigated remains relatively low. This is particularly true of territorial disputes, where, unlike international commercial litigation, the stakes are often not measurable in financial terms. The issues involved can be complex and political implications paramount.

3. Domestic opinion often attributes great importance to questions which appear insignificant to the world at large. Thus, issues of sovereignty over small parcels of territory or unpopulated areas can assume for the countries involved enormous importance. In extreme situations, countries have been known to resort to armed conflict before they can agree to resolve their differences through a peaceful process leading to an adjudicated result[2].

4. In certain cases, negotiating issues of considerable domestic sensitivity may not be possible, and States may find it preferable to submit such disputes to a panel of neutral judges in order to avoid making unpopular decisions and "lose face" before their public opinion. Such cases may satisfactorily wind up as a "win-win" situation, with no real winners or losers. To the extent a decision may be criticised by a party, the responsibility may conveniently fall on the arbitral panel or the judicial body and not the relevant government. On the other hand, it is also possible that a day in court providing the opportunity to argue openly the parties' respective

[2] This was the case, for example, of the recent *Eritrea-Yemen* and *Eritrea-Ethiopia* arbitrations.

cases will lead more readily to an amicable settlement or open the door to compromise solutions.

5. In any event, when States decide to litigate their legal differences, different factors come into play that can tilt the balance in favour of arbitration or judicial settlement. I will review a number of considerations which may come into play for a State which is contemplating its options and will focus on arbitration as one of the available alternatives for inter-State dispute resolution compared with adjudication by an international judicial body.

B. Opting for Arbitration

6. By way of introduction, it should be recalled that the modern acceptance of arbitration as a method of settlement of inter-State disputes pre-dates by over a century the creation of the Permanent Court of Arbitration and the Permanent Court of International Justice[3].

7. The definition of inter-State arbitration remains to this day that provided by Article 15 of the 1899 Hague Convention for the Pacific Settlement of Disputes and repeated in Article 37 of the 1907 Hague Convention, i.e. "the settlement of differences between States by judges of their own choice and on the basis of respect for law." This definition was reconfirmed by the Permanent Court in the 1925 Advisory Opinion interpreting Article 3, paragraph 2, of the Treaty of Lausanne, and by the works of the International Law Commission, and, in more recent years, adopted by the arbitral tribunal in the 1981 *Dubai-Sharjah Border Arbitration* and by the International Court of Justice ("ICJ" or "the Court") in its 2001 judgment in the *Qatar-Bahrain* case[4].

8. The Permanent Court of Arbitration ("PCA"), established by the Hague Convention I for the Pacific Settlement of Disputes originally adopted in 1899 and amended in 1907, has the express object of "facilitating an immediate recourse to arbitration for international differences" where diplomacy has failed[5]. The PCA is not a judicial body, but consists

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3 This is assuming that the birth of inter-State arbitration can be fixed at the time of the Jay Treaty (1794) and the creation of Mixed Commissions for disputes arising out of the American war of independence.

4 See *I.C.J. Reports 2001*, para. 113.

5 Article 41.

of an International Bureau which acts as a registry and provides an administrative structure for arbitral tribunals. The PCA also maintains a list of arbitrators, compiled by the States parties to the Convention, which is designed to assist State parties in the selection of international arbitrators.

9. During the early years since its creation, the PCA enjoyed considerable success and a number of arbitrations were held under its auspices. However, after the establishment of the Permanent Court of International Justice in 1923, States refrained from submitting their disputes to the PCA as such, although its administrative services and facilities have been used more and more since the 1990s.

10. Between 1992 and 1996, the PCA also modernised its Optional Rules for Arbitrating Disputes between two States[6]. Since the mid-1990s, the International Bureau has acted as Registrar in a number of State-to-State arbitrations, which include - to cite only a few - the *Eritrea-Yemen*, *Eritrea-Ethiopia, Malaysia-Singapore Mox Plant (Ireland v. United Kingdom)* arbitrations. The most recent and widely publicized case where the PCA is acting as Registrar is the *Abyei* arbitration between the Government of Sudan and the Sudan People's Liberation Movement/Army. Two important maritime delimitation cases - brought under Annex VII of the Law of the Sea Convention - have also been administered by the PCA, rather than having been brought to adjudication by the ICJ or the Law of the Sea Tribunal ("ITLOS"), these are: *Guyana/Suriname* and *Barbados/Trinidad and Tobago*.

11. The PCA's growing role in this field has led authors to evoke the concept of "institutionalisation" of arbitration between States. In concrete terms, this phenomenon has not resulted in any particular formalisation of the arbitral process, since even when an arbitration is administered by an institution such as the PCA, or when the PCA acts as a registry to an arbitral tribunal, the arbitration still maintains all the characters of an *ad hoc* process.

12. Moreover, a number of important inter-State disputes have not even been held under the auspices of the PCA, but have been submitted to *ad hoc* tribunals without any further administrative assistance, save for the

[6] Other arbitration rules of the PCA which have been amended are : Optional Rules for Arbitrating Disputes between Two Parties of Which Only One is a State.

appointment of a registrar detached from any particular institution. To remain in the field of territorial disputes, these include: the *Rann of Kutch* arbitration (1968) between India and Pakistan,[7] the *Palena* (1967)[8] and *Beagle Channel* (1978)[9] arbitrations between Chile and Argentina, the *Channel Continental Shelf* case (1978)[10] between France and the United Kingdom, the *Dubai-Sharjah* case (1981)[11] and the *Taba* arbitration (1988)[12] between Egypt and Israel.

13. Much like in commercial arbitration, the cornerstone of arbitration in public international law is consent. Without a free expression of the parties' will to have a legal dispute decided by an appointed arbitral panel, there can be no arbitration. This consent may be expressed in an arbitration agreement (or *compromis)* or contained in a specific dispute settlement provision of a general treaty.

14. Naturally, the voluntary nature of the process leads to a greater flexibility than adjudication by a permanent court, but it cannot be confidently stated - as some argue - that arbitrators favour compromise solutions or are more inclined to decide on the basis of equity. The applicable law in arbitration - just like in adjudication - remains international law, generally speaking, based on the sources of law set forth in Article 38 of the Statute of the Court, unless the parties have conferred the power upon the tribunal to decide *ex aequo et bono* or to apply any specific principles.

15. There are a number of reasons why States may wish to submit their disputes to arbitration rather than adjudication and I will review them further, comparing the advantages and disadvantages of the two systems.

1. Is Arbitration Faster Than ICJ Proceedings?

16. The ICJ is often the target of criticism for the relatively slow pace of its proceedings. Although Article 48 of the Rules of Court states that "time-limits shall be as short as the character of the case permits", the practice of the Court - often at the parties' own insistence - has been to fix

7 50 *ILR* 2 (1968).
8 16 *UNRIAA* 109.
9 52 *ILR* 39.
10 54 *ILR* 6 (1979).
11 91 *ILR* 543.
12 80 *ILR* 224.

fairly long time-limits for the filing of written pleadings. Normally, six to twelve month time-limits are granted and on average ICJ proceedings can be expected to last for a minimum of four to five years.

17. The *Qatar-Bahrain* case is an extreme example of this practice. Lasting a total of ten years, the proceedings in this case were the second longest in the Court's history, after the *Oil Platforms* case between Iran and the United States which took eleven years in total[13]. Qatar filed an Application before the Court on 8 July 1991, and Bahrain's opposition to Qatar's basis of jurisdiction led the Court to request the parties to submit two pleadings each of which was to be devoted to questions of jurisdiction and admissibility. A hearing on these preliminary issues was held and a judgment rendered three years after Qatar's Application whereby the Court ruled that the Application concerned only certain specific claims of Qatar and granted a time-limit for both parties (30 November 1994) to submit the entire dispute to the Court.

18. On 30 November 1994 Qatar filed a document entitled "Act to comply with paragraphs (3) and (4) of operative paragraph 41 of the Judgment of the Court of 1 July 1994" in which it stated that, since the parties failed to agree to act jointly, Qatar was unilaterally submitting the whole of the dispute to the Court. On the same day Qatar filed its second Application. Bahrain opposed again the Court's jurisdiction by filing with the Registry a report, followed by a letter six days later, indicating that the Qatari separate Act "could not create the jurisdiction of the Court, or effect a valid submission in the absence of Bahrain's consent". Finally, by its Judgment of 15 February 1995[14], the Court found that it had jurisdiction to adjudicate upon the whole of the dispute and that the Application submitted by Qatar on 30 November 1994 was admissible.

