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The Dispute Settlement Mechanisms in Major Multilateral Treaties

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I. INTRODUCTION

1. The principle of the peaceful settlement of disputes has been a constant focus for States since ancient times.[1] But, as is all too evident, it has not always been consistently practiced or successfully implemented.

2. In 1899 it was recognised as a key principle of international law at the 1899 Hague Peace Conference,[2] which ended with the adoption of the **Convention on the Pacific Settlement of International Disputes**. The Convention obligates States to "use their best efforts to ensure the pacific settlement of international differences"[3] and established the first permanent institution to facilitate inter-state arbitration: the Permanent Court of Arbitration.[4]

3. States' desire for a greater focus on the peaceful settlement of international disputes was also a key factor in the establishment in 1922 of the Permanent Court of International Justice (PCIJ) and the creation of the United Nations (UN) in 1945, with the **UN Charter** explicitly requiring States to resolve disputes in a peaceful manner, and establishing the principal judicial organ of the UN: the International Court of Justice (ICJ).[5]

4. Since the creation of the UN it has become commonplace for international treaties concluded between States to include a dispute settlement clause (often called a compromissory clause) outlining the method to be used by States Parties in the event of a

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[1] For example, mediation was a feature of ancient India and the Islamic world. Arbitration was used in ancient Greece, in China, among the Arabian tribes, in maritime customary law in medieval Europe and in Papal practice.
[2] The agenda of the conference is made clear by the official correspondence sent by Count Mouravieff, Russian Minister for Foreign Affairs on 30 January 1898, on behalf of the Russian Tsar, which stated that, "…8. Acceptance, in principle, of the use of good offices, mediation and voluntary arbitration, in cases where they are available, with the purpose of preventing armed conflicts between nations…" A.G.Koroma, The Peaceful Settlement of International Disputes, (1996), 43:2, Netherlands Law Review, 227, 236.
[3] Article 1, 1907 Hague Convention for the Pacific Settlement of International Disputes
[4] While arbitration has been sporadically utilised even before the 19th Century, the 1899 Conference saw the organisation of rules relating to arbitration. For more on the 1899 Hague Peace Conference and its contribution to international dispute settlement including the creation of the Permanent Court of Arbitration, see Shabtai Rosenne (ed), Tjaco T. van den Hout, The Hague Peace Conferences of 1899 and 1907 and International Arbitration, (Asser, 2001), vii.
[5] Articles 2(3) and 33 of the UN Charter

dispute about the interpretation or application of the treaty. While these provisions typically share the common objective of ensuring disputes are resolved in a peaceful manner, they employ a wide variety of methods: negotiation, consultation, inquiry, mediation, good offices, conciliation, arbitration, judicial settlement, and resort to regional agencies or arrangements.

5. Among these varied methods, some involve appealing to third parties, while others involve only the disputing parties. Examples of the latter are negotiations and consultations, as found in the **1947 General Agreement on Tariffs and Trade** (the GATT), which provides for dispute settlement by consultations between the parties, with no third-party involvement.[6] Examples of the former include mediation, which places the parties to a dispute in a position in which they can themselves resolve their dispute with the support of a third party. Arbitration is another third-party method that goes further than mediation, in that the dispute is submitted to the decision or award of an impartial third party, so that a binding settlement can be achieved. The same is true of judicial settlement, except that a court is subject to stricter rules than an arbitral tribunal, particularly in procedural matters. An example of a dispute settlement clause providing for judicial settlement is the **1948 Convention on the Prevention and Punishment of the Crime of Genocide**, Article 21 of which requires that all disputes must be submitted to the ICJ.

6. There are many studies that analyse in detail at the dispute settlement mechanisms of individual treaties. The dispute settlement mechanism in the **1982 UN Law of the Sea Convention** (UNCLOS) - arguably the most complex in existence - has been written about extensively.[7] So too have the mechanisms in the WTO Dispute Settlement Understanding[8]

[6] Article XXII of the 1947 GATT provides: "1. Each contracting party shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, such representations as may be made by another contracting party with respect to any matter affecting the operation of this Agreement. 2. The CONTRACTING PARTIES may, at the request of a contracting party, consult with any contracting party or parties in respect of any matter for which it has not been possible to find a satisfactory solution through consultation under paragraph 1."

[7] See for example Liber Amicorum "Law of the sea, environmental law, and settlement of disputes" 2007 Permalink; Klein, Natalie "Dispute settlement in the UN Convention on the Law of the Sea" Cambridge studies in international and comparative law, 2005. The substantive nature of the UNCLOS dispute settlement mechanism is integral to uphold the public order at sea provided by the Convention. See Bernard H. Oxman, Complementary Agreements and Compulsory Jurisdiction, 2001, 95:2. The American Journal of International Law, 277, 279.

[8] See for example Yang, Guohua; Mercurio, Bryan; Li, Yongjie "WTO dispute settlement understanding: a detailed interpretation" Global trade and finance series, 2005 and Martin, Mervyn "WTO dispute settlement understanding and development" Nijhoff international trade law series, 2013, 1.

and human rights treaties.[9] There are also many articles about the dispute settlement mechanisms in the various ASEAN agreements.[10] The dispute settlement mechanisms in certain categories of treaties have also been studied—for example, there is much academic work on the dispute settlement mechanisms in environment treaties.[11]

7. However, we have found very few studies that examine generally the varying types of dispute settlement mechanisms found in multilateral treaties.[12]

8. The purpose of this paper is to fill that gap by presenting a quantitative analysis of the dispute settlement provisions of 236 multilateral treaties for which the UN Secretary-General is depositary. As part of that, this paper looks at the various different methods employed in those 236 treaties, including how many provide for referral to a third party, how many provide for compulsory as opposed to voluntary procedures, and the types of third-party forum provided for. We have looked at our data from a variety of angles, including by decade and treaty subject, to try and present a complete picture. Where we have been able to, we have also considered the negotiating history of particular treaties to identify why particular dispute settlement methods were adopted.

9. We hope that our findings will enable a better understanding of the different types of dispute settlement mechanisms found in multilateral treaties and their background and purpose, and will use be a useful tool, particularly to those involved in the negotiation of dispute settlement provisions in future multilateral treaties.

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[9] See for example Andreas Zimmermann "Human Rights Treaty Bodies and the Jurisdiction of the International Court of Justice" The Law and Practice of International Courts and Tribunals 12 (2013) 5–29.

[10] See for example Walter Woon, Dispute Settlement in ASEAN, The Korean Journal of International and Comparative Law, 1(1), 2013, 92; Caballero-Anthony, M., Mechanisms of Dispute Settlement: The ASEAN Experience, Contemporary Southeast Asia, 20(1), 38; Chachavalpongpun, Pavin , Thai-Cambodian Conflict: The Failure of ASEAN's Dispute Settlement Mechanisms, Asian Journal of Peacebuilding, 1(1), (2003), 65.

[11] See for example Romano, Cesare "The peaceful settlement of international environmental disputes: a pragmatic approach" International environmental law and policy series, 2000; Malgosia Fitzmaurice, David M. Ong and Panos Merkouris (eds), Natalie Klein, Settlement of International Environmental Law Disputes in Research Handbook on International Environmental Law, (2010, Elgar), 379; Cesare P.R. Romano, International Dispute Settlement in Daniel Bodansky, Jutta Brunnee, and Ellen Hey (eds), Oxford Handbook on International Environmental Law, (Oxford, 2008)

[12] The only example we found was Dr. P. J. I. M. de Waart "The Element of Negotiation in the Pacific Settlement of Disputes Between States: An Analysis of Provisions Made And/Or Applied Since 1918 in the Field of the Pacific Settlement of International Disputes" ISBN: 978-94-017-4582-6 (Print) 978-94-017-4768-4 (Online). This book is focused more on practice and procedure issues, but does include detail on the different types of dispute settlement procedure found in international treaties, both multilateral and bilateral.

10. This paper is intended to be the first in a series that will utilise the data we have collected on the 236 treaties referred to above. It will be followed by papers analysing various issues, including conciliation mechanisms (an as yet unknown quantity in international dispute settlement) and individual State practice in relation to compulsory third-party dispute settlement mechanisms (see paragraph 126 below for further details).

11. In terms of the structure of this paper, in Part II we explain the methodology we used to collect our data, including an explanation of the scope of our study, why we have focused on treaties for which the UN Secretary-General is depositary and how we identified dispute settlement provisions. We also explain the various key concepts covered in this paper, including "compulsory third-party dispute settlement".

12. In Part III of this paper, we present our findings:

    a. Identifying first those treaties within the scope of our study that contain a dispute settlement clause and considering the reasons why certain treaties do not.

    b. Identifying the type of dispute settlement mechanism provided for in those treaties with a dispute settlement clause, including how many treaties within the scope of our study include:

        i. Compulsory third-party dispute settlement, the types of third-party forum they provide for and some of the underlying reasons for these trends. We also look in this section at how many treaties without our scope allow parties to "opt-in" and "opt-out" of compulsory third-party dispute settlement mechanisms, and the evolution and rationale for those mechanisms.

        ii. Voluntary third-party dispute settlement mechanisms, the types of third-party forum they provide for and the rationale for these provisions.

        iii. Non-third-party dispute settlement mechanisms (i.e. negotiation and consultation), their rationale and where they are commonly found.

13. In Part IX, we conclude by presenting our key findings and identifying further issues that we intend to focus on in future papers utilising the data we have collected for this study.

II. METHODOLOGY

14. The first step of our research was to create a compilation of all the dispute settlement provisions in the 236 multilateral treaties for which the UN Secretary-General is depositary, using information sourced from the UN Treaty Collection database (Compilation).[13] We sought to take a broad approach with the Compilation, so that it could serve as a basis for future research in a range of areas, not just dispute settlement (on which this paper is focused). Accordingly, we have also included in our Compilation reservation[14] and compliance[15] provisions, as well as provisions establishing centralised treaty bodies and secretariats, given their often close inter-relationship with dispute settlement mechanisms (for example, many reservation provisions specifically allow or prohibit States Parties from making reservations in relation to dispute settlement provisions). A copy of our Compilation with the full list of treaties included in our research is available on the Centre for International Law website.

15. In identifying dispute settlement provisions to include in our Compilation, we focused on provisions which elaborated a process for disputes regarding the interpretation or application of the treaty—a classic example being Article 19(1) of the **2013 Arms Trade Treaty** which establishes a procedure for resolving "any dispute that may arises between [States Parties] with regard to the interpretation or application of this Treaty". We did not include within our scope dispute settlement provisions that relate to other types of disputes. For example, some of the trade and development treaties within the scope of our study that establish banks provide arbitration clauses for disputes between the bank and

[13] Available at: https://treaties.un.org/Pages/ParticipationStatus.aspx. as at 31 August 2015. Note we have also followed the UN Treaties series subject classifications.
[14] Focusing on the definition of reservation in Article 2(d) of the 1969 Vienna Convention on the Law of Treaties, which provides that: "'reservation' means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provision of the treaty in their application to that State."
[15] Focusing on procedures to consider apparent instances of non-compliance by States Parties, where the dispute is about whether a States Party has fulfilled its obligations under the Treaty.

its former members.[16] As these provisions do not relate to disputes about the interpretation and application of the treaty itself, we did not include them within the scope of our study. We also did not include provisions relating to whether a State Party has *fulfilled* or *complied* with its obligations under the Treaty, as we classify such provisions as compliance, rather than dispute settlement, mechanisms.[17] Of note, however, we did find a few examples of provisions that contain *both* dispute settlement and compliance elements. For example, Article 20(1) of the **1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal** applies to "disputes between Parties as to the interpretation or application of, or compliance with, this Convention or any protocol thereto…[emphasis added]". Likewise, Article IX of the **1948 Convention on the Prevention and Punishment of the Crime of Genocide** which applies to "Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention…" [emphasis added].[18] Any provision which relates to disputes about the interpretation and application of the treaty, regardless of whether it also has compliance elements, has been included within the Compilation.

16. We also classified each treaty by subject, using the subject groupings provided for in the UN Treaty Collection database.[19]

17. We then used the Compilation to identify which treaties contain dispute settlement provision/s, and examined those to identify the specific type of mechanism, including: (i) whether it provides for compulsory third-party dispute settlement and, if so, what type; (ii) whether it provides for voluntary third-party dispute settlement and, if so, what type; (iii) whether it provides for non-third-party dispute settlement and, if so, what type.

[16] See for example Article 43 of the 1996 Agreement Establishing the Bank for Economic Cooperation and Development in the Middle East and North Africa

[17] We recognise that some scholars see dispute settlement as a form of compliance. However, because this research is specially focused on dispute settlement mechanisms, we have taken the approach of separately identifying dispute settlement and compliance provisions.

[18] A final example is the 2012 Food Assistance Convention provides that: "The Committee shall seek to resolve any dispute among the Parties concerning the interpretation or implementation of this Convention…including any claim of failure to perform the obligations set out in this Convention".