19. When the parties simultaneously submitted their written pleadings on the merits, the time limits were extended for the filing of both the Memorials and Replies. Furthermore, there were requirements for additional pleadings comprising an interim report that was filed by Qatar in re-

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13 See G. Plant, "Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar v. Bahrain)" 96 *A.J.I.L.* (2000), pp. 198-210. In the *Oil Platforms* case Iran filed its Application on 2 November 1992 and the Judgment on the merits was rendered eleven years later *i.e.*, on 6 November 2003.

14 *Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar v. Bahrain), Jurisdiction and Admissibility*, *I.C.J. Reports 1995*, p. 6.

sponse to Bahrain's challenge of certain documentary evidence Qatar had filed with its pleadings which Bahrain claimed were fabricated. Overall, by the time the Court rendered its final judgment on the merits, ten years had elapsed since Qatar's first Application[15].

20. A similar situation concerned another case which combined territorial and maritime aspects: the *Land and Maritime Boundary between Cameroon and Nigeria*[16]. In that case, Cameroon's Application was introduced in 1994 and the final judgment was rendered eight years later, in 2002. However, the case was complicated by the submission of preliminary objections to the Court's jurisdiction by Nigeria and further delayed by Equatorial Guinea's request for permission to intervene (granted by the Court in 1999) and related proceedings. Thus, there are a number of procedural reasons explaining the length of these proceedings and it would be unfair to take them as characteristic of the ordinary course of business for the ICJ. After all, cases before the ICJ can be decided by a Chamber of the Court, with speedier and less cumbersome results. This was done through a special agreement signed in 1986 by the parties to the *Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras)* case. The Court's judgment was rendered only six years later, in 1992, a relatively speedy result, also taking into account Nicaragua's intervention in 1989[17]. In more recent years, the Court has successfully managed to catch up with its backlog of cases.

21. Having said that, arbitration remains a faster process than proceedings before the I.C.J. Some examples may serve to illustrate how procedural delays fare in *ad hoc* arbitration as opposed to ICJ proceedings. In the *Eritrea-Yemen* arbitration, like in the previous examples, the dispute concerned both sovereignty over territory (certain islands in the Red Sea) and maritime delimitation. The Arbitration Agreement signed on 2 October 1996[18] by the parties stipulated that the proceedings would be organised in two stages: a first phase concerning the scope of the dispute and sover-

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15 The Court rendered its judgment on the merits on 16 March 2001.

16 *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria*: *Equatorial Guinea Intervening) Judgment of 10 October 2002*, www.icj-cij.org.

17 *ICJ Reports 1992*, p. 351. However, this case was the object of revision proceedings, introduced by El Salvador's application of 10 September 2002 before a different Chamber of the Court. The Chamber rejected El Salvador's application for revision by a decision dated 18 December 2003.

18 This was preceded by an Agreement on Principles signed on 21 May 1996 in Paris with the mediation of the French Government.

eignty over the disputed islands, and a second phase dealing with the maritime delimitation. There are persuasive reasons for considering that establishing sovereignty first and then moving on to drawing the delimitation line is a more rational and effective way to proceed. In contrast, in the examples mentioned above, the entirety of the dispute had been submitted to the Court in one proceeding and thus the parties had to argue their respective positions on the maritime delimitation without having the benefit of knowing what the Court's decision was on the attribution of sovereignty over the disputed territory.

22. Before Yemen and Eritrea decided to refer their case to an arbitral tribunal, military skirmishes had broken out over the disputed islands. Both countries had experienced long civil struggles which led in one case to unification in 1990 (Yemen) and in another to independence in 1991 (Eritrea). Given the sensitivity of the issue and the threat of hostilities, it was important to provide for a speedy resolution of the dispute by a final and binding decision. This was reflected in the time-limits fixed for the written pleadings stipulated in the Arbitration Agreement: for the first stage, eleven months for a simultaneous exchange of Memorials, three months for the Counter-Memorials and two months for the Replies. The oral proceedings were to be held three months after the exchange of the last written submissions and the awards of the tribunal were to be rendered, in so far as possible, no later than three months after the end of the proceedings.

23. The Tribunal rendered its award on the first stage of the arbitration (scope and sovereignty over the islands) on 9 October 1998, e.g. within three months from the formal closing of the procedure, as the parties had stipulated in the Arbitration Agreement. The second stage was even faster, as the whole proceeding took a little over a year (including two rounds of written pleadings and oral arguments) and the final award was rendered on 17 December 1999. Thus, the entire arbitration - both sovereignty and maritime delimitation - was over within three years of the signature of the Arbitration Agreement.

24. In the *Eritrea-Ethiopia* arbitration, the parties opted for even shorter time-limits. A war had been fought between Ethiopia and Eritrea since May 1998. A major issue contributing to the hostilities was the fact that the countries' borders remained undetermined and thus the Agreement ter-

minating the military hostilities of 12 December 2000 ("the December Agreement") foresaw the creation of a Boundary Commission charged with the delimitation and demarcation of the entire boundary.

25. This was a complex case which required extensive research in the historical background, conducted mainly in the archives of the Italian Ministry of Foreign Affairs. Nonetheless, the time-limits were extremely tight. The December Agreement provided for the simultaneous filing of written submissions by the parties on the mandate of the Commission within 45 days from the date of the Agreement. The parties subsequently had three months to file simultaneous Memorials, three months for an exchange of Counter-Memorials and one month for the Replies. Even by commercial litigation standards, these time-limits resembled those applying to fast-track arbitrations.

26. The balance of the proceedings was equally swift: the oral phase took place within two months of the filing of the Replies and the Commission rendered its Decision on the delimitation of the border four months after the closing of the hearings.[19] The total amount of time spent for this arbitration was thus sixteen months from the date of the *compromis* to the final Decision. All parties involved, the Boundary Commission as well as the parties' representatives, complied with very demanding time-limits, thus demonstrating that it is possible to litigate a complex territorial dispute between States within a tight schedule. Nonetheless, given the complexity of this case, which involved the delimitation of the entire land boundary between the parties, it would probably have been preferable for the parties to agree to a more realistic time-table both for the preparation of their cases and for the work of the Boundary Commission.

27. The *Abyei* arbitration holds the record of the fastest procedural schedule to date. The procedural dates have been set by the Tribunal in consultation with the parties and in accordance with the Arbitration Agreement: 18 December 2008 (i.e., about 45 days from the date on which the Tribunal was formally constituted) for the Memorials, 13 February 2009 for the filing of the Counter-Memorials and 28 February 2009 for the Rejoinders. The oral hearings were held less than 2 months after the filing

[19] Decision regarding Delimitation of the Border between the State of Eritrea and the Final Democratic Republic of Ethiopia of 13 April 2002, published in the PCA's website, at <http://www.pca-cpa.org>.

of the Rejoinders, from 18 to 23 April 2009, and the Tribunal rendered its award 90 days from that date, i.e. on 22 July 2009. Thus, the entire arbitration lasted a total of seven months, a regular *tour de force* for all involved.

28. Other examples of arbitrations provide more workable time-limits. In the *Guinea-Bissau/Senegal* case, the parties had four months to file Memorials and Counter-Memorials and two months for Replies and Rejoinders[20]. In the *Taba* arbitration, Egypt and Israel enjoyed five months for the Memorials and Counter-Memorials, could file Rejoinders within forty-five days of a fourteen-day notification, and held hearings within two months of the filing of the last pleadings. However, these cases date back thirty and twenty years respectfully and it is to be feared that - after more recent arbitrations have opted for very tight time-limits and parties have succeeded in respecting very demanding procedural schedules in spite of the burdens - the example of the latter cases is more likely to be followed in future disputes.

2. Arbitration May be Preferable for Political Reasons

29. Given that the hearings before the ICJ are open to the public and all submissions, written and oral, as well as the Court's judgments, are published in the Court's website and in the ICJ Reports,[21] one of the possible advantages that States may find in arbitration over adjudication by the International Court was confidentiality.

30. In sensitive cases, where the relations between the parties are particularly strained or the interests at stake amount to quasi-internal matters, States sometimes prefer to keep the proceedings confidential. Such considerations may have played a role in the events leading to the *Taba* arbitration, when a Joint Commission of representatives of Egypt and Israel was unable to establish the location and demarcate the boundary as stipulated in the Treaty of Peace of 26 March 1979 between the two countries. Egypt and Israel chose to submit to arbitration their differences regarding the location of fourteen of the boundary pillars demarcating their bound-

[20] At the request of the parties the Tribunal accepted to extend the time-limits specified in the Arbitration Agreement for the filing of the Reply and Rejoinder by two additional months.

[21] Generally, the parties' written submissions become public on or after the opening of the oral proceedings (Article 53 of the Rules of Court).

ary[22]. Likewise, Dubai and Sharjah preferred arbitration to adjudication in order to decide their territorial differences in the hope of preserving the confidentiality of the process[23].

31. But the times are changing and confidentiality may not be a priority anymore. We live in an era when transparency and publicity are seen as important aspects of arbitrations involving States. The *Abyei* arbitration was entirely open to the public since the parties chose to make the hearings and written submissions fully public. The PCA was also authorized in the Arbitration Agreement to make the Award public on its website.

32. Arbitration may also be the preferred mechanism for resolution of certain categories of disputes or for settling a number of claims against a State party. This was the case of the mixed tribunals created after World War I to settle territorial questions such as the Mexican Claims Commission, which handled claims against Mexico, and, more recently, the United Nations Compensation Commission established for the settlement of the claims against Iraq arising from its invasion of Kuwait in August 1990[24]. Similarly, arbitral panels may be appointed to decide the matters pending between two States parties and deciding claims brought by nationals of one party against the other State party, as was done by the United States and Iran with the creation of the Iran-U.S. Claims Tribunal and Ethiopia and Eritrea with the recently established Claims Commission[25].

3. The Ability to Choose the Arbitral Tribunal

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22 For a copy of the *Taba* Award, see 80 *ILR* 224-364.

23 For a copy of the award in *Sharjah-Dubai*, see 91 *ILR* 543.

24 See the UNCC web site <http://www.unog.ch/uncc/>. See also R.B. Lillich (ed.), *The United Nations Compensation Commission* (Irvington, NY, 1995); B.G. Affaki, 'The United Nations Compensation Commission: a new era in claims settlement?' (1993) 10(3) *Journal of International Arbitration* 21; J.R. Crook, 'The United Nations Compensation Commission – A New Structure to Enforce State Responsibility' (1993) 87 *AJIL* 144; R. Bettauer, 'The United Nations Compensation Commission – Developments Since October 1992' (1995) 89 *AJIL* 416; V. Heiskanen and R. O'Brien, 'UN Compensation Panel Sets Precedents on Government Claims' (1998) 92 *AJIL* 339; R. P. Alford, 'Well Blowout Control Claim' (1998) 92 *AJIL* 287.

25 The Eritrea-Ethiopia Claims Commission was established pursuant to Article 5 of the Agreement signed in Algiers, on 12 December 2000 between the Governments of the State of Eritrea and the Federal Republic of Ethiopia. See the PCA web-side<http://www.pca-cpa-org>. The Decisions issued by the Claims Commission to date also available on the PCA's website.

33. A permanent judicial body, such as the ICJ, offers the advantage of having a panel of sitting judges who are recognised experts in the field of international law representing different legal cultures and geographical regions of the world. Another obvious advantage of the ICJ is that the judges do not have to be compensated by the parties, thus saving considerable amounts in arbitrators' fees. Similarly, parties to ICJ litigation enjoy the services of the Registry of the Court for administrative matters, while in arbitration, the parties have to arrange (and pay) for the services of a registry which must thus be added to the arbitrators' fees.

34. There are also ways of rendering ICJ proceedings more flexible and similar to arbitration. For instance, the possibility of appointing a judge *ad hoc* can be a reassurance for the State that appointed him or her. Moreover, pursuant to Article 26, paragraph 2 of the Statute of the Court, parties can establish a Chamber of the Court to deal with a particular case. In that event, the number of the judges which constitute the Chamber is determined by the Court with the approval of the parties.

35. Nonetheless, State parties are often attracted to the idea of selecting the entire panel that will be called upon to decide their dispute and controlling the method of their appointment. The idea of managing the process of selection and appointment of arbitrators is indeed appealing, not only because States may wish to appoint an individual who is familiar with a particular legal culture or who comes from a specific region of the world, but also because they may wish to retain a certain measure of control in the appointment of the Chairman of the panel and determine from the outset the mechanism of decisions upon challenges and replacements of arbitrators.

36. Precisely because the selection of a tribunal's members is left to the parties, these must give careful consideration not only to the professional expertise and reputation of the candidates, but also to other factors. These include the prospective arbitrator's personal qualities and character, his/her independence and impartiality and ability to inter-act with the rest of the tribunal. Another aspect that should not be underestimated is the arbitrator's knowledge and proficiency in the language of the arbitration, which should be sufficient to allow the arbitrator to command the legal subtleties of a particular language, on the same level as the other members of the panel.

37. If the parties can choose the arbitrators, they can also decide upon their number, usually limited to either three or five, but the parties can of course also opt for a sole arbitrator if their dispute justifies it[26]. This point will be further discussed later; for purposes of this discussion, it suffices to say that having a smaller adjudicating panel than the fifteen (or sixteen if a judge *ad hoc* is nominated) judges sitting on the Court or the twenty-one judges of the Law of the Sea Tribunal, may result in speedier proceedings and shorten the deliberation process.

4. Adoption of Rules of Procedure

38. A possible advantage of arbitration, as opposed to adjudication, is that the parties may choose their own rules of procedure and tailor them to the specific needs of a given case. Although this can also be achieved by drafting provisions to that effect in a *compromis* to submit a dispute to the ICJ, the fact remains that some of the Rules of Court which in certain circumstances States would rather avoid - such as those allowing for the intervention of third States (Articles 62 and 63 of the Court's Statute) or the granting of provisional measures (Section D, Subsection 1 of the Rules of Court) - still apply in ICJ proceedings.

39. At the same time, drafting detailed procedural rules for the organization of arbitral proceedings can be a time-consuming process. The procedural rules are generally specified in the arbitration agreement and should be drafted in unambiguous and fairly detailed terms in order to avoid leaving entirely to the tribunal important decisions which will affect the conduct and organisation of the proceedings. Quite aside from the details regarding the filing, number and sequence of the parties' pleadings, the organisation of the hearings, the assembling of documentary evidence and witnesses testimony, the procedural rules should also cover logistical aspects such as the choice of the seat of arbitration, the language of the arbitration, the translation of documents, etc. Specific points of procedure that may be covered by the *compromis* also include the mechanism for deciding possible challenges or replacements of arbitrators, the interpretation or revision of an award or the correction of an error contained therein.

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[26] The most obvious example of this is Judge Huber in the *Island of Palmas* case 2 UNRIAA 829, 22 AJIL 867 (1928), but States can also suggest that a head of State acts as a sole arbitrator, as was the case, for instance, in the *Argentina-Chile* case (38 *ILR* 10) and the *Beagle Channel* arbitration (52 *ILR* 93).

40. If the parties have not expressly provided for procedural rules, the Hague Convention of 1899 (revised in 1907) contains principles which may be used to the extent that there are gaps in what was agreed between the parties regarding the arbitral procedure[27]. Alternatively, States can apply the 1992 Optional Rules for Inter-State Arbitration issued by the PCA, which have adapted the UNCITRAL Rules (designed for commercial arbitration) for use in State-to-State arbitrations which is what the Parties did in the *Abyei* arbitration. In any event, the tribunal will typically hold a procedural meeting with the parties and their representatives at the beginning of the arbitration to decide upon logistical matters, fix a calendar of the proceeding and generally agree on the procedural rules.

[27] See 1907 Convention for the Pacific Settlement of International Disputes, available at http://www.pca-cpa.org.

5. The Role of Third Parties

41. Frequently, politics and diplomacy play an important role in the decision to go to arbitration. Greater cooperation between the parties is expected and required, but when that is lacking, third parties can assist in facilitating and guiding the settlement process.