[19] Note that we created an additional category of "other" in which we classified the following treaty subjects from the UN database because they each included only three treaties or less: UN Charter, declaration of death, economic statistics, freedom of information, maintenance obligations, obscene publications, outer space, pacific settlement, status of women, telecommunications and trafficking in persons and other miscellaneous treaties.

18. We also identified those treaties that include a provision specifically allowing States Parties to "opt-out" of the dispute settlement obligations in the treaty by making either a reservation or a declaration, referred to as "Opt-out Mechanisms" in this paper. States that do not utilize these Opt-out Mechanisms are automatically bound by the dispute settlement obligations in the treaty. An example of an Opt-out Mechanism is Article 29(2) of the **1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families** which enables States Parties, at the time of signature or ratification, to "declare that it does not consider itself bound" by the dispute settlement obligations in the treaty.[20] We did not however include within our definition of such Opt-out Mechanisms any general reservation provisions which do not specifically refer to dispute settlement.[21] While we recognise that such provisions can enable States to make reservations with respect to dispute settlement obligations (and that States can make reservations to provision evens where a treaty does not expressly so provide), we have excluded them from our definition of Opt-out Mechanism because our focus is on provisions which elaborate a procedure specifically applying to dispute settlement.[22]

19. In addition, we also identified those treaties that include dispute settlement obligations that States Parties can "opt into" either by way of a declaration or by becoming party to a

[20] The full text of Article 29 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families is as follows: "1. Any dispute between two or more States Parties concerning the interpretation or application of the present Convention that is not settled by negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.
2. Each State Party may at the time of signature or ratification of the present Convention or accession thereto declare that it does not consider itself bound by paragraph 1 of the present article. The other States Parties shall not be bound by that paragraph with respect to any State Party that has made such a declaration."

Another examples of an "opt-out" mechanism is Article 58 of the 1980 Agreement establishing the Common Fund for Commodities which provides: "Reservations may not be made with respect to any of the provisions of this Agreement, except with respect to article 53 [which is on dispute settlement]". This means that a state may "opt-out" of the dispute settlement provisions by making a reservation.

[21] Examples of general reservation provisions that would enable States to make reservations in respect of dispute settlement, but which we do not consider to be "opt-out" clauses are:
- Article 14(1) of the 1998 Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations which provides: "When definitively signing, ratifying or acceding to this Convention or any amendment hereto, a State Party may make reservations".
- Article 25(1) of the 2013 Arms Trade Treaty provides: "At the time of signature, ratification, acceptance, approval or accession, each State may formulate reservations, unless the reservations are incompatible with the object and purpose of this Treaty."
- Article 8 of the 1957 Convention on the Nationality of Married Women which provides that: "At the time of signature, ratification or accession, any State may make reservations to any article of the present Convention other than articles 1 or 2 [neither of which concern dispute settlement]".

[22] We also note that treaties without any provision explicitly allowing or prohibiting for a reservation, a reservation may still be entered consistent with Article 19 Vienna Convention on the Law of Treaties.

separate optional protocol, referred to as "Opt-in Mechanisms" in this paper. An example is the **1961 Optional Protocol to the 1961 Vienna Convention on Diplomatic Relations,** which provides a dispute settlement mechanism that parties to its parent convention can opt-into by ratifying the Optional Protocol. Parties to the Convention that have not ratified the Optional Protocol are not bound by the dispute settlement obligations in the Optional Protocol.[23]

A. Why treaties for which the UN Secretary-General is depositary?

20. The scope of our study is all treaties for which the UN Secretary-General is depositary.[24] The only exception to this is: (i) treaty amendments, which we have excluded from our scope as they are not typically stand-alone instruments, and do not usually relate to dispute settlement;[25] and (ii) certain optional protocols which are not intended to be stand-alone instruments, but instead simply supplement certain aspects of their parent convention.[26]

[23] Another example of an "opt-out" mechanism is Article 27(3) of the Convention on Biological Diversity which provides: "When ratifying, accepting, approving or acceding to this Convention, or at any time thereafter, a State or regional economic integration organization may declare in writing to the Depositary that for a dispute not resolved in accordance with paragraph 1 or paragraph 2 above, it accepts one or both of the following means of dispute settlement as compulsory: (a) Arbitration in accordance with the procedure laid down in Part 1 of Annex II; (b) Submission of the dispute to the International Court of Justice."

[24]Note the basis in which the UN Secretary-General derives his authority as depository, See: Treaty Handbook, United Nations, para.2.1, p. 3.

[25] Note that where any amendment has been made to the dispute settlement provisions of a treaty within the scope of our study, we have included the amended version of the provisions in the Compilation. This is also the approach we have taken to the various commodity treaties for which the UN Secretary-General is depositary. Commodity treaties are typically updated or modified at regular intervals. In this Compilation, we have included only the most recent version of each commodity treaty. For example, only the latest version of the International Cocoa Agreement, which has had various versions dating from 1972, has been included.

[26] In accordance with that approach, we:

- Included the following 3 optional protocols within the scope of our study: 1989 Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the Abolition of the Death Penalty; 2000 Optional Protocol to the Convention on the Rights of the Child on the involvement of Children in Armed Conflict; the 2000 Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography
- Excluded the following 12 optional protocols from the scope of our study: 1958 Optional Protocol of Signature concerning the Compulsory Settlement of Disputes; the 1961 Optional Protocol to the Vienna Convention on Diplomatic Relations, concerning the Compulsory Settlement of Disputes; the 1961 Optional Protocol to the Vienna Convention on Diplomatic Relations, concerning Acquisition of Nationality; the 1963 Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes; the 1963 Optional Protocol to the Vienna Convention on Consular Relations concerning Acquisition of Nationality; the 1969 Optional Protocol to the Convention on Special Missions concerning the compulsory settlement of disputes; the 2008 Optional Protocol to the International Covenant on Economic, Social and Cultural Rights; the 1966 Optional Protocol to the International Covenant on Civil and Political Rights; the 1999 Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women; and the 2002 Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; 2011 Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure; 2006 Optional Protocol to the Convention on the Rights of Persons with Disabilities.

For obvious reasons we also excluded terminated treaties[27] as well as treaties concluded more than 30 years ago that have not yet entered into force (on the basis that they are unlikely ever to do so).[28]

21. We chose to focus on the treaties for which the UN Secretary-General is depositary for a number of reasons. First, constitute a clearly definable group of treaties to study, which cover a wide spectrum of subjects including trade, human rights and environment. Second, this group is compelling as it encompasses treaties of "world-wide interest",[29] such as the **1945 UN Charter**, the **1947 General Agreement on Tariffs and Trade**, the **1966 International Covenants on Civil and Political Rights and Economic, Social and Cultural Rights**, the **1982 UN Convention on the Law of the Sea**, the **1992 UN Framework Convention on Climate Change** and the **1998 Rome Statute of the International Criminal Court.**[30] Third, the UN Secretary-General is the depositary for the largest number of treaties of any international organisation.[31]

22. Although we think that treaties for which the UN Secretary-General is depositary is a good sample, we recognise that it does not cover some important multilateral treaties, including those for which UN specialised bodies are the depositary (for example the Food and Agriculture Organization, the International Civil Aviation Organization and the International Labour Organization). The dispute settlement provisions of these other more specialised treaties could be a focus for future research in this area (see paragraph 97(g) below).

We would highlight, however, that many of the above excluded optional protocols are still relevant to our study, particularly those that elaborate a dispute settlement procedure for their parent convention. In saying we have excluded them, we simply mean that we have not counted them as a stand-alone treaty for the purpose of our data collection. However, where they elaborate a dispute settlement process for a parent treaty that is within the scope of our study, we have recorded this information as part of the entry for the parent treaty.

[27] For a list of all terminated treaties for which the UN Secretary-General is depository, see Annex 1 of the Compilation available on the website of the Centre for International Law (https://cil.nus.edu.sg/).

[28] We have adopted this approach on the basis that treaties more than 30 years old are not likely to ever enter into force. The figure of 30 years was an arbitrary period chosen by the authors. For a list of all such treaties, see Annex 2 of the Compilation available on the website of the Centre for International Law (https://cil.nus.edu.sg/).

[29] This is how the UN Secretary-General has described his depositary mandate (as covering only those treaties of "world-wide interest"): see Final Clauses of Multilateral Treaties Handbook, United Nations, page 6 and 7, para 4. Available at: https://treaties.un.org/doc/source/publications/FC/English.pdf

[30] Our Compilation, which includes a full list of all the treaties covered in our study and their dispute settlement provisions is available on the website of the Centre for International Law (https://cil.nus.edu.sg/).

[31] Anthony Aust "Modern Treaty Law and Practice" 3rd Ed, Cambridge, 2013, page 287.

B. What do we mean by compulsory and voluntary third-party dispute settlement?

23. In identifying whether a provision provides for compulsory third-party dispute settlement, we have focused on consent of the parties to the dispute:

a. If one party can trigger the mechanism without first gaining the consent of the other disputing party, it is compulsory. Such mechanisms are sometimes referred to as "unilateral referrals".[32] With such provisions, the consent of the parties to referral to a third-party is given when they become a party to the treaty—so any later consent is not required. Throughout this paper we refer to such provisions as "Compulsory Third-party Mechanisms". An example is **Article IX of the Genocide Convention** which States that: "Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or any of the other acts enumerated in Article 3, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute" [emphasis added]. Because the dispute can be submitted to the ICJ "at the request of any of the parties to the dispute", one disputing party can compel the other disputing party before the ICJ and we thus consider it to be compulsory. Other examples of Compulsory third-party Mechanisms are:

   - **Article 14(1) of the Montreal Convention** which provides: "Any dispute between two or more Contracting States concerning the interpretation or application of this Convention which cannot be settled through negotiation, shall, at the request of one of them, be submitted to arbitration…" [emphasis added].[33]

   - **Article 18 of the 1950 Convention** on the declaration of death of missing persons, which makes the issue clear by providing: "If a dispute shall arise between Contracting States relating to the interpretation or application of the present Convention, and if such dispute has not been settled by other means, it shall be referred to the International Court of Justice. The dispute shall be brought

[32] The Oxford Guide to Treaties, edited by Duncan B. Hollis, page 738

[33] Further examples are: Article IX of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide which provides that

> "Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute."

before the Court either by the notification of a special agreement or by a unilateral application of one of the Parties to the dispute."[34]

b. On the other hand, if the consent of both parties to a dispute is required to trigger the third-party mechanism, then it is voluntary. Throughout this paper we refer to such provisions as "Voluntary Third-party Mechanisms". An example is **Article 19 of the 1985 International Convention against Apartheid in Sports** which provides: "Any dispute between States Parties arising out of the interpretation, application or implementation of the present Convention which is not settled by negotiation shall be brought before the International Court of Justice at the request and with the mutual consent of the States Parties to the dispute, save where the Parties to the dispute have agreed on some other form of settlement" [emphasis added]. Because this provision requires "the mutual consent of the States Parties to the dispute" before disputes can be referred to the ICJ, it is a voluntary mechanism, as one disputing party cannot compel the other disputing party before the ICJ.[35]

24. In some cases, we found provisions that were silent on the issue of consent. An example is **Article 75 of the 1946 Constitution of the World Health Organization** which provides that: "Any question or dispute concerning the interpretation or application of this Constitution which is not settled by negotiation or by the Health Assembly shall be referred to the International Court of Justice in conformity with the Statute of the Court[36], unless the parties concerned agree on another mode of settlement." We interpreted this provision as providing for compulsory referral to the ICJ, with the reference to "unless the parties agree on another mode of settlement" implying that party consent is only necessary in order to pursue an alternative means of settlement. In general, we found that

[34] Interestingly, this formulation is only used in one other treaty, the 1956 Convention on the Recovery Abroad of Maintenance. Article 16 of the 1956 Convention on the Recovery Abroad of Maintenance provides:

> "If a dispute should arise between Contracting Parties relating to the interpretation or application of this Convention, and if such dispute has not been settled by other means, it shall be referred to the International Court of Justice. The dispute shall be brought before the Court either by the notification of a special agreement or by a unilateral application of one of the parties to the dispute."

[35] See in the instance of the Southern Blue Fin Tuna case, a dispute between Australia, New Zealand and Japan pursuant to the 1993 Convention for the Conservation of Southern Bluefin Tuna. In that case, the parties could not submit the case to the ICJ as Japan had not given its consent for the dispute to be heard before the ICJ (*see* Article 16(2) Convention for the Conservation of Southern Bluefin Tuna).

[36] We have considered such provisions as compulsory while further noting that parties to the dispute have a further obligation to meet requirements pursuant to the Statute of the ICJ.

provisions silent on this issue were usually Compulsory third-party Mechanisms, not requiring consent - although of course each provision must be interpreted on a case by case basis.

25. The compulsory versus voluntary, or consent issue can easily be conflated with the use of binding versus permissive language—namely whether a party "may" bring a dispute or "shall" bring a dispute. A logical assumption would be that the use of binding language (ie "shall") should indicate that a provision is compulsory. However, we found that the type of language (permissive vs binding) used in dispute settlement provisions typically has no bearing on whether the provision entails a Compulsory Third-party Mechanism or not. For example, **Article 19 of the 1985 International Convention against Apartheid in Sports** provides that disputes not settled by negotiation "shall be brought before the International Court of Justice", implying that this is a binding obligation, but then goes on to state that the "mutual consent of the States Parties to the dispute" is required to trigger the mechanism. Thus, despite the use of so-called binding language, this is a Voluntary third-party Mechanism - because it requires consent to be triggered.

26. Conversely, we found Compulsory Third-party Mechanisms that use permissive language. An example is **Article 47 of the 1956 Convention on the Contract for the International Carriage of Goods by Road** which provides: "Any dispute between two or more Contracting Parties relating to the interpretation or application of this Convention, which the parties are unable to settle by negotiation or other means may, at the request of any one of the Contracting Parties concerned, be referred for settlement to the International Court of Justice." Despite the use of permissive language "may", because the provision enables the procedures to be triggered "at the request of any one of the Contracting Parties", this provisions is compulsory in terms of the respondent's consent.

27. Indeed, having considered the various formulations, our view is that constructing such language as "binding" will seldom be appropriate in the context of dispute settlement provisions. This is because:

    a. The use of binding language often implies that, if there is a dispute, the parties are obligated to trigger the dispute settlement mechanisms in the treaty. However, a party should never be compelled to institute expensive and time-consuming dispute

settlement proceedings. Rather, a disputing state should always have the autonomy to decide whether or not to do so—and indeed there are many instances where a party may decide, for political reasons or otherwise, not to invoke dispute settlement mechanisms despite the existence of a legitimate dispute.

b. It can also imply that disputing parties are not able to agree on another mode of dispute settlement. This is problematic because if the parties agree that a different mechanism is likely to be more fruitful in resolving the dispute, they should be encouraged to pursue it. For example, **Article IX of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide** provides that "Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute." A literal interpretation of this provision is that all disputes must be referred to the ICJ, even if the parties would both prefer to pursue another avenue. To guard against this, in our view dispute settlement provisions should either use permissive language or make clear, as **Article 75 of the 1946 Constitution of the World Health Organization** does (see above), that parties are always able to agree on other forms of settlement.[37]

28. In summary, in distinguishing between Compulsory Third-Party Mechanisms and Voluntary Third-Party Mechanisms our focus has been on the issue of whether the respondent's consent is required in order to submit to the relevant dispute settlement procedure. Whether or not the provision uses so called binding language is not a determining factor.

[37] Article 75 of the 1946 Constitution of the World Health Organization provides that: "Any question or dispute concerning the interpretation or application of this Constitution which is not settled by negotiation or by the Health Assembly shall be referred to the International Court of Justice in conformity with the Statute of the Court, unless the parties concerned agree on another mode of settlement." [emphasis added].

C. Can third-party mechanisms that do not result in binding rulings be compulsory?

29. In determining whether a third-party dispute mechanism is compulsory we have also not focused on whether the mechanism results in a binding result.[38] While the majority of Compulsory third-party Mechanisms would result in a binding result (i.e. by providing for referral to the ICJ or arbitration), there are examples of compulsory provisions that do not. We found a number of provisions providing for compulsory referral to a conciliation committee or a Treaty Body[39], which would not result in binding decisions. An example is **Article 26 of the 2006 Convention on the International Customs Transit Procedures for the Carriage of Goods by Rail under Cover of SMGS Consignment Notes** which provides for compulsory referral to a Treaty Body (in this case a Committee made up of States Parties) which provides that the Committee can only make "recommendations" for settlement, which suggests that the views of the Committee are not binding on the disputing parties. Another example is **Article 14 of the 2003 Intergovernmental Agreement on the Asian Highway Network** which provides that any dispute unable to be settled by negotiation or consultation "shall be referred to conciliation if any of the Parties to the dispute so requests" and explicitly States that the recommendations of the conciliators are "not binding in character".[40]

[38] We have, however, also collected data on the specific type of Compulsory Third-Party Mechanism, and by their type the nature of the decision (i.e. binding or not) is usually clear, i.e. the decisions of ICJ and arbitral tribunals are always binding.

[39] In this work we have defined "Treaty Body" as a central treaty body, such as a Conference or Meeting of the Parties, or other similar body that: (i) meets regularly; (ii) is established by the treaty to act as its principle policy-making and governing body; and (iii) whose members are States Parties. In accordance with this definition, we have excluded: (i) specialised committees, including the various committees established under human rights treaties, given they are focused only on specific issues/aspects of the treaty, and; (ii) One-off review conferences, given their ad hoc character.

[40] Article 14 of the 2003 Intergovernmental Agreement on the Asian Highway Network provides:

> 1. Any dispute between two or more Parties which relates to the interpretation or application of this Agreement and which the Parties to the dispute are unable to settle by negotiation or consultation shall be referred to conciliation if any of the Parties to the dispute so requests and shall, to that end, be submitted to one or more conciliators selected by mutual agreement between the Parties to the dispute. If the Parties to the dispute fail to agree on the choice of a conciliator or conciliators within three (3) months after the request for conciliation, any of those Parties may request the Secretary-General of the United Nations to appoint a single conciliator to whom the dispute shall be submitted.
> 2. The recommendation of the conciliator or conciliators appointed in accordance with paragraph 1 of this article, while not binding in character, shall become the basis of renewed consideration by the Parties to the dispute.
> ….

30. In collecting our data we have not differentiated between such provisions because, as noted above, our focus is on whether the provision provides for compulsory referral to a third party, and not on the status of any eventual ruling. Accordingly, the data presented in this paper on Compulsory third-party Mechanisms includes provisions that will lead to a binding result as well as those that will not. However, we do present data on the various types of third parties, identifying the percentage of treaties providing for referral to the ICJ, arbitration, conciliation committees and treaty bodies which, save for conciliation committees and Treaty Bodies, by their nature produce binding rulings.

D. Our treatment of Opt-out Mechanisms and Opt-in Mechanisms

31. As noted above, a number of dispute settlement provisions allow States Parties to opt-out of any compulsory obligations through either a reservation or declaration. By definition, opt-out Mechanisms only apply to Compulsory third-party Mechanisms. Voluntary third-party mechanisms are by their nature optional, so parties are entitled to opt-out at the time the provision is triggered.

32. We categorised Compulsory third-party mechanisms with Opt-out Mechanisms as compulsory, despite the existence of the Opt-out Mechanism. This is because, in order to utilise an Opt-out Mechanism, States Parties are required to take the additional step of submitting a declaration or ratifying an optional protocol. Unless they do so at the time of ratification they remain bound by the compulsory dispute settlement obligations in the treaty; hence our categorisation as Compulsory Third-Party Mechanisms.

33. However, we have separately identified those Compulsory Third-Party Mechanisms that include an Opt-out Mechanisms and presented data on the number of Compulsory Third-Party Mechanisms that contain such mechanisms (see paragraph 2 below).

34. Categorising Opt-in Mechanisms is more difficult, because Opt-in Mechanisms appear in all types of dispute settlement provisions (including Compulsory Third-Party Mechanisms and Voluntary Third-party Mechanisms, as well as Non Third-party Mechanisms - see paragraph 69 below), and also because there are two different types of Opt-in Mechanism:

a. opt-in by declaration, where the Opt-in Mechanism is part of the dispute settlement provision. An example is **Article 21 of the 1992 Convention on the Transboundary Effects of Industrial Accidents** which provides for disputes to be settled by negotiation and enables a party at the time of ratification or acceptance to declare that it accepts compulsory referral to either arbitration or the ICJ;[41] and
b. opt-in by ratification of a separate optional protocol, where the Opt-in Mechanisms is provided by a separate optional protocol. An example is the 1961 Optional Protocol to the **1961 Vienna Convention on Diplomatic Relations** which provides a dispute settlement mechanism (compulsory referral to the ICJ) that parties to its parent convention can opt-in to by ratifying the Optional Protocol.

35. In light of the above issues, our approach has been to categorise provisions with Opt-in Mechanisms only on the basis of their non-opt-in elements. For example, we categorised **Article 21 of the 1992 Convention on the Transboundary Effects of Industrial Accidents** as a Non Third-party Mechanism, because it provides for disputes to be settled by negotiation for parties that have not utilized the opt-in mechanism. Despite the fact that the Opt-in Mechanism provides for compulsory referral to the ICJ or arbitration, we have not categorised Article 21 as a Compulsory Third-Party Mechanism because States Parties must take an additional step (make a declaration) before they are bound by compulsory referral to the ICJ or arbitration. Similarly, if a treaty's only dispute settlement mechanism is an Opt-in Mechanism, we have categorised it simply as an Opt-in Mechanism, rather than one of the three categorises set out in paragraph 48 below.

36. Nevertheless, we have separately identified those dispute settlement provisions that have Opt-in Mechanisms and have presented data on the number of provisions that include such mechanisms (see paragraph 70 below).

[41] Article 21 provides: "1. If a dispute arises between two or more Parties about the interpretation or application of this Convention, they shall seek a solution by negotiation or by any other method of dispute settlement acceptable to the parties to the dispute.
2. When signing, ratifying, accepting, approving or acceding to this Convention, or at any time thereafter, a Party may declare in writing to the Depositary that, for a dispute not resolved in accordance with paragraph 1 of this Article, it accepts one or both of the following means of dispute settlement as compulsory in relation to any Party accepting the same obligation: (a) Submission of the dispute to the International Court of Justice; (b) Arbitration in accordance with the procedure set out in Annex XIII hereto."
3. If the parties to the dispute have accepted both means of dispute settlement referred to in paragraph 2 of this Article, the dispute may be submitted only to the International Court of Justice, unless the parties to the dispute agree otherwise.

E. What about compulsory procedural preconditions to negotiate or settle the dispute through other peaceful means?

37. A large number of dispute settlement provisions in our study include a procedural precondition that parties attempt to settle disputes by negotiations or consultations before any third-party mechanism can be triggered (this is common as a preliminary phase to invoking third-party dispute settlement as a way to inform the other party of the existence of the dispute, identify the scope and subject matter of dispute and attempt to settle the dispute by mutual agreement[42]). A classic example is **Article 29 of the 1979 Convention on the Elimination of All Forms of Discrimination against Women** which provides that "any dispute between two or more States Parties concerning the interpretation or application of the present Convention which is not settled by negotiation shall, at the request of one of them, be submitted to arbitration" [emphasis added].

38. While such procedural requirements are arguably compulsory (in that States must comply with them before they can trigger third-party procedures), we have not focused on them in our data collection on compulsory mechanisms. Rather, as noted above, our data on compulsory mechanisms is focused only on those mechanisms which provide for referral to a third-party (Compulsory Third-party Mechanisms). We have taken this approach because third-party procedures are arguably much more interesting: while most States have no problem with dispute settlement provisions requiring negotiation and consultation, third-party mechanisms, especially those which are compulsory, have proven to be extremely controversial (as can be seen in the discussion below).