42. For instance, in the conflict between Yemen and Eritrea, the U.N. Secretary-General Boutros Boutros Ghali first, and later the French Government, assisted the parties in a mediation effort which was concluded with the signature of an Agreement on Principles on 21 May 1996. Moreover, the French Ministry of Foreign Affairs provided logistical support and the Deputy Legal Director of that Ministry presided over the drafting session between the parties and their representatives which led to the signature of the Arbitration Agreement on 3 October 1996. France also played a monitoring role in the region to ensure that the parties did not engage in any self-serving activities on the disputed islands designed to improve their position or having the possibility of exacerbating the dispute.

43. The European Union and the United States played similar roles in attempting to end the hostilities between Ethiopia and Eritrea and favouring the establishment of a Commission for the delimitation and demarcation of their disputed boundary. In addition, the United Nations Mission in Ethiopia and Eritrea (UNMEE) monitored the implementation of the Peace Agreement between the parties. The U.S. Government was also a facilitator during the Abyei Peace process.

44. At the same time, in State-to-State arbitrations, there is generally no possibility of a third State intervening in the case as exists under Article 62 of the Court's Statute for ICJ cases. This can be an important consideration for States, particularly where maritime boundaries are at issue.

6. Cases When Arbitration is the Only Forum for Dispute Settlement

45. In certain situations, arbitration may be the only option for dispute settlement. This is the case of the mechanism instituted by Article 287 of the 1982 U.N. Convention on the Law of the Sea (UNCLOS). Pursuant

to paragraph 3 of that provision, if a State has not chosen by a written declaration one of the different dispute settlement methods listed therein, it shall be deemed to have accepted arbitration in accordance with UNCLOS, Annex VII. Similarly, pursuant to paragraph 5 of Article 287, if the parties to a dispute have not opted for the same dispute settlement method, and unless they agree otherwise, the dispute can only be submitted to Annex VII arbitration.

46. Annex VII arbitral tribunals are composed of five members. Article 3(c) and (d) of Annex VII provides that each party appoints one member of the tribunal with the remaining three members being appointed by agreement of the parties. In the absence of the parties' agreement on one or more arbitrators or the presiding member, the President of the Law of the Sea Tribunal will make the necessary appointments (Article 3(e)). Annex VII tribunals decide upon their procedural rules (Annex VII, Article 5), which are usually modelled on UNCITRAL Rules.

C. Establishing the Arbitral Tribunal and Registry

1. Issues Relating to the Constitution of the Tribunal

47. As noted above, the method of appointment and composition of the arbitral tribunal is an aspect of inter-State arbitration which warrants careful consideration. The legal aspects of a given case are obviously important, but political sensitivities may also have an impact on the final selection of the arbitrator(s) appointed by a State.

48. In the *Eritrea-Yemen, Eritrea-Ethiopia* and *Abyei* arbitrations, the governing arbitration agreements provided for a five-member panel, where each party appointed two arbitrators who together appointed the Chairman[28]. This solution may have the undesired result that the Chairman of

[28] In *Eritrea-Yemen*, Eritrea appointed ICJ Judges Stephen Schwebel and Roselyn Higgins and Yemen appointed Mr. Keith Highet and Dr. Ahmed el Kosheri. The arbitrators appointed Sir Robert Jennings to preside over the Tribunal. In *Eritrea-Ethiopia*, Eritrea appointed Judge Stephen Schwebel and Mr. Jan Paulsson, who was challenged by Ethiopia and later replaced by Prof. Michael Reissman. Ethiopia appointed Prince Bola Adjibola and Sir Arthur Watts. The arbitrators appointed Prof. Eli Lauterpacht as President of the Commission. In *Abyei*, the Government of Sudan appointed Judge Al Khasawneh and Professor Hafner and the SPLM/A appointed Professor Michael Reisman and Judge Schwebel. The Secretary-General of the PCA appointed Professor Dupuy to chair the Tribunal.

the tribunal is the only "neutral" member of the panel and may find himself/herself in a difficult position vis-à-vis his/her colleagues.

49. In the *Taba* arbitration, Israel and Egypt opted for panels with three neutral members and two party-appointed arbitrators. As recalled above, this composition is also foreseen by the mechanism of Annex VII of the Law of the Sea Convention.

50. It is essential that the parties designate an appointing authority, either in their *compromis*, or later in the proceedings in consultation with the tribunal, in order to entrust a neutral body with the task of deciding the issues relating to the tribunal's composition. This is not only necessary in the event the parties cannot agree on the names of the tribunal's members, but also when an arbitrator needs to be replaced due to incapacity or resignation.

51. A question that may also arise, either at the time of the tribunal's appointment or in the course of the arbitral proceedings, and which can also be referred to an appointing authority, concerns replacement of arbitrators due to incapacity or death or following a possible request for challenges for lack of impartiality or independence. Indeed, if the parties do not foresee a mechanism for introducing challenges or disqualification requests, and if they do not carve out a role for an appointing authority in this respect, confusion and procedural delays may result and the issue may eventually be left to the decision of the arbitral tribunal.

52. The importance of providing for a mechanism to manage and ultimately decide challenges is best illustrated by an example. In the *Eritrea-Ethiopia* arbitration, Ethiopia lodged a challenge against one of the arbitrators appointed by Eritrea. However, there was no specific provision contemplating challenges in the arbitration agreement and the Boundary Commission had not even adopted its own rules of procedure. Accordingly, the Commission - recognising the immediate need for a procedural rule regulating the matter - adopted an interim rule of procedure (without prejudice to the later adoption of a full set of rules). The Commission's rule stated that the non-challenged members of the Commission would endeavour to decide the challenge. In the absence of a decision, the matter would be referred to the UN Secretary-General for a decision.

53. The members of the Commission could not reach an agreement about the challenge. However, before the matter could be decided by the UN Secretary-General, the challenged arbitrator tendered his resignation. Clearly, the lack of a specific provision regulating challenges in its case resulted in procedural delays and complications which could have been easily avoided had the parties included a provision to this effect in their arbitration agreement.

54. Perhaps learning from that experience, the Arbitration Agreement in the *Abyei* case provided that the arbitrators sign a "declaration of impartiality, independence and commitment".

2. Internal Functioning of the Tribunal

55. Provision must also be made in arbitration for the internal functioning of the arbitral tribunal and notably for the number of arbitrators necessary to constitute a valid *quorum*. It is also customary that decisions on relatively non-controversial procedural questions be delegated to the President of the arbitral panel.

56. Deliberations of the Tribunal take place in private and are subject to strict rules of confidentiality. However, the presence and assistance of a Registrar or an administrative secretary, if there is one, may be requested by the tribunal.

3. The Registry

57. While the proceedings before the International Court of Justice have the support of the Registrar of the Court and its staff, *ad hoc* arbitration does not enjoy the assistance of an administrative entity. It is therefore customary for parties - or arbitral tribunals once they are constituted - to appoint a Registry or an administrative secretary to assist the arbitral tribunal.

58. The Registry acts as the official channel for all communications between the tribunal and the parties and generally provides a number of important administrative services, including, *inter alia*: keeping track of all costs and advances made by the parties, organizing the exchanges of pleadings, participating in the tribunal's meetings and deliberations and

arranging the logistical aspects of the procedure. As noted above, in a number of recent State-to-State arbitrations, the Permanent Court of Arbitration has provided the services of its International Bureau as Registrar and offered its facilities in The Hague - or those of the I.C.J. - for the hearings.

4. Time-Limits for Written and Oral Pleadings and for Delivering the Award

59. One way of ensuring expeditious proceedings in inter-State arbitration is to provide for tight time-limits for the parties' written submissions and oral arguments and for the Tribunal's deliberations and rendering of an award in the arbitration agreement, as was done for instance in the *Eritrea-Yemen* and *Eritrea-Ethiopia* arbitrations[29]. Naturally, the possibility for extensions in exceptional circumstances can also be foreseen in the parties' *compromis*.

60. As to the sequence of written pleadings, in ICJ proceedings, and despite the Court's Practice Direction No. I, which encourages the seriatim filing of written pleadings in cases brought by special agreement, the Rules of Court provide for the simultaneous filing of pleadings for cases begun by the notification of a special agreement when the parties have failed to specify any requirements as to the order of pleadings (Article 46, para. 1 of the Rules of Court). This is justified by the procedural fiction that - when parties file a joint agreement to arbitrate a dispute - there technically is no claimant and no defendant. However, this puts the parties in the uncomfortable position of having to anticipate their opponents' arguments, a sort of "shadow-boxing", which is not always conducive to the most efficient results.