39. Thus, while we have separately collected data on dispute settlement provisions that provide for non-third-party mechanisms such as negotiation and consultation (referred to in this paper as "Non Third-party Mechanisms"), in doing so we have not differentiated between compulsory and voluntary mechanisms. As such, our "Non Third-party Mechanisms" category includes provisions that are both compulsory and voluntary. We have taken this approach because, in our view, such a distinction has little meaning: in articulating what is required to fulfil such procedural requirements, international courts

[42] See page 10 of the ICJ, Summary of the Judgement of 1 April 2011, Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation).

and tribunals have typically set a low bar. For example, in the Land Reclamation Case between Malaysia and Singapore before the International Tribunal for the Law of the Sea, the Tribunal held that, as long as Malaysia was satisfied that any negotiations with Singapore would not be fruitful, the precondition of having to negotiate before the third-party mechanism could be triggered was satisfied.[43] Similarly in the dispute between Georgia and Russia in relation to the International Convention for the Elimination of Racial Discrimination, the ICJ held that the precondition of having to negotiate could be met as long as Georgia had made some attempt to initiate discussions with Russia on the issues which fell within the Convention in dispute.[44]

III. FINDINGS

A. number of treaties that contain dispute settlement provisions

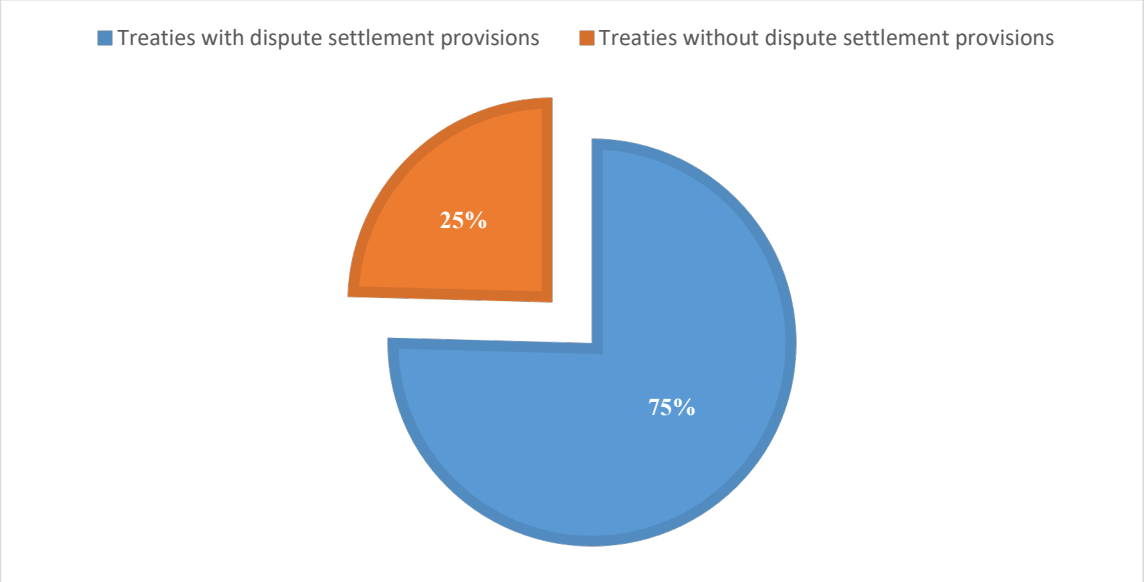
40. First we examined all the treaties within the scope of our study to identify whether they contain a dispute settlement provision, which, as noted above, we define as a provision setting out a procedure for dealing with disputes about the interpretation or application of the treaty (see paragraph 13 above).

41. Of the 236 treaties examined, 75% (or 178) included such a provision. See **Chart 1** (below).

[43] Case concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore), Order of 8 October 2003, Provisional Measures, para. 52. See also Case concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), Preliminary Objections, Judgment, ICJ Reports 1998, p. 303.

[44] Para 114 of 15 October 2008, Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation).

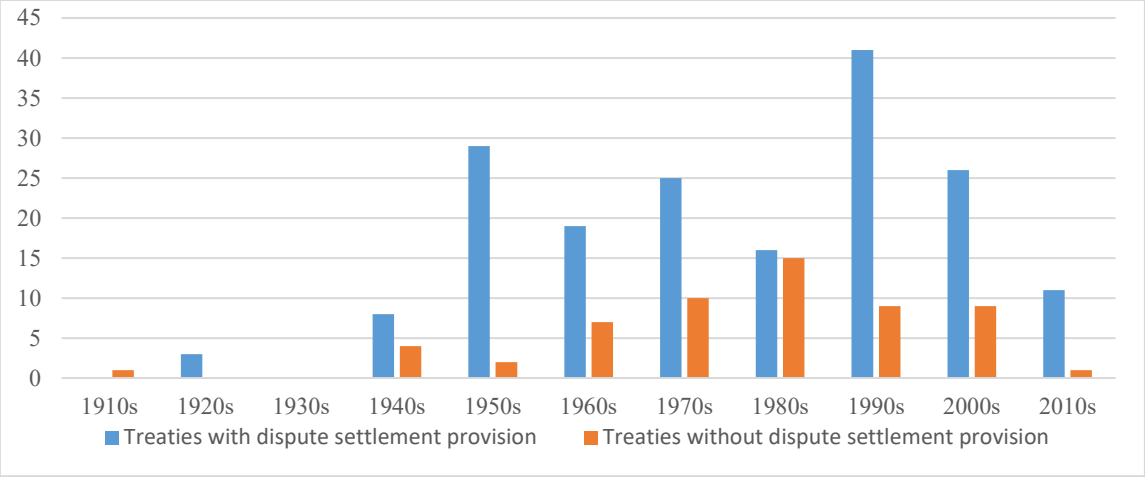
Chart 1: This chart shows the overall percentage of the 236 treaties within the scope of our study with and without dispute settlement provisions



42. We were surprised that 25% of all treaties in our study do not include any dispute settlement provision, and sought to identify why.

43. First, we looked at those treaties by decade from 1910 to the present to see if there are any patterns or trends based on the era in which they were entered into. See **Chart 2** (below).

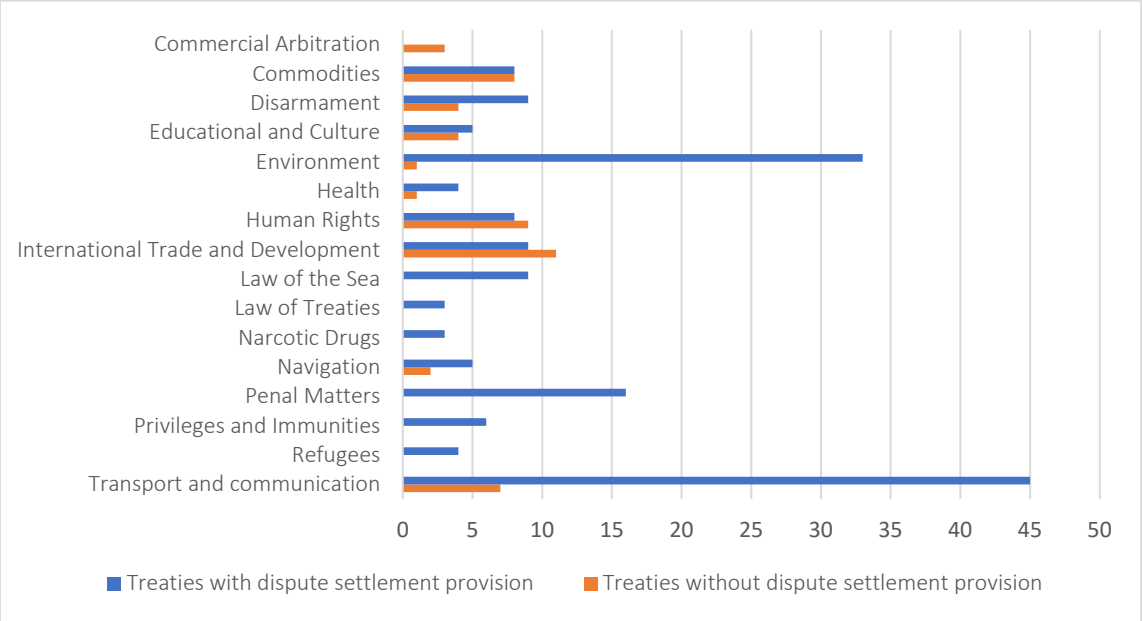
Chart 2: This chart shows the number of treaties concluded by decade with and without dispute settlement provisions



44. As shown by **Chart 2**, in each decade the majority of treaties concluded have included a dispute settlement provision - the only anomaly being the 1980s, where almost half of the treaties concluded contain no dispute settlement provision.

45. Next, we looked at this data by treaty subject, and this was more revealing. See **Chart 3** (below).

Chart 3: This chart shows the number of treaties with and without out dispute settlement provisions, broken down by subject[45]



46. As shown by **Chart 3,** there are certain subject matters for which treaties commonly do not have dispute settlement provisions. These are commercial arbitration, commodities, education and culture, human rights, disarmament and international trade and development. We looked closely at treaties in those subjects and identified the following:

a. The lack of dispute settlement mechanisms for treaties in the commodities, education and culture, and international trade and development categories may be because these

[45] We classified each treaty by subject using the subject groupings provided for in the UN Treaty Collection database. We created an additional category of "other" in which we classified the following treaty subjects from the UN database because they each included only three treaties or less: UN Charter, declaration of death, economic statistics, freedom of information, maintenance obligations, obscene publications, outerspace, pacific settlement, status of women, telecommunications and trafficking in persons and other miscellaneous treaties.

subjects include many treaties that establish international development banks[46] and other international centres, courts and institutes.[47] Because the purpose of such treaties is articulating the rules, procedures and operating frameworks for the body they are establishing, they do not typically impose extensive obligations on States Parties. For obvious reasons, States generally care less about treaty provisions which do not impose specific obligations on them, as the likelihood for dispute is much less. This may be the reason that the negotiators of these treaties felt that disputes over the interpretation and application of the treaty were less likely. However, the practice in this regard is not uniform. While the majority of treaties establishing development banks do not have dispute settlement provisions, some do - for example, the **1965 Agreement establishing the Asian Development Bank** contains a dispute settlement provision which applies both for disputes between members and disputes between the Bank and members, providing for compulsory referral to the Bank's Board of Directors, with an appeal mechanism to the Bank's Board of Governors.[48] Clearly, the diligent negotiators of that treaty saw the potential for disputes to arise.

b. The lack of dispute settlement provisions for treaties in the commercial arbitration subject may be because these treaties are focused on establishing procedures for arbitral proceedings. See for example the **1958 Convention on the Recognition and**

[46] Examples are the 1963 Agreement establishing the African Development Bank, the 1967 Articles of Association for the establishment of an Economic Community of West Africa and the 1982 Charter of the Asian and Pacific Development Centre.

[47] Examples are the 1980 International Agreement for the Establishment of the University for Peace, the 1968 Agreement establishing the Asian Coconut Community and the 1977 Agreement establishing the Asia-Pacific Institute for Broadcasting Development, the 1984 Protocol of the Reconvened Plenipotentiary Meeting on the Establishment of the International Centre for Genetic Engineering and Biotechnology, the 1971 Agreement establishing the International Pepper Community, the 1977 Agreement establishing the Southeast Asia Tin Research and Development Centre, the 2001 Agreement establishing the Terms of Reference of the International Jute Study Group and the 1976 Constitution of the Asia-Pacific Telecommunity and the 1945 Statute of the International Court of Justice.

[48] Article 60 provides:

"1. Any question of interpretation or application of the provisions of this Agreement arising between any member and the Bank, or between two or more members of the Bank, shall be submitted to the Board of Directors for decision. If there is no Director of its nationality on that Board, a member particularly affected by the question under consideration shall be entitled to direct representation in the Board of Directors during such consideration; the representative of such member shall, however, have no vote. Such right of representation shall be regulated by the Board of Governors.

2. In any case where the Board of Directors has given a decision under paragraph 1 of this Article, any member may require that the question be referred to the Board of Governors, whose decision shall be final. Pending the decision of the Board of Governors, the Bank may, so far as it deems necessary, act on the basis of the decision of the Board of Directors."

Enforcement of Foreign Arbitral Awards.[49] Like the category above, these treaties are focused more on the establishment of processes, rather than imposing specific obligations on State Parties, which could explain their lack of any dispute settlement provisions.

c. We were surprised to find a number of treaties without dispute settlement provisions in the human rights and disarmament categories, as these are treaties that impose extensive and significant obligations on States Parties, and which by their nature are inherently susceptible to disputes between States Parties. Potential reasons are: First, those human rights treaties that do not have dispute settlement provisions typically have extensive compliance provisions, including inter-state complaints procedures, which States Parties would be able to utilise for certain types of disputes - see for example the **1966 International Covenant on Economic, Social and Cultural Rights,** which has no dispute settlement provision, but a sophisticated compliance mechanism - including through its **2008 Optional Protocol to the International Covenant on Economic, Social and Cultural Rights** which establishes an inter-state complaints mechanism. While these compliance mechanisms are focused on whether a States Party has fulfilled its obligations under the treaty and not on issues of interpretation or application of the treaty, because such issues are generally inter-linked (and States generally only care about issues of interpretation or application where they are linked to compliance), they would likely provide a forum to address such issues. In relation to disarmament, it is only the **1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons**, which may be deemed to be Excessively Injurious or to have Indiscriminate Effects, and its three protocols that have no dispute settlement provisions. All the other disarmament treaties do have dispute settlement provisions (although, as discussed later, the majority of these treaties do not contain Compulsory Third-party Mechanisms). Sadly,

[49] This includes the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the 2014 United Nations Convention on Transparency in Treaty-based Investor-State Arbitration. Other examples are the 1961 European Convention on International Commercial Arbitration, the United Nations Convention on the Use of Electronic Communications in International Contracts, 2001 United Nations Convention on the Assignment of Receivables in International Trade and the 2001 United Nations Convention on the Assignment of Receivables in International Trade.

the negotiating history of the 1980 Convention does not shed any light on why this is so.[50]

d. Finally, there is also a number of treaties in the miscellaneous subject matter[51] which do not contain dispute settlement provisions, the most interesting example being the **1945 Charter of the United Nations**. While the Charter is concerned with dispute settlement in the broader scene - one of its key purposes is to establish procedures for dealing with disputes between UN Members, and maintaining international peace and security - it does not contain any mechanism for resolving disputes between parties in relation to the interpretation or application of the treaty itself. The negotiating history of the Charter shows that the issue of a dispute settlement mechanism was discussed, so obviously the negotiators saw scope for disputes.[52] However, in the end none was added as there was general reluctance by States to endow any one body with the power to interpret the Charter.[53] The Charter appears to have been seen as a special case given its importance and status as a "world constitution". Likewise, no dispute settlement provision was included in the **1945 Statute of the International Court of Justice** because the negotiating parties believed that the court itself was best placed to rule on issues of interpretation and application of the Statute. In contrast, there is a dispute settlement provision in the **1998 Rome Statute of the International Criminal Court.** The negotiating history of the Rome Statute shows that a number of States took the position that no dispute settlement provision should be included because the Court itself should rule on issues of application and interpretation (as is the case for the ICJ)[54] but in the end the parties agreed to a "nuanced compromise"[55] which provided for disputes being referred to a Treaty Body[56], in this case the

[50] The only allusion to the lack of a dispute settlement provision in the 1980 Convention is the following comment on the final clauses of the Convention: "final clauses [are] not exhaustive and only those which are directly related to the special character of this Treaty have been included": Doc A/CONF.95/3, Annex I, p. 9.
[51] In which we grouped treaties from the following UN subjects, all of which had less than three treaties in total: the UN Charter, declaration of death, economic statistics, freedom of information, maritime obligations, obscene material, outer space, pacific settlement, status of women, telecommunications and trafficking in persons.
[52] B Conforti "The Law and Practice of the United Nations*"* 4th edn, 2010, p. 16 to 18.
[53] *Id*., p. 18 (citing U.N.C.I.O, vol. 13, p. 832).
[54] These States were: the UK, Oman, India, Iraq, Saudi Arabia, Libyan Arab Jamahiriya, Tunisia, China, Algeria, Egypt. Of note, one of the early versions of the text produced by the 5th Preparatory Committee included the following proposal for a dispute settlement clause: "[Except as otherwise provided in the Statute] [, a] [A]ny dispute concerning the interpretation or application of this Statute shall be settled by the decision of the Court." Conference Reports, p. 255 para 48.
[55] O Triffetrer (ed.), "Commentary on the Rome Statute of the International Criminal Court*"* 3rd edn, 2016.
[56] As noted above in footnote 40, in this work we have defined "Treaty Body" as a central treaty body, such as a Conference or Meeting of the Parties, or other similar body that: (i) meets regularly; (ii) is established by the treaty

Assembly of States Parties, with the ability of the Assembly to on-refer the dispute to the ICJ.

47. Indeed, the only thing that seems clear from all of this is that there is no consistent pattern for those treaties which include dispute settlement provisions and those which do not. At the end of the day, decisions about whether or not to include a dispute settlement clause in a multilateral treaty are likely to come down to the political issues at stake and the players involved, rather than any set criteria.

B. Types of Dispute Settlement Mechanisms

48. Next, we examined the 178 treaties that contain dispute settlement provisions to identify the type of mechanism. We categorised all mechanisms into one of the following three groups (described in paragraphs 22 to 23 above):

a. "**Compulsory Third-party Mechanisms**" which are provisions providing for compulsory referral to a third-party where the third-party referral is able to be triggered by a party without such party first having to obtain the consent of the respondent party;
b. "**Voluntary Third-party Mechanisms**" which are provisions providing for voluntary referral to a third-party where the third-party referral is only able to be triggered with the consent of both parties; and
c. "**Non Third-Party Mechanisms**" which are provisions providing for non third-party procedures, including negotiation and consultation.

49. It is important to emphasise that these three categories are not mutually exclusive. Indeed, the majority 79%[57] of the treaties within our scope have a dispute settlement provision which incorporates more than one of the above categories. An example is Article 48 of the **1961 Single Convention on Narcotic Drugs** which provides:

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to act as its principle policy-making and governing body; and (iii) whose members are States Parties. In accordance with this definition, we have excluded: (i) specialised committees, including the various committees established under human rights treaties, given they are focused only on specific issues/aspects of the treaty, and; (ii) one-off review conferences, given their ad hoc character.

[57] Of the 178 treaties with dispute settlement provisions, only 38 included only one of the above categories (23 included only Compulsory Third-Party Mechanisms, 1 included only a Voluntary Third-Party Mechanism and 14 included only Non-Third-party Mechanisms).

(1) If there should arise between two or more Parties a dispute relating to the interpretation or application of this Convention, the said Parties shall consult together with a view to the settlement of the dispute by negotiation, investigation, mediation, conciliation, arbitration, recourse to regional bodies, judicial process or other peaceful means of their own choice.

(2) Any such dispute which cannot be settled in the manner prescribed shall be referred to the International Court of Justice for Decision.

50. Article 48 includes all three of the above categories: paragraph 1 includes the Non-Third Party Mechanism of negotiation, as well as various Voluntary Third Party Mechanisms, including mediation, conciliation, arbitration, investigation and judicial processes. Paragraph 2 includes a Compulsory Third Party Mechanism, referral to the ICJ, for any dispute not able to be settled through the Non-Third Party and Voluntary Third Party Mechanisms provided for in paragraph 1.

C. Compulsory Third-party Mechanisms

51. In initiating this research, our expectation was that only a small number of treaties would contain Compulsory Third-Party Mechanisms - largely because there are a number of States, particularly in Asia, that have expressed opposition to Compulsory Third-Party Mechanisms. For example, Chinese Foreign Ministry officials have explicitly stated that "China does not accept compulsory jurisdiction of the International Court of Justice…".[58] Likewise, in the negotiations for the **UN Charter** and **Statute of the ICJ**, both the then Soviet Union and the United States expressed their "strong objections" to the principle of compulsory jurisdiction.[59] ASEAN Member States' preference for Non Third-party Mechanisms over Compulsory Third-party Mechanisms is clearly articulated in Article 22(1) of the **2007 Charter of the Association of Southeast Asian States** (ASEAN

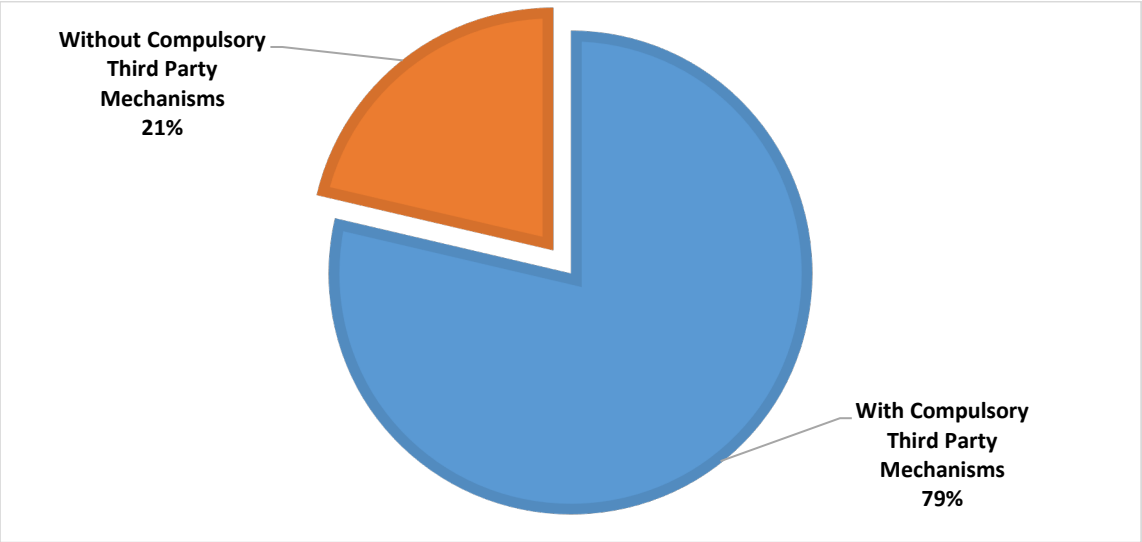
[58] MA Xinmin "China's Mechanism and Practice of Treaty Dispute Settlement" Chinese Journal of International Law (2012), 387–392, 391. China has also said: "China stands for proper settlement through negotiations, dialogue and consultations. The selection and application of means of dispute settlement should be made in strict accordance with the principle of sovereign equality and in full respect for the wish of the States concerned" [emphasis added] (statement by Mr. XU Hong On Agenda Item 75 Report of the International Court of Justice at the 70th Session of the UN General Assembly, 2015/11/06, available at: http://www.fmprc.gov.cn/mfa_eng/wjbxw/t1312835.shtml) which clearly underlines preference for negotiation and consultation or Voluntary Third-Party Mechanisms, with the reference to "in full respect for the wish of the States concerned".

[59] P. J. I. M. de Waart, The Element of Negotiation in the Pacific Settlement of Disputes Between States, Chapter 1, Part 1.

Charter) which provides that the "general principle" for ASEAN States in relation to dispute settlement is that: "Member States shall endeavour to resolve peacefully all disputes in a timely manner through dialogue, consultation and negotiation."[60] With various States opposed to Compulsory Third-Party Mechanisms, we assumed that the likelihood of States having agreed to Compulsory Third-party Mechanisms in multilateral negotiations would be low.

52. However, our expectation proved wrong: of the 178 treaties that have a dispute settlement provision, a significant majority of 79%[61] (140 treaties) contain a Compulsory Third-party Mechanism, as shown in **Chart 4** (below). Given the significance of this finding, we have listed those 140 treaties in **Annex A**.

Chart 4: This chart shows the percentage of treaties with dispute settlement provisions which have a Compulsory Third-party Mechanism



[60] Article 22(1) of the 2007 Charter of the Association of Southeast Asian. All other ASEAN instruments follow this guiding principle in relation to dispute settlement mechanisms. The only outlier is the Protocol to the ASEAN Charter on Dispute Settlement Mechanisms, which provides that if there is a dispute concerning the interpretation or application of the ASEAN Charter, the complaining party has to request consultation first and can only proceed to arbitration if consultation fails.

[61] This figure consists of 140 of the 178 treaties with dispute settlement provisions.

1. Type of forum preferred by Compulsory Third-Party Mechanisms

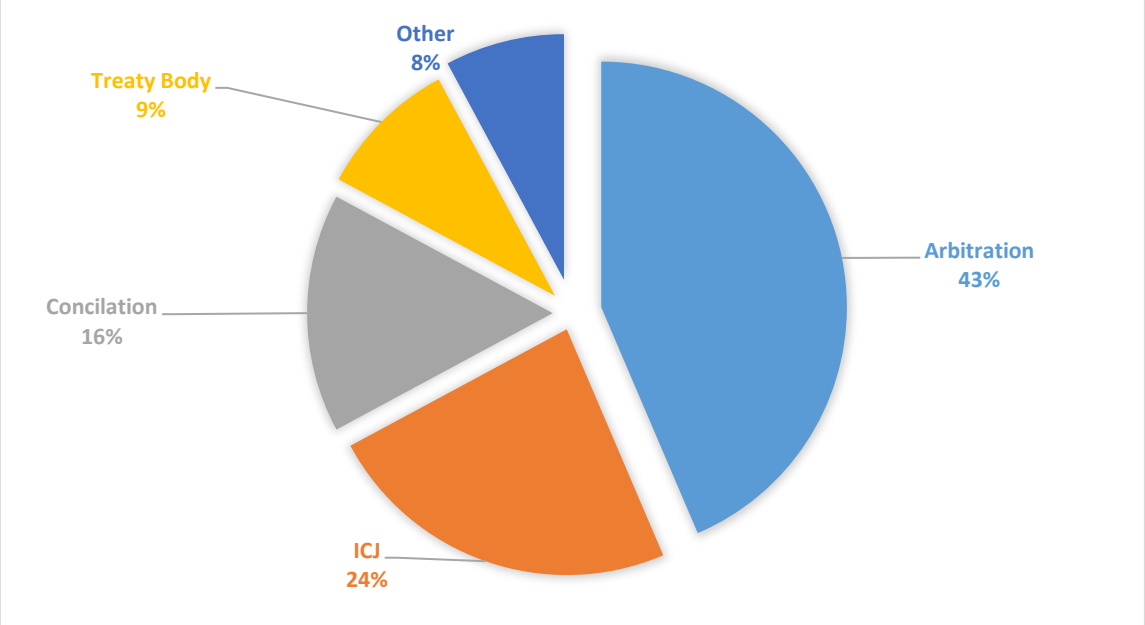
53. We also collected data on the type of third-party forum provided for in each of these Compulsory Third-party Mechanisms. In doing so, we found that a small number of Compulsory Third-party Mechanisms provide for more than one third-party fora. An example is Article 11 of the **1998 Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations** which provides that either party can submit disputes to Good Offices but "[i]f neither State Party seeks [good offices]…or if the exercise of good offices fails to facilitate a settlement of the dispute…" then either party can submit the dispute to arbitration or the ICJ.[62] As such, it essentially provides for compulsory referral to three different types of third-party—good offices, arbitration and the ICJ. Another example is the **1982 Convention on the Law of the Sea** (UNCLOS) which provides for the compulsory referral of disputes to a third party, but allows parties to choose the third party forum.[63]