61. It is certainly advisable that parties to inter-State arbitrations agree to the order and number of pleadings in advance and, preferably, that they foresee seriatim exchanges.

62. While the parties' submissions and the tribunal's awards may be published with the parties' consent, the hearings are usually closed to the public and are held only in the presence of the Tribunal, the registry (if any), the parties and their agents and representatives. As seen above, for the time being the *Abyei* arbitration remains the only notable exception to this rule.

63. When it comes to the timing for the rendering of the arbitral award, the deliberation process under arbitration is likely to be more rapid than

[29] See paras. 22-26 above.

the Court's judicial deliberations given the fact that it only involves a limited number of arbitrators rather than fifteen or more judges.

D. Terms of Reference of the Tribunal

1. Jurisdictional Parameters: the Limits of the Tribunal's Jurisdiction and Scope of the Arbitration Agreement

64. An arbitration agreement which establishes the issues to be decided by an arbitral tribunal is not dissimilar from a special agreement or *compromis* by which disputes may be submitted to the ICJ. A special agreement is the conventional instrument by which the parties express their intention to confer jurisdiction on the Court and through which they define the task of the Court. The ICJ has stated that when "proceedings are instituted by special agreement it must not exceed the jurisdiction conferred on it by the parties", and it must also "exercise that jurisdiction to its full extent"[30].

65. Likewise, in an arbitration the parties can define with precision the issues that are to be decided by the arbitral tribunal in their arbitration agreement. Accordingly, the arbitral tribunal has the authority only to answer those issues that the parties have referred to it. However, the arbitral tribunal has the power to decide any dispute between the parties with respect to its jurisdiction (*kompetenz-kompetenz* principle) and can thus interpret the special agreement on which its jurisdiction is based in order to establish whether such jurisdiction can be validly exercised[31].

66. The degree of precision with which the scope of the arbitration tribunal's jurisdiction can be determined varies. For example, in the *Taba* arbitration between Egypt and Israel, the tribunal was mandated to decide the location of a certain number of boundary pillars of the recognized international boundary between Egypt and the former mandated territory of Palestine. However, the parties did not authorise the tribunal "to address the location of boundary pillars other than those specified" in an annex to

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30 Rosenne, *op cit.*, citing *Continental Shelf* (*Libyan Arab Jamahiriya/Malta*), *Judgment, I.C.J. Reports 1985*, p. 13, at p. 23 (para. 19).

31 See, for instance, the Iran-U.S. arbitral award of 21 December 1981, *Iran-United States Claims Tribunal: Decision with regard to Jurisdiction over Claims Filed by Iran against U.S. Nationals*, 21 *I.L.M.* 1982, pp. 78-91.

the arbitration *compromis*[32]. In this document, the parties restricted the tribunal's task as follows: "The Tribunal is not authorized to establish a location of a boundary pillar other than a location advanced by Egypt or by Israel". In other words, the tribunal had no other option with respect to the location of the disputed boundary pillars than choose between the parties' positions and could not opt for a third solution.

67. In inter-State arbitration, in accordance with the *non ultra petita* rule, regarded as both a rule of procedure and as relating to jurisdiction, a tribunal is not to go beyond the scope of its mandate. Furthermore, problems will arise, and the award may be challenged, if the arbitral tribunal: i) fails to accept the parties' choice of applicable law; ii) does not address the questions to be determined; or iii) addresses questions that were not included in its mandate[33].

68. Therefore, if the award has not remained within the framework of the issues to be determined, a party may request that the award be set aside. This occurred in connection with the arbitral award rendered in an arbitration between Guinea-Bissau and Senegal the validity of which was submitted by Guinea-Bissau to the International Court of Justice.

69. In that case, two questions were contained in the arbitration agreement, e.g.: i) whether an agreement concluded in 1960, consisting of an exchange of diplomatic notes which related to the maritime boundary, had the force of law in the relations between Guinea-Bissau and Senegal and ii) if the first question was answered in the negative, what was the course of the line delimiting the maritime territories of the two States. Guinea-Bissau argued that the arbitral tribunal had failed to answer the second question. The Court ruled that the arbitral tribunal had completed its task since it had answered the first question in the affirmative. Accordingly, in the Court's view, "The Tribunal could thus find, without manifest breach of its competence, that its answer to the first question was not a negative one, and that it was therefore not competent to answer the second question"[34].

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32 *Egypt-Israel Arbitration Tribunal: Award in Boundary Dispute Concerning the Taba Area*, 27 *I.L.M.* 1421 (1988).

33 Merrills, J.G., *International Dispute Settlement*, Third Edition, Cambridge University Press, 2002., p. 109.

34 *Arbitral Award of 31 July 1989, Judgment, I.C.J. Reports 1991*, p. 53, at p. 73.

70. In maritime delimitation cases the arbitral tribunal may be asked to decide the delimitation of a single, multi-purpose maritime boundary for all maritime areas, or it may be requested to provide multiple lines for the different zones that fall to be delimited.

71. In the *United Kingdom/France Continental Shelf* case, the arbitral court was requested to decide "the course of the boundary (or boundaries) between the portions of the continental shelf appertaining to the United Kingdom and the Channel Islands and the French Republic, respectively, westward of 30 minutes west of the Greenwich Meridian as far as the 1,000 metre isobath"[35]. In this case, the Court of Arbitration had the option whether to adopt one or several delimitation lines. Eventually, the Court of Arbitration opted for two lines in the area to be delimited within the English Channel. The Court first decided on a mainland-to-mainland median line that ignored the Channel Islands; then it drew a second line to delimit the continental shelf of the islands, a 12-mile "enclave" around the islands, but the Court denied its competence in those areas where the boundary that resulted would be a territorial sea and not a continental shelf boundary, as, otherwise, it would have gone beyond the terms of the parties' *compromis*.[36]

72. In both the *Guinea/Guinea Bissau*[37] and *Guinea-Bissau/Senegal* arbitrations, in addition to answering specific questions with regard to particular conventions previously signed between the parties - as was the case in *Guinea-Bissau/Senegal* - or agreements signed between the colonial powers - as was the case in *Guinea/Guinea-Bissau*, the tribunal was assigned the task of determining the course of the boundary between the maritime territories of the two States, thus to issue a decision that would encompass all maritime zones, and establish the parties' respective jurisdiction over the sea as well as over the sea-bed.

73. In the *Eritrea-Yemen* arbitration, the scope of the dispute submitted to the arbitral tribunal was also an issue. The importance of this question

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35 *Delimitation of the Continental Shelf (United Kingdom of Great Britain and Northern Ireland and the French Republic)*, Award of 30 June 1977, 54 *I.L.R.*, 6, at 13.

36 *Delimitation of the Continental Shelf (United Kingdom of Great Britain and Northern Ireland and the French Republic*, Decision of 30 June 1977, 54 *I.L.R.* 6.

37 *Guinea/Guinea-Bissau: Dispute concerning Delimitation of the Maritime Boundary*, Award of 14 February 1985, 25 I.L.M. 251 at 255 and *Case concerning the Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, 83 *I.L.R.* 1, at 10.

was such that the Agreement on Principles concluded by the parties in May 1996 contemplated a first stage of the arbitration entirely devoted to the definition of the scope of the dispute and a second stage concerning the question of sovereignty and the maritime delimitation. Subsequently, with the Arbitration Agreement of 3 October 1996, the decision on the scope of the dispute was to be decided by the tribunal in the first stage of the arbitration together with the decision on territorial sovereignty (Arbitration Agreement, Article 2, paragraph 2).

74. The scope of the dispute to be decided by the *Abyei* Tribunal concerned whether the ABC Experts exceeded their mandate. If the Tribunal determines that they did not, it shall simply issue a declaration to that effect and ask for immediate implementation of the ABC Report. If the Tribunal determines that the Experts did exceed their mandate, it will proceed to delimit and demarcate the disputed area.

2. The Applicable Law

75. When bringing their dispute to arbitration, it is preferable that State parties specify in the arbitration agreement the law that shall apply to the merits of their dispute. In any event, even in the absence of the express specification by the parties, the tribunal must decide the dispute in accordance with law. Typically, the applicable law set forth in an arbitration agreement refers to the different sources of international law as set forth in Article 38(1) of the Statute of the International Court of Justice, which comprises international conventions, international custom, general principles of law recognized by civilized nations and judicial decisions and the teachings of the most highly qualified publicists (the latter category being a subsidiary means for the determination of the rules of law)[38].

76. In certain instances the parties may indicate special norms or criteria to take into account or ask the Tribunal to apply a specific treaty or treaties. For instance, in the *Ethiopia/Eritrea* arbitration, the parties' agreement provided for the Boundary Commission to delimit and demarcate

[38] See Shaw, M.N., *International Law*, Fifth Edition, Cambridge University Press, 2003, p. 955. Shaw indicates that in accordance with Article 28 of the 1928 General Act for the Pacific Settlement of Disputes, as revised in 1949, if nothing is provided in the arbitration agreement with regard to the law applicable to the merits of the case, the arbitral tribunal is to apply the rules as laid down in Article 38 of the Statute of the International Court of Justice (*Ibid*., footnote 34).

the colonial treaty border between them based on "pertinent colonial treaties (1900, 1902 and 1908) and applicable international law".

77. As stated above[39], in the *Eritrea/Yemen* arbitration the arbitral tribunal was requested to provide rulings, "in accordance with international law" in two stages. The parties had specified in their arbitration agreement of 3 October 1996 that the tribunal was to decide territorial sovereignty - the first stage - "in accordance with the principles, rules and practices of international law applicable to the matter, and on the basis, in particular, of historic titles". For the second stage, the arbitral tribunal was to decide "taking into account the opinion that it will have formed on questions of territorial sovereignty, the United Nations Convention on the Law of the Sea, and any other pertinent factor".

78. Historic titles played an important role in the parties' arguments in the first phase of the *Eritrea/Yemen* arbitration. Yemen's claim to the Red Sea islands relied heavily on "ancient" title, which Yemen argued existed before the second Ottoman occupation of the 19th century. Yemen argued additionally that title reverted to it when the Turks were defeated after World War I and when the Ottoman Empire renounced its title to the islands by the Treaty of Lausanne in 1923.

79. Eritrea's claim was equally dependent on an historic title and in particular on the territorial claims of its predecessor in title, Italy, to some of the disputed islands. Eventually, neither Party was able to persuade the Tribunal that "this history of the matter reveals the juridical existence of an historic title, or historic titles, of such long established, continuous and definitive lineage to these particular islands, islets and rocks as would be a sufficient basis for the Tribunal's decision."[40]

80. In the compromis leading to the *Taba* arbitration, the parties specified that the arbitral tribunal was to decide the location of the boundary pillars "in accordance with the Treaty of Peace concluded by Egypt and Israel on 26 March 1979, the 25 April 1982 Agreement by which Egypt and Israel agreed to submit the remaining technical questions concerning the international boundary to an agreed procedure to achieve a "final and

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39 See para. 21.

40 *Eritrea-Yemen: Award of the Arbitral Tribunal in the First Stage of the Proceedings (Territorial Sovereignty and Scope of the Dispute)*, para. 449.

complete resolution, in conformity with Article VII of the Treaty of Peace" and Annex I to the Treaty of Peace.

81. Despite the fact that the parties specifically wished to define the tribunal's task in this manner, they were subjected to the critical commentary of one member of the tribunal in her dissenting opinion to the award, who wrote: "It is rare for the powers of an arbitral tribunal to be limited in such a way. Usually, the tribunal is empowered to establish a boundary or part thereof according to its own opinion and not necessarily in accordance with the line claimed by either of the parties"[41]. In the *Abyei* arbitration agreement, the applicable law includes, in addition to the provisions of the Comprehensive Peace Agreement ("CPA"), "general principles of law and practices as the Tribunal may determine to be relevant" (Article 3.1).

82. In certain cases, the parties may instruct the arbitral tribunal to decide *ex aequo et bono*, i.e., to rely on equitable considerations in order to expand on their application and interpretation of the law. Applying equitable principles is particularly appropriate for disputes concerning the delimitation of maritime zones: as established by the jurisprudence of the ICJ, State practice and international conventions, delimitation is to be achieved in accordance with equitable principles (*infra legem*), taking into account all relevant circumstances, so as to reach an equitable result[42]. Arbitral agreements can also confer on the tribunal the power to act as "amiable compositeur", i.e., to seek an amicable settlement on the basis of non-legal considerations[43].

83. In maritime delimitation or land boundary cases, it is common practice for the parties to request the arbitral tribunal to include as part of its award an illustrative map depicting the boundary line. For example, in the arbitration agreement signed by Guinea-Bissau and Senegal to submit their dispute relating to their maritime boundary, the parties specified that the decision of the tribunal was to include "the drawing of the boundary line on a map" for which the Tribunal was empowered to appoint one or

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41 *Egypt-Israel Arbitration Tribunal: Award in Boundary Dispute Concerning the Taba Area*, 27 *I.L.M.* 1421 (1988), Dissenting Opinion of Prof. Lapidoth, p. 1497.

42 Merrills, J.G., *op. cit.*, p. 103.

43 "Amiable composition" was frequently used in the 19th century but appears to have fallen into oblivion in recent times.

more technical experts in the map's preparation[44]. Similarly, in the arbitration agreement signed by Eritrea and Yemen the parties agreed that the Tribunal should indicate, but for illustrative purposes only, the course of delimitation on an appropriate chart.

3. The Role of Agents and Co-Agents

84. The appointment of agents and co-agents as official representatives of the parties is of course compulsory in the Rules and Statute of the ICJ. In a contentious case before the ICJ an agent may serve at least five roles: i) official representation of a party to the Court; ii) direct participation in the argument of the case before the Court; iii) supervision of the team in the preparation and presentation of the State's case; iv) involvement in decision-making by the State's government on matters that affect the case; and v) coordination and negotiation with other governments and organizations regarding the case[45]. However, under the Rules and Statute of the Court, only the first role is officially prescribed[46].

85. By the same token, when two States elect to bring their dispute to an arbitral tribunal, they usually appoint individuals to act as their agents and co-agents.

86. Agents are frequently government officials, but they need not be. There is no specific requirement that the agent be a lawyer or even that he/she have a legal background and the Statute and Rules of the Court do not provide specific guidance as to the qualities of an agent. The agent will have the task of liaising with the arbitral tribunal and he/she will also have the role of coordinating and directing the presentation of the State's case to the arbitral tribunal. The agent for each State in an inter-State arbitration shall also be responsible for attending any meetings of the parties called by the tribunal and signing the party's written pleadings. In many arbitrations an agent will appoint a co-agent or several co-agents, sometimes referred to as deputy agents. The co-agent will act in the place of the agent, should the latter be unavailable.

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44 *Guinea-Bissau v. Seneg*al, 83 *I.L.R.* 1, at 11.

45 Matheson, M.J., "Practical Aspects of the Agent's Role in Cases before the International Court", *The Law and Practice of International Courts and Tribunals*, Vol. 1:(2002), p. 467.

46 *Ibid*.

87. The parties may choose to refer to the appointment of agents and co-agents in their arbitration agreement where they may specify the deadline for appointing an agent and co-agent(s) or deputy-agent and where the names and addresses of these individuals need to be forwarded[47]. Recent experience has shown that a member of the legal team or counsel representing the State in the arbitral proceedings may be appointed agent or co-agent for the State[48].

[47] Under Article 4 of the Permanent Court of Arbitration's Optional Rules for Arbitrating Disputes between two States where the rule applying to the appointment of agents provides as follows: "Each party shall appoint an agent. The parties may also be assisted by persons of their choice. The name and address of the agent must be communicated in writing to the other party, to the International Bureau and to the arbitral tribunal after it has been appointed" (Permanent Court of Arbitration - Basic documents, available on the PCA's website).

[48] In both *Eritrea/Yemen* and *Eritrea/Ethiopia* members of the parties' legal teams were appointed as co-agents.

4. Rules of Procedure

88. In contrast to adjudication before the ICJ where the Rules of Court set forth the procedural framework to be followed throughout the proceedings, when States opt for arbitration, specific rules of procedure must be adopted, ideally in the arbitration agreement.