[62] The full text of Article 11 is as follows:
"1. In the event of a dispute between States Parties concerning the interpretation or application of this Convention, the States Parties to the dispute shall consult each other for the purpose of settling the dispute. Such consultation shall begin promptly upon the written declaration, delivered by one State Party to another State Party, of the existence of a dispute under this Convention. The State Party making such a written declaration of the existence of a dispute shall promptly deliver a copy of such declaration to the depositary.
2. If a dispute between States Parties cannot be settled within six (6) months of the date of delivery of the written declaration to a State Party to the dispute, the States Parties to the dispute may request any other State Party, State, non-State entity or intergovernmental organization to use its good offices to facilitate settlement of the dispute.
3. If neither State Party seeks the good offices of another State Party, State, non-State entity or intergovernmental organization, or if the exercise of good offices fails to facilitate a settlement of the dispute within six (6) months of the request for such good offices being made, then either State Party to the dispute may:
a) request that the dispute be submitted to binding arbitration; or
b) submit the dispute to the International Court of Justice for decision, provided that both States Parties to the dispute have, at the time of signing, ratifying or acceding to this Convention, or at any time thereafter, accepted the jurisdiction of the International Court of Justice in respect of such disputes.
4. In the event that the respective States Parties to the dispute request that the dispute be submitted to binding arbitration and submit the dispute to the International Court of Justice for decision, the submission to the International Court of Justice shall have priority.
5. In the case of a dispute between a State Party requesting telecommunication assistance and a non-State entity or intergovernmental organization headquartered or domiciled outside of the territory of that State Party concerning the provision of telecommunication assistance under Article 4, the claim of the non-State entity or intergovernmental organization may be espoused directly by the State Party in which the non-State entity or intergovernmental organization is headquartered or domiciled as a State-to-State claim under this Article, provided that such espousal is not inconsistent with any other agreement between the State Party and the non-State entity or intergovernmental organization involved in the dispute.6. When signing, ratifying, accepting, approving or acceding to this Convention, a State may declare that it does not consider itself bound by either or both of the dispute settlement procedures provided for in paragraph 3. The other States Parties shall not be bound by a dispute settlement procedure provided for in paragraph 3 with respect to a State Party for which such a declaration is in force."
[63] See UNCLOS Article 287, Part XV.

54. To keep things simple, in categorising provisions like the two above we have classified them by their "primary" third-party forum. So, for example, we classified the third-party forum in the **1998 Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations** as "good offices", since that is the first option given to States. Likewise, we classified UNCLOS as "arbitration" since that is the default option where parties have not indicated a preference.

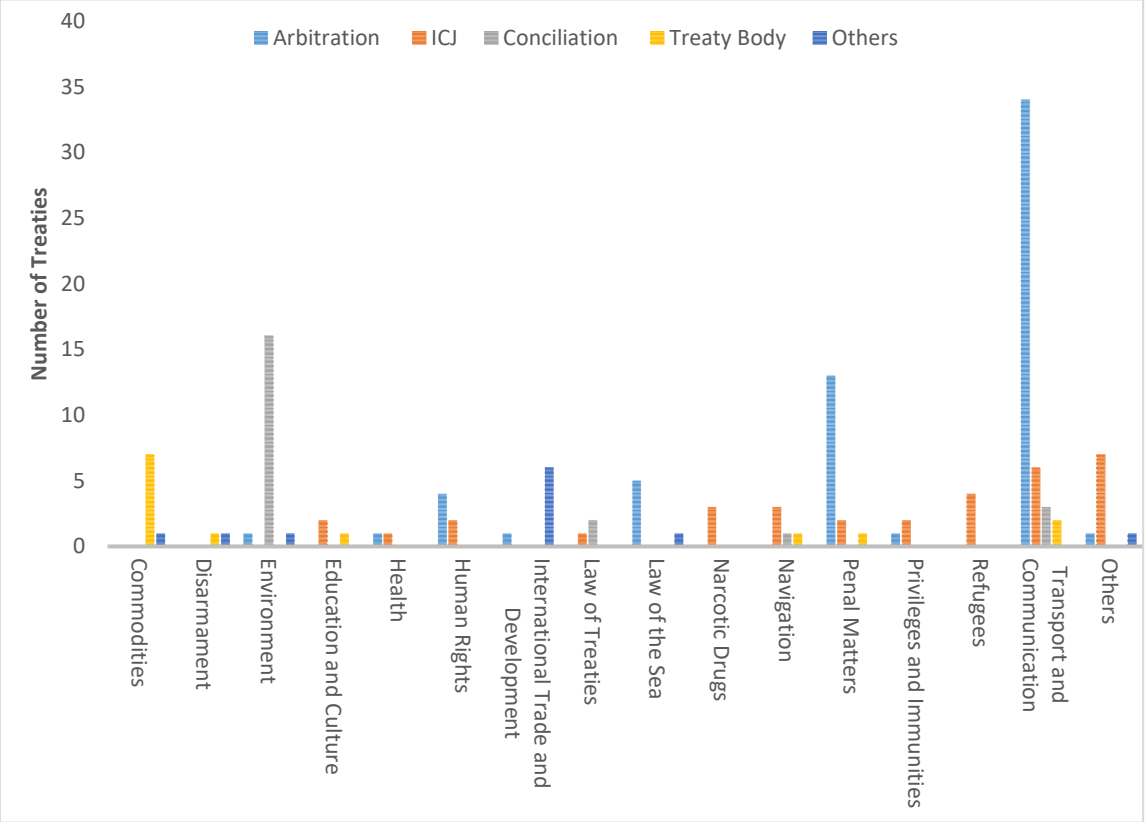
55. As shown by **Chart 5** below, arbitration is by far the most prevalent third-party forum found in Compulsory Third-Party Mechanisms, accounting for 43% of all Compulsory Third-Party Mechanisms. Surprisingly, the ICJ only accounts for 24%, not materially greater than conciliation, which account for 16%. The remaining 17% is split between Treaty Bodies and other types of bodies and fora, which includes the UN Security Council, special commissions and fact finding bodies.

Chart 5: This chart presents a breakdown of the types of third-party forum provided for in Compulsory Third-party Mechanisms



56. We also looked at the types of Compulsory Third-party Mechanism used for each treaty subject, and our findings are set out below in **Chart 6.**

Chart 6: This chart presents a breakdown of the types of third-party forum provided for by subject in Compulsory Third-party Mechanisms



57. As is shown in **Chart 6**:

a. Despite only accounting for 24% of all Compulsory Third-Party Mechanisms (see **Chart 5** above), referral to the ICJ appears in a wide range of treaty subjects, the only exceptions being commodities, disarmament, environment and international trade and development. Privileges and immunities, narcotic drugs, refugees, education and culture, navigation and other[64] treaties generally favour referral to the ICJ, with narcotic drugs and refugee treaties providing for referral to the ICJ exclusively.

b. Unlike for the ICJ and despite arbitration being the most popular Compulsory Third-party Mechanism (see **Chart 5** above), no treaty subject matter exclusively provides for referral to arbitration. Penal matters, human rights, transport and communication

[64] "Other" includes treaties within the following treaty subjects from the UN database, which we grouped together because they each include only three treaties or less: UN Charter, declaration of death, economic statistics, freedom of information, maintenance obligations, obscene publications, outerspace, pacific settlement, status of women, telecommunications and trafficking in persons and other miscellaneous treaties.

and law the sea treaties generally favour **arbitration**. In addition, referral to arbitration can also be found in one environment treaty, one international trade and development treaty and one privileges and immunities treaties.

c. Environmental treaties strongly favour **conciliation**. 16 of the 18 environmental treaties with Compulsory Third-party Mechanisms provide for referral to conciliation. Conciliation is not favoured by any other subject, but is also used in two law of treaties, one navigation, three transport and communication treaties and UNCLOS (although for UNCLOS it is not the primary method, see paragraph 54 above).

d. Commodity treaties generally favour referral to a **Treaty Body**.[65] An example is the **1995 Grains Trade Convention** which, as noted above, provides for compulsory referral of disputes not settled by negotiation to a Treaty Body called the "Council". Referral to a Treaty Body is also used in five other treaty subjects, including one education and culture treaty, one disarmament treaty, one navigation treaty, two transport and communications treaties and one penal matters treaty.

e. International trade and investment treaties generally favour referral to **other** types of third-party forums. In most cases, the forum is a Board established by the treaty that is made up of experts chosen by the States Parties.[66] An example is the **1965 Agreement establishing the Asian Development Bank** which provides for compulsory referral of disputes to the Bank's Board of Directors, which is a body established by the treaty composed of 10 persons of high competence in economic and financial matters who are elected by the States Parties and which in most cases is established to fulfil a broader governance role function, and not solely a dispute settlement function.[67]

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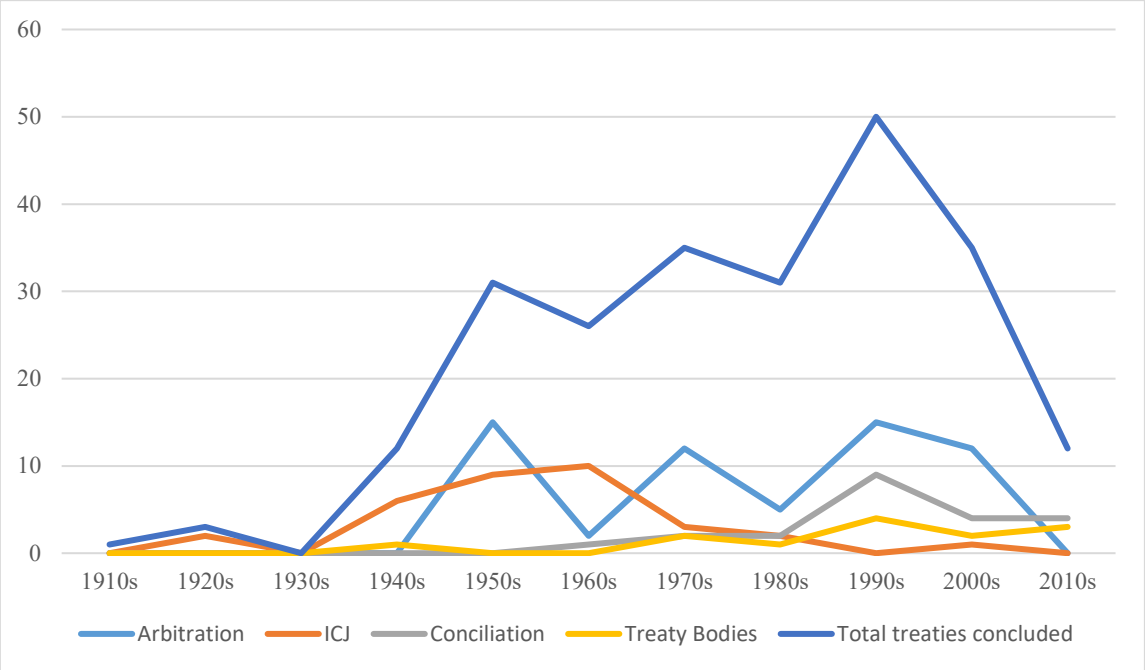
[65] Which, as noted above in footnote 39, we have defined as a central treaty body, such as a Conference or Meeting of the Parties, or other similar body that: (i) meets regularly; (ii) is established by the treaty to act as its principle policy-making and governing body; and (iii) whose members are States Parties. In accordance with this definition, we have excluded: (i) specialised committees, including the various committees established under human rights treaties, given they are focused only on specific issues/aspects of the treaty, and; (ii) One-off review conferences, given their ad hoc character.

[66] This is different to a Treaty Body, which is made up of all States Parties to the treaty. See footnote 39 above.

[67] The relevant provisions of the 1965 Agreement establishing the Asian Development Bank are as follows:
- Article 60: "1. Any question of interpretation or application of the provisions of this Agreement arising between any member and the Bank, or between two or more members of the Bank, shall be submitted to the Board of Directors for decision. If there is no Director of its nationality on that Board, a member particularly affected by the question under consideration shall be entitled to direct representation in the Board of Directors during such

58. We also looked at the type of third-party forum specified in treaties with Compulsory Third-party Mechanisms by decade from the 1920s to the present.[68] This data is presented in **Chart 7** (below).

Chart 7: This chart presents the types of third-party forum specified in treaties with Compulsory Third-party Mechanisms by decade from the 1920s to the present, as compared to the total number of treaties concluded



59. As is shown by **Chart 7** (above), referral to the ICJ was initially the most popular Compulsory Third-party Mechanism, enjoying a steady increase from the 1940s to the 1960s. However, from the 1960s its usage decreased.

consideration; the representative of such member shall, however, have no vote. Such right of representation shall be regulated by the Board of Governors. 2. In any case where the Board of Directors has given a decision under paragraph 1 of this Article, any member may require that the question be referred to the Board of Governors, whose decision shall be final. Pending the decision of the Board of Governors, the Bank may, so far as it deems necessary, act on the basis of the decision of the Board of Directors.