89. The parties may choose to rely on the UNCITRAL Arbitration Rules or the Optional Rules of the Permanent Court of Arbitration for Arbitrating Disputes between States, which are themselves based on the UNCITRAL Arbitration Rules, modified to reflect the public international character of disputes between States. Alternatively, the parties may specify in their arbitration agreement that the arbitral tribunal may adopt its own rules of procedure. This was what occurred in the agreement by which Ethiopia and Eritrea submitted their land boundary dispute to a Boundary Commission. Their agreement contained a clause stating that the boundary commission was to adopt its own rules of procedure based upon the 1992 Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two States. This is also the case of the Abyei arbitration.

90. In the absence of a pre-established set of procedural rules, the parties must consider, and ultimately agree upon, a number of issues, including: i) the sequence, number and timing of written submissions, ii) the production of documentary evidence; iii) the organization and timing of the oral arguments; and, iv) the hearings of possible witnesses and experts. Each one of these procedural aspects will be briefly reviewed.

91. The provisions concerning the submission of documentary evidence might entail a provision in the arbitration agreement whereby the parties are required to submit a summary of the documents and evidence they plan to present to support their respective cases before a certain time-limit. An additional rule concerning documentary evidence might cover the timing of the submission of documents, e.g., no new documents may be filed after the closure of the written proceedings - except with the Tribunal's and other party's consent - or a rule stipulating that no reference may be made to a document during an oral hearing that has not been produced during the written phase of the case, unless it is publicly available.

92. As mentioned above, the parties will need to agree upon the number of written exchanges that will be submitted, the sequence of those written exchanges and the dates when they will be filed. In addition, the parties will need to agree on the organization and length of any oral hearings, e.g., the number of days, the number of sessions, the division of sessions into first (presentation) and second (rebuttal) rounds, the necessity for the production of transcripts or interpretation services and any issues relating to costs.

93. Other procedural rules on which the parties will need to come to an agreement concern the production of experts' reports and the examination and cross-examination of any witnesses or experts who may be called to testify at an oral hearing. Finally, it may also be envisaged to provide for the eventuality that documents may be requested by one party or the tribunal to the other or to a third State or third party.

94. An arbitral tribunal might also be concerned with naming in its own experts to assist it in its task, and therefore provision may be made for the terms of reference of those experts and the communication of any reports of the experts to the parties and the parties' eventual opportunity to comment on an expert's report.

95. As emphasized above, if the parties refrain from relying on an established set of procedural rules for arbitration, they will need to supplement their arbitration agreement with specific provisions relating to procedural matters. To facilitate the task, the parties might find it practical to consult the Statute and Rules of the International Court of Justice, which have often served as a model for procedural rules for States that bring a dispute before an arbitral tribunal.

5. Choosing the Place of Arbitration

96. When two States opt for arbitration, they are free to select their place of arbitration. This should be a neutral location, and, thus, preferably, have no connection with either State involved in the dispute. Furthermore, the place of arbitration should not be a location that is more convenient for one of the States than for the other. From a logistical point of view, it is also preferable that the seat of the arbitration be easily reach-

able for both parties and for the members of the tribunal. Ordinarily, in the absence of an express choice of the place of arbitration by the parties in the arbitration agreement, the tribunal, in consultation with the parties, will fix the place of the arbitration. The parties may also leave it to the tribunal, once it is constituted, to fix the place of the arbitration. This was the option chosen by the United Kingdom, Ireland and France in their 1977 arbitration for the delimitation of the continental shelf where they agreed that the arbitral court would decide the place of arbitration in agreement with the parties.[49]

97. From a logistical point of view, it is also preferable to choose a place of arbitration where appropriate facilities are available for hearings and meetings of the type required for an inter-State dispute. However, it is possible that the parties will elect to have the seat of arbitration in one city and conduct meetings and/or hearings in another[50].

E. Costs

98. The creation in 1989 of the UN Secretary General's Trust Fund to Assist States in the Settlement of Disputes through the International Court of Justice has meant that developing countries can benefit from a fund to lessen the financial burden of bringing a case before the International Court of Justice[51]. Ordinary, however, the parties to ICJ proceedings pay for their own costs of preparation, even if the Court's expenses are borne by the United Nations (Article 33 of the Court's Statute).

99. It is sometimes argued that it is more expensive to submit a dispute to arbitration than to comparable proceedings before the ICJ. In addition to legal fees, the costs involved in arbitration proceedings include the fees and expenses of the members of the arbitral tribunal, the expenses of implementing an award or other recommendation of the tribunal, and the costs associated with the administrative expenses of any oral or written proceedings.

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49 *Delimitation of the Continental Shelf (United Kingdom of Great Britain and Northern Ireland and the French Republic)*, Award of 30 June 1977, 54 *I.L.R.* 6, at 14.

50 See Rules of Procedure for the Tribunal Constituted under Annex VII to the United Nations Convention on the Law of the Sea pursuant to the Notification of Barbados dated 16 February 2004 (Barbados/Trinidad & Tobago), available on the Permanent Court of Arbitration's website: www.pca-cpa.org.

51 Romano, C., "International Justice and Developing Countries: a Qualitative Analysis", *The Law and Practice of International Courts and Tribunal*, Vol. 1, No. 3, p. 554.

100. On the other hand, arbitral proceedings are often more efficient and shorter than comparable ICJ proceedings. In part, this may lessen the costs for the preparation of a State's case and the over-all remuneration of its legal advisers.

101. The Permanent Court of Arbitration enjoys a Financial Assistance Fund geared towards assisting developing countries to meet part of the costs involved in international arbitration or other means of dispute settlement offered by the PCA. To qualify for the PCA fund, a State must be a party to the 1899 or 1907 Hague Convention for the Pacific Settlement of International Disputes, and, at the time of requesting financial assistance, the State must be listed on the "DAC List of Aid Recipients" prepared by the Organization for Economic Cooperation and Development.

102. In connection with the allocation of funds for the payment of costs involved in arbitration for developing nations, it is of note that Article 4 of the agreement signed by Ethiopia and Eritrea on 12 December 2000 by which the parties agreed to submit their dispute to a Boundary Commission, provided that, in order to defray expenses, the Boundary Commission could accept donations from the United Nations Trust Fund established under paragraph 8 of Security Council Resolution 1177 of 26 June 1998. At the same time, the arbitration itself was administered by the Permanent Court of Arbitration, which disposes of its own independent fund. The GoS in the Abyei arbitration is also partly using the PCA fund to finance the costs of the arbitration.

103. In an arbitration, the administrative costs and the arbitrators' fees are generally shared equally by the parties and a provision to that effect should be set out in the arbitration agreement. The costs to be borne by the parties relate to such items as remuneration for the arbitrators and payment for their expenses relating to travel and accommodation, the fees of the registrar or the administrative secretary of the tribunal as well as any costs of the facilities for oral hearings and deliberations. Additional costs may include the preparation of transcripts of hearings, and translations of documents or interpretation services for oral proceedings.

104. The costs of an arbitration may be reduced by making use of the offer of facilities by third States, for example for holding meetings or oral

hearings. However, the costs incurred, other than those for the administrative matters and arbitrators' fees and expenses mentioned above, are not dissimilar from those that parties experience when they bring a case before the ICJ.

105. Each party will of course have to pay for its own legal teams and for any technical experts that it may have retained. The parties will also have to take into account the costs incurred for historical or legal research, for example carried out in the national archives or specialized libraries of a particular country. Other costs include the creation or the reproduction of maps, graphics and illustrations. It should be noted, however, that, in contrast to proceedings before the ICJ, where over 100 copies of all written pleadings are generally required, the number of written pleadings needed in an *ad hoc* or institutional arbitration will certainly be lower, with a subsequent reduction of the costs associated with the reproduction of the written pleadings.

F. Binding Nature of the Award

106. It is common knowledge that an arbitral award will be final and binding. Nonetheless, the parties generally include a paragraph to that effect in their compromis. For instance, Article 13 of the arbitration agreement in *Eritrea/Yemen* stipulated: "The awards of the Tribunal shall be final and binding. The Parties commit themselves to abide by those awards, pursuant to Article 1, paragraph 2 of the Agreement on Principles"[52]. Article 9(2) of the Abyei Agreement was drafted in similar terms.