- Article 30:"1. (i) The Board of Directors shall be composed of ten (10) members who shall not be members of the Board of Governors, and of whom: (a) seven (7) shall be elected by the Governors representing regional members; and (b) three (3) by the Governors representing non-regional members. Directors shall be persons of high competence in economic and financial matters and shall be elected in accordance with Annex B hereof."

[68] Note: this data includes only the total number of treaties concluded that provided for Compulsory Third-Party Mechanisms.

60. Of note, the first treaty to provide for compulsory referral to the ICJ following its establishment through the **1945 Statute of the International Court of Justice** was the **1948 Convention on the Prevention and Punishment of the Crime of Genocide** which provides in Article IX that "[d]isputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute" [emphasis added]. Interestingly, it is one of the few Compulsory Third-party Mechanisms that does not require States to attempt negotiations or consultation as a compulsory prerequisite to trigger the third-party procedure (see more on this below in paragraph 118).

61. The decrease in use of the ICJ from the 1960s on is likely to be attributable, at least in part, to the South West Africa cases decided by the ICJ in 1962[69], which were highly contentious and considered to have seriously eroded the developing world's confidence in the ICJ.[70] Indications of this can be found in the negotiating history for the **1978 Vienna Convention on Succession of States in respect of Treaties** which records that Mali and Swaziland objected to the inclusion of a dispute settlement provision providing for compulsory referral to the ICJ due to their lack of confidence in the Court following its South West Africa decision. During the negotiations Mali explained: "[t]hird world countries [can] not accept judgments which [take] no account of their own opinions and which seemed to imply that such countries [do] not belong to the category of civilized nations referred to in article 38 of the **Statute of the International Court of Justice**".[71] Similar concerns were also raised during the negotiations of the **1963 Vienna Convention on Consular Relations** with India, speaking on behalf of a number of States who opposed inclusion of a clause providing for compulsory referral to the ICJ, stating that "the most

[69] The cases were initiated in 1960 by Ethiopia and Liberia against South Africa. They alleged that South Africa's apartheid policy violated certain articles of the League of Nations Mandate for South West Africa and Article 22 of the Covenant of the League. In its judgment of 21 December 1962, the Court dismissed the jurisdictional objections and found that it was competent to hear the case on the merits. However, after hearing arguments, the Court controversially dismissed the case on the grounds that the Applicants lacked standing to raise the issues because they possessed no legal right or interest in the subject matter of their claims.

[70] See for example Michla Pomerance (1999) "Case Analysis: The ICJ and South West Africa (Namibia): A Retrospective Legal/Political Assessment" Leiden Journal of International Law, 12, pp 425-436 , p

[71] The conference records are found in the United Nations Conference on the Succession of States in Respect of Treaties, Official Records (Volume II), Summary records of the plenary meetings and of the meetings of the Committee as a whole, Doc A/CONF.80/16/Add.1 ('Official Records, Vol II'). Official Records, Vol II, p. 121 para 9.

important reason for the rejection by some States of the jurisdiction of the [ICJ] was a lack of confidence in the impartiality of its judgments. The composition of the Court did not, as the Statute desired, represent equally the different legal systems of the world"[72].

62. The ICJ, at least in the context of Compulsory Third-party Mechanisms in multilateral treaties, seemingly never recovered from the stigma of the South West Africa cases: since its sharp decline in popularity in the 1970s and 1980s (see **Chart 7**), it has appeared in only one Compulsory Third-Party Mechanism from 1990 to the present—the **2008 Additional Protocol to the Convention on the Contract for the International Carriage of Goods by Road (CMR) concerning the Electronic Consignment Note**.[73]

63. However, as is explained below (see paragraph 109), while the ICJ ceased to appear as a Compulsory Third-party Mechanism from the 1960s onwards, it became a popular forum for Voluntary Third-party Mechanisms. This is presumably because those opposed to compulsory ICJ referral did not have a problem with the ICJ as a voluntary third-party mechanism, since they would have the option to veto any such referral should a dispute ever arise (as any such referral would be contingent upon the mutual agreement at the time of the parties in dispute).

64. On the other hand, referral to arbitration has been more consistent and, as is shown by **Chart 7,** has steadily tracked along with the total number of treaties concluded. This may be explained by the fact that, unlike the ICJ which was only established in 1945, inter-state arbitration dates back to the fifth century BC and has enjoyed a permanent framework since 1899.[74]

65. The first example of compulsory referral to arbitration in our data set is the **1952 International Convention to Facilitate the Crossing of Frontiers for Passengers and Baggage Carried by Rail** which provides for compulsory referral of disputes not settled

[72] 21st Meeting of the Plenary, United Nations Conference on Consular Relations, Doc A/CONF.25/SR.21, p. 88 para 8 (emphasis added).
[73]Article 11 of which provides: "Any dispute between two or more Parties relating to the interpretation or application of this Protocol which the Parties are unable to settle by negotiation or other means may, at the request of any one of the Parties concerned, be referred for settlement to the International Court of Justice."
[74] 1899 Convention for the Pacific Settlement of International Disputes, which established the Permanent Court of Arbitration. See also Srecko Lucky Vidmar, Compulsory Inter-state Arbitration of Territorial Disputes, 31:1 Denv.J. Int'l L. & Pol'y, 87, 90.

by negotiation to arbitration.[75] As shown by **Chart 7**, since the late 1960s, arbitration has consistently ranked as the most popular Compulsory Third-party Mechanism.

66. Compulsory referral to a conciliation committee first appeared in our data set in the **1969 Vienna Convention on the Law of Treaties** which provides for compulsory referral of disputes to a conciliation committee, and includes a detailed conciliation procedure set out in Annex 1.[76] As shown by **Chart 7**, it then saw a slow but steady increase in popularity and was used extensively in the many environmental treaties concluded in the 1990s (see paragraph 55c above), perhaps inspired by the development of UN Model Rules for the Conciliation of Disputes between States during the 1990s.[77]

67. Compulsory referral to a Treaty Body first emerged in the 1940s, first appearing in the **1948 Convention on the International Maritime Organization** which provides for compulsory referral of disputes to the Assembly, a body established by the Convention and made up of all members of the Organisation.[78] Of note, the Convention also empowers the Organisation to refer any legal question which cannot be settled by the Assembly to the ICJ for an advisory opinion.

68. Since then, compulsory referral to a Treaty Body has continued to be used in a small number of treaties, including such prominent examples as the **1998 Rome Statute of the**

[75] Article 15 provides: "Any dispute between any two or more Contracting Parties concerning the interpretation or application of this Convention, which the Parties are unable to settle by negotiation or by another mode of settlement, may be referred for decision, at the request of any one of the Contracting Parties concerned, to an arbitral commission, to which each party to the dispute shall nominate one member; the chairman, who shall have the casting vote, shall be appointed by the Secretary-General of the United Nations."

[76] Note, Article 66 also provides for compulsory referral of disputes about certain articles (53 and 64) to the ICJ. However, in accordance with our approach as explained in para X, because the mechanism for disputes about all other articles is conciliation, we categorised this treaty as conciliation. The full text of Article 66 is as follows: "If, under paragraph 3 of article 65, no solution has been reached within a period of 12 months following the date on which the objection was raised, the following procedures shall be followed: (a) any one of the parties to a dispute concerning the application or the interpretation of article 53 or 64 may, by a written application, submit it to the International Court of Justice for a decision unless the parties by common consent agree to submit the dispute to arbitration; (b) any one of the parties to a dispute concerning the application or the interpretation of any of the other articles in part V of the present Convention may set in motion the procedure specified in the Annex to the Convention [which is conciliation] by submitting a request to that effect to the Secretary-General of the United Nations."

[77] http://www.un.org/ga/search/view_doc.asp?symbol=a/res/50/50, A/RES/50/50

[78] The relevant articles (Article 69 and 70) provide: "Any question or dispute concerning the interpretation or application of the Convention shall be referred to the Assembly for settlement, or shall be settled in such other manner as the parties to the dispute may agree. Nothing in this article shall preclude any organ of the Organization from settling any such question or dispute that may arise during the exercise of its functions. Any legal question which cannot be settled as provided in Article 69 shall be referred by the Organization to the International Court of Justice for an advisory opinion in accordance with Article 96 of the Charter of the United Nations".

International Criminal Court.[79] This is an unusual trend because, unlike the other third-party fora, Treaty Bodies are not made up of neutral, legal experts. Rather, they are political bodies, made up of all the parties to the treaties, so the likelihood of political considerations influencing decision making would seem much higher. So why would negotiating parties prefer such a method over traditional neutral third-party fora such as the ICJ, an arbitral commission or a conciliation committee? We looked at the records from the Rome Statute negotiations to see if this example could shed any light. They show that the initial proposal was for disputes to be referred to arbitration or the ICJ[80] but that certain NGOs participating in the negotiation thought that it would "undermine the authority" of the ICC if a third-party judicial body was permitted to authoritatively rule on the interpretation of the ICC's Statute.[81] As a result, referral to the Assembly of States Parties was agreed as "nuanced compromise"[82] to try and resolve these issues.[83] However, whether or not the 124 members of the Assembly of States Parties would be able to resolve a dispute between two members remains to be seen.

2. The use of Opt-in Mechanisms

69. An interesting feature of our data is that some treaties include Compulsory Third-party Mechanisms as an optional obligation that States Parties can elect to take on or not. As noted above, in this paper we call these Opt-in Mechanisms.[84] An example is Article 21

[79] Article 119 provides: "1. Any dispute concerning the judicial functions of the Court shall be settled by the decision of the Court. 2. Any other dispute between two or more States Parties relating to the interpretation or application of this Statute which is not settled through negotiations within three months of their commencement shall be referred to the Assembly of States Parties. The Assembly may itself seek to settle the dispute or may make recommendations on further means of settlement of the dispute, including referral to the International Court of Justice in conformity with the Statute of that Court."

[80] See the records of the 5th Preparatory Committee in December 1997

[81] Amnesty International, "The International Criminal Court - Making the right choices", p. 30.

[82] O Triffetrer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (3rd edn, 2016).

[83] See Article X of the 1998 Rome Statute of the International Criminal Court

[84] Of note, Opt-in Mechanisms can be found in a wide variety of dispute settlement provisions including:

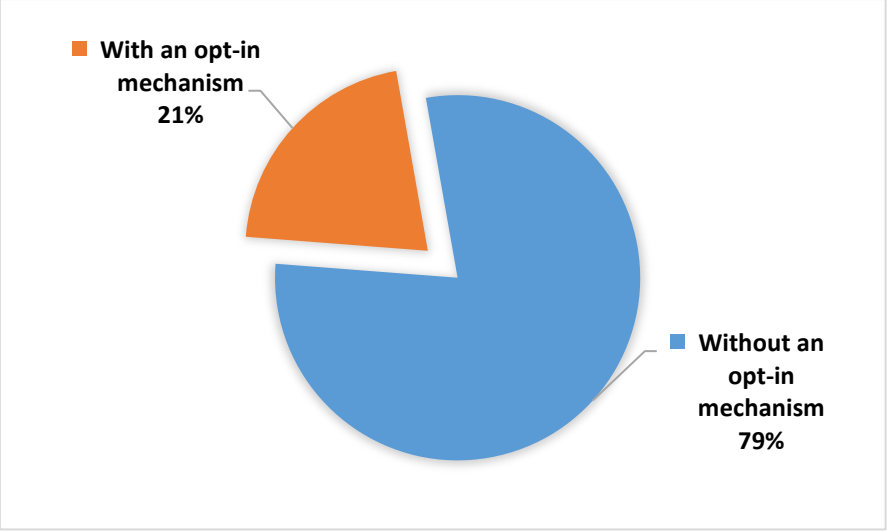
- Compulsory Third-Party Mechanisms—for example, the 2001 Stockholm Convention on Persistent Organic Pollutants which provides for compulsory referral to conciliation for all disputes not settled by negotiation and also enables parties to opt-in by declaration to compulsory referral to either the ICJ or arbitration (see Article 18(2) and (6)).
- Voluntary Third-Party Mechanisms—for example the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal which provides that for disputes not settled by negotiation the parties can agree to refer to the ICJ or arbitration (Article 20(1) and (2)) and also enables parties to opt-in by declaration to compulsory referral to either the ICJ or arbitration (Article 20(3)).
- Non-Third-Party Mechanisms—for example, the 2013 Minamata Convention on Mercury which provides for the settlement of disputes by negotiation or "other peaceful means" (Article 25(1)) but also enables parties to opt-in by declaration to compulsory referral to either the ICJ or arbitration (Article 25(2)).

of the **1992 Convention on the Transboundary Effects of Industrial Accidents** which provides:

> 1. If a dispute arises between two or more Parties about the interpretation or application of this Convention, they shall seek a solution by negotiation or by any other method of dispute settlement acceptable to the parties to the dispute.
> 2. When signing, ratifying, accepting, approving or acceding to this Convention, or at any time thereafter, a Party may declare in writing to the Depositary that, for a dispute not resolved in accordance with paragraph 1 of this Article, it accepts one or both of the following means of dispute settlement as compulsory in relation to any Party accepting the same obligation:
> (a) Submission of the dispute to the International Court of Justice;
> (b) Arbitration in accordance with the procedure set out in Annex XIII hereto [emphasis added].

70. As shown in **Chart 8** below, in total we found that 21% of treaties within the scope of our study[85] (37 in total) include such an Opt-in Mechanism.

Chart 8: This chart shows the percentage of treaties with Compulsory Third-Party Mechanism that include an Opt-in Mechanisms

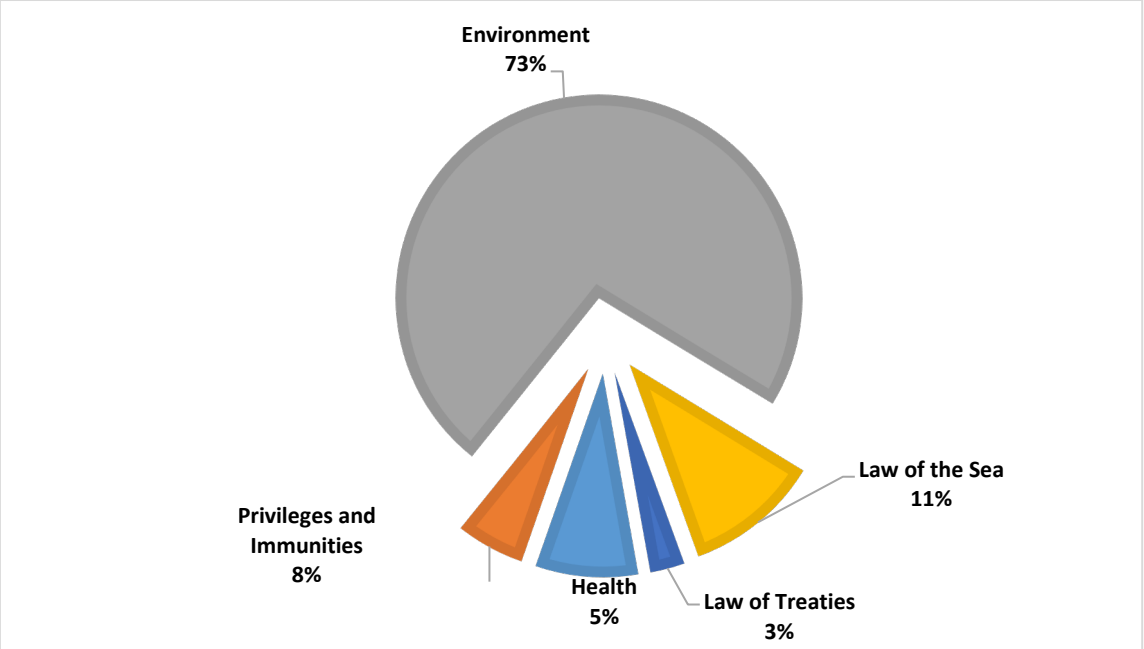


- No mechanism at all—for example parties to the 1958 Law of the Sea treaties are able to opt-in to compulsory referral to the ICJ by ratifying the 1958 Optional Protocol of Signature concerning the Compulsory Settlement of Disputes. But if they do not do so, no dispute settlement mechanism applies.

[85] Ie those 178 treaties within the scope of our study that have dispute settlement provisions.

71. The Opt-in Mechanisms that we identified in these 37 treaties exclusively provide for opt-in to compulsory ICJ and/or arbitration referral; no other Compulsory Third-Party Mechanisms are provided for. The Opt-in Mechanisms take two forms: (i) opt-in by declaration, where the Opt-in Mechanism is part of the dispute settlement provision[86]; and (ii) opt-in by ratification of a separate optional protocol, where the Opt-in Mechanism is provided for in a separate optional protocol.[87] In all instances where the Opt-in Mechanism is provided for through ratification of an optional protocol, the parent treaty includes no dispute settlement provision - so unless States Parties opt-in by ratifying the optional protocol, no dispute settlement mechanism is available.[88]

Chart 9: This chart shows the percentage of treaties with an Opt-in Mechanism



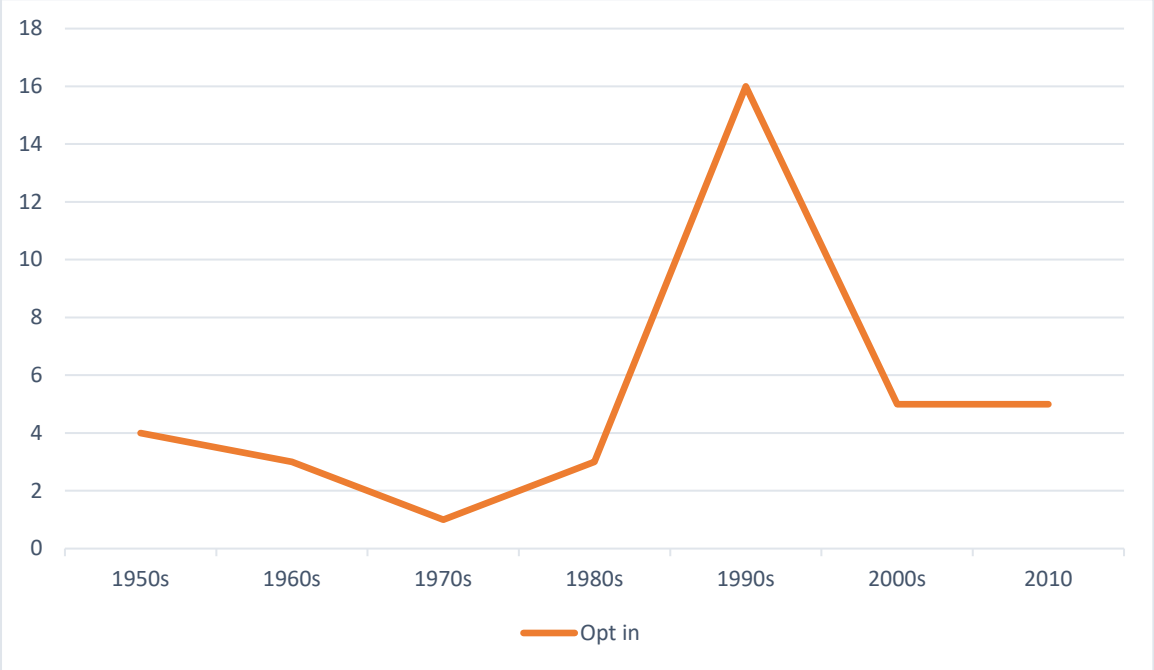
72. As can be seen from **Chart 9** above, Opt-in Mechanisms are a major feature of environmental treaties. Almost 80% of environmental treaties include an opt-in

[86] An example is Article 21 of the 1992 Convention on the Transboundary Effects of Industrial Accidents which provides for disputes to be settled by negotiation and enables a party at the time of ratification or acceptance to declare that it accepts compulsory referral to either arbitration or the ICJ.
[87] An example is the 1961 Optional Protocol to the 1961 Vienna Convention on Diplomatic Relations which provides a dispute settlement mechanism (compulsory referral to the ICJ) that parties to its parent convention can opt-in to by ratifying the Optional Protocol.
[88] Of the remainder, 3 are found in treaties with Voluntary Third-Party Mechanisms and 6 in treaties with Non-Third-Party Mechanisms.

procedure. This approach has been adopted in 27 environment treaties ranging from 1985 to the present, the most recent example being the **2013 Minamata Convention on Mercury**. In addition to environmental treaties, Opt-in Mechanisms can also be found in law of the sea,[89] law of treaties,[90] health,[91] and privileges and immunities[92] treaties.

73. We also looked at the number of treaties concluded with Opt-in Mechanisms by decade. See **Chart 10** below.

Chart 10: This chart shows the number of treaties concluded with Opt-in Mechanisms by decade



74. As can be seen from **Chart 10**, there was an increase in the use of Opt-in Mechanisms during the 1970s and 1980s, which peaked in the 1990s, and then steadily declined.

75. We looked at the negotiating history (where available) of those treaties that have utilised Opt-in Mechanisms to understand the background and rationale to this approach.

[89] The 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas, the 1958 Convention on the Territorial Sea and the Contiguous Zone, the 1958 Convention on the High Seas and the 1958 Convention on the Continental Shelf
[90] The 1978 Vienna Convention on Succession of States in Respect of Treaties
[91] The 2003 WHO Framework Convention on Tobacco Control and the 2012 Protocol to Eliminate Illicit Trade in Tobacco Products
[92] The 1961 Vienna Convention on Diplomatic Relations, the 1963 Vienna Convention on Consular Relations and the 1969 Convention on Special Missions

76. The earliest example we found of an Opt-in Mechanism is the **1958 Optional Protocol of Signature concerning the Compulsory Settlement of Disputes**, which provides an optional dispute settlement mechanism (compulsory referral to the ICJ, unless there is agreement to arbitration) for parties to the four **1958 Law of the Sea Conventions**.[93] The negotiating history shows that this approach was adopted because there was intractable disagreement between the parties over whether the dispute settlement mechanism for the 1958 Conventions should be compulsory referral to arbitration or to the ICJ.[94] The Optional Protocol Opt-in Mechanism was a novel approach proposed in order to deal with these conflicting positions, with those States that supported referral to arbitration satisfied as they had the option not to ratify the Optional Protocol.[95] Interestingly, this approach was not a great success: the majority of States Parties to the 1958 Conventions did not ratify the Optional Protocol, which has attracted only around 40 ratifications to date. Thus, most States Parties to the 1958 Conventions ended with no dispute settlement mechanism available to them.

77. The lack of success with the **1958 Law of the Sea Optional Protocol** was said to be a catalyst for UNCLOS not following the same approach (instead, UNCLOS includes Compulsory Third-party Mechanisms as part of the treaty's core obligations). However, while the approach was not followed for UNCLOS, it was utilised again for the 1960s **Vienna Conventions on diplomatic and consular relations**[96] and the **1969 Convention on Special Missions,** all of which have optional protocols on dispute settlement.[97] In all

[93] The 1958 Convention on the Territorial Sea and the Contiguous Zone, the 1958 Convention on the High Seas, the 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas and the 1958 Convention on the Continental Shelf

[94] Yoshifumi Tanaka "The International Law of the Sea" Cambridge University Press 2012, page 24.

[95] Although interestingly this was contrary to the recommendations of the International Law Commission which was for "compulsory arbitration in case of dispute" to include within the treaty text: International Law Commission, Report to the UN General Assembly "Commentary to the articles concerning the law of the sea", page 287

[96] The 1961 Vienna Convention on Diplomatic Relations, the 1963 Vienna Convention on Consular Relations and the 1969 Convention on Special Missions

[97] 1961 Optional Protocol to the Vienna Convention on Diplomatic Relations Concerning the Compulsory Settlement of Disputes, the 1963 Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, and the 1969 Optional Protocol to the Convention on Special Missions concerning the compulsory settlement of disputes. Like their law of the sea predecessor, all three Optional Protocols to the Vienna Conventions provide for compulsory referral of disputes to the ICJ, unless the parties agree to arbitration or conciliation. Unlike their predecessor, many States ratified these Optional Protocols. And indeed, the dispute settlement mechanism provided by the Optional Protocol on Diplomatic Relations has been utilized, with five cases having come before the ICJ based on the compulsory referral provisions of the Optional Protocols.

of these cases, the catalyst for adopting an Opt-in Mechanism was State Party disagreement over whether there should be compulsory referral to arbitration or the ICJ, which was fuelled by developing country opposition to the ICJ in the aftermath of the South West Africa cases (see paragraph 61 above).

78. **Chart 10** also shows that popularity for Opt-in Mechanisms peaked in the 1990s, and then slowly declined. This peak in the 1990s is almost exclusively attributable to their extensive use in the many environmental treaties that were concluded in that period.[98] As shown in **Chart 9** above, Opt-in Mechanisms are a major feature of environmental treaties. Indeed, the most common dispute settlement mechanism found in environmental treaties (the bulk of which were concluded in the 1980s, including such high profile treaties as the **1992 United Nations Framework Convention on Climate Change** and the 1992 **Convention on Biological Diversity**[99]) is: compulsory referral to conciliation of disputes not able to be settled by negotiation, with an ability for parties to opt-in by declaration (rather than by ratifying an optional protocol) to compulsory referral to the ICJ or arbitration.[100]

[98] The only other examples of post 1980 Opt-in Mechanisms we found outside these environmental treaties are the 2003 WHO Framework Convention on Tobacco Control and 2012 Protocol