107. It should be stressed that, if one of the parties does not comply with the arbitral tribunal's decision, there are no enforcement proceedings available to a party who wishes to have the award enforced. With respect to the judgments of the ICJ, Article 94(1) of the U.N. Charter expressly imposes upon member States the obligation: "to comply with the decision of the International Court of Justice in any case to which it is a party" and provides in its second paragraph that: "If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which

[52] The Agreement on Principles preceded the arbitration agreement and stipulated in Article 1, paragraph 2 that the parties commit themselves to abide by the decision of the Tribunal. *Eritrea-Yemen Arbitration*, Documents, Agreement on Principles, available at http://pca-cpa.org.

may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment". By contrast, in inter-State arbitration the pressure created by the enforcement mechanism of Article 94 of the Charter is missing[53].

108. In reality, the practice shows that arbitral awards maintain a certain legal, moral and diplomatic force, and that in most instances States will respect an arbitral award rendered pursuant to an arbitration agreement which they had freely negotiated and entered into.

109. In certain circumstances, a party may request the annulment of an arbitral award. However, this can only be done on specific grounds. First, an arbitral award may be annulled if the arbitration agreement is invalid. Moreover, a party may request the annulment of an award if the tribunal has exceeded its authority (*excès de pouvoir*), for instance, if the tribunal has decided a question that was not submitted to it or has applied rules that the parties did not authorise it to apply[54]. Beyond these grounds, an award may also be set aside if the tribunal has violated a rule of judicial procedure, or because the award is not motivated[55]. In simple terms, as stated by the International Law Commission in its Model Rules on Arbitral Procedure, annulment of an arbitral award may be pleaded in three cases: excess of power, corruption of a tribunal member or serious departure from a fundamental rule of procedure, including failure to state the reasons for an award[56].

110. This raises a related issue: which is the competent forum to decide an annulment request? If a cause of nullity arises during the proceedings, the question can be disposed of by the same tribunal. If - on the other hand - the award itself is called into question, the tribunal is *functus officio* and the issue has to be directed to a different jurisdiction. A new arbitration can be instituted or the issue can be brought before a permanent international jurisdiction.

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53 For a detailed treatment of States' compliance with ICJ Judgments, see Schulte, C. *Compliance with Decisions of the International Court of Justice*, Oxford University Press, 2004.

54 Shaw, M., *International Law*, Fifth Edition, Cambridge University Press, 2003, p. 957.

55 Merrills, *op. cit.*, pp. 110-111.

56 See, Shaw, *op cit.*, p. 957.

111. In 1958, Honduras filed an application with the ICJ and asked the Court to adjudge and declare that Nicaragua was under an obligation to execute an award rendered by the King of Spain in 1906 regarding the delimitation of the frontier between Honduras and Nicaragua. Nicaragua - on the other hand - asked the Court to adjudge and declare that the award was not binding and was incapable of execution. The Court, in its Judgment of 18 November 1960, held that the arbitrator's award was valid and binding and thus capable of execution[57]. In this case, the parties' dispute had been brought to the Court, after attempts at mediation and negotiation had failed, thanks to the good offices of the Organization of American States which had obtained the parties' agreement to submit the issue to the Court.

112. As discussed earlier[58], in 1989 Guinea-Bissau seized the Court of an application concerning the existence and validity of an arbitral award delivered in 1985 concerning the maritime boundary between Guinea-Bissau and Senegal[59]. Guinea-Bissau based its application on the parties' acceptance of the Court's compulsory jurisdiction under Article 36, para. 2 of the Statute and, on that basis, the Court recognised its jurisdiction as established. The Court's judgement of 12 November 1991 rejected Guinea Bissau's submissions regarding the inexistence and nullity of the award.

113. Even where there are no grounds for annulment, an award may be unclear or contain material errors. In these cases, to the extent a party wishes to introduce a request for interpretation and correction of an award or for its revision, these eventualities, which are covered in the case of ICJ proceedings by the Rules of Court, need to be specifically foreseen in State-to-State arbitration.

114. In the event of a "dispute with the other party as to the meaning and the scope of the award"[60] or a "dispute between the parties as to the interpretation of the award or its implementation" or a party may request that the arbitral tribunal provides an interpretation of its own award, or

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57 *Arbitral Award Made by the King of Spain on 23 December 1906*, *Judgment*, *ICJ Reports 1960*, p. 192.

58 At paras. 65-66.

59 *Arbitral Tribunal of 31 July 1989*, *Judgment*, *ICJ Reports 1991*, p. 53.

60 See, for example, Article 13(3) of the parties' arbitration agreement in *Eritrea/Yemen*.

alternatively, if provision has not been made in the arbitration agreement, from a new and separate arbitral tribunal[61].

115. Pursuant to Articles 28 and 29 of the Commission's Rules of Procedure in the *Eritrea-Ethiopia* arbitration, the parties had the possibility to request the Boundary Commission to provide interpretation of its Decision if the meaning of some statement contained therein was unclear and required clarification. On 13 May 2002, Ethiopia filed a submission called "Request for Interpretation, Correction and Consultation" which listed a number of issues for the Commission's consideration.

116. In a decision rendered on 24 June 2002, the Commission rejected Ethiopia's request and held that "[T]he concept of interpretation does not open up the possibility of appeal against a decision or the reopening of matters clearly settled by a decision." The Commission found support for its conclusions in the authority provided by the *Chorzow Factory* case and the *France-UK* arbitration on the delimitation of the continental shelf and stressed that "Interpretation is a process that is merely auxiliary, and may serve to explain, but not change, what the Court already settled with binding force as res judicata.[62]"

117. An unusual situation is that of the *Abyei* arbitration, where the Tribunal was asked whether a previous body of experts enjoying adjudicative powers, but not a tribunal or court *stricto sensu*, has exceeded its mandate. The Tribunal ruled in the affirmative, and thus the decision of that body was annulled and replaced by a *de novo* determination of the Tribunal, "based on the submission of the Parties".

118. A party may also ask for the revision of an award when additional elements are discovered that were not available at the time of the proceedings which, had they been known to the tribunal before the award was rendered, might have changed the outcome. Therefore, the parties may wish to include in their arbitration agreement a clause providing for the possibility to request a revision of the award under certain conditions.

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61 Pellet, A., *Droit International Public*, 7e édition, L.G.D.J., 2002, p. 886.

62 Eritrea-Ethiopia Boundary Commission. Decision Regarding the "Request for Interpretation, Correction and Consultation" Submitted by the Federal Republic of Ethiopia on 13 May 2002 (24 June 2002), para. 16, p. 3, available at www.pca-cpa.org.

119. With regard to a request for revision, it is important that the conditions under which such a request may be submitted and the time-limits within which it may be introduced specified in detail by the parties in the arbitration agreement, or provided for later in consultation with the tribunal. A good example of a provision allowing for revision of an award is given by the Guinea/Guinea-Bissau Special Agreement of 18 February 1983, which stated as follows, in its Article 11(1): "Revision of the award can be requested by either of the two Parties if any new element has been discovered which could have decisively influenced the award, provided that before the delivery of the award this new element was unknown to the Tribunal and to the Party which requested the revision and there is no fault on the part of this Party"[63]. It is also usual practice to include a paragraph whereby the request for revision of an award will not suspend the binding nature of the award[64].

G. Conclusions

120. When diplomacy fails, international arbitration is considered to be an effective and equitable means of settling a dispute. Indeed, it has been noted, with regard to resolving differences between States in the field of international law, "[t]he procedure of arbitration grew to some extent out of the processes of diplomatic settlement and represented an advance towards a developed international legal system"[65].

121. Indeed, to the extent that States recognise the existence of a legal dispute and express in a joint legal document their willingness to have it resolved through a final judicial process handled by a neutral panel of experienced professionals, half of the work is done. However, States should not underestimate the importance of a well-drafted arbitration agreement which foresees and provides a solution for the legal, procedural and practical issues that may lay ahead. Agreeing in advance on the terms of reference of the tribunal, the issues to be decided and the different procedural steps also serves the interests of justice and can play an important role in assuring compliance with the tribunal's final decision.

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63 This was the clause used by Guinea and Guinea-Bissau when they submitted their dispute on maritime delimitation to an arbitral tribunal. See Merrills, *op. cit.*, p. 107.

64 See Special Agreement signed by the Governments of Guinea and Guinea-Bissau of 18 February 1983, *Guinea/Guinea-Bissau: Dispute concerning Delimitation of the Maritime Boundary*, Award of 14 February 1985, 25 *I.L.M.* (1986) 251, at 258.

65 Shaw, M., *op. cit.*, p. 952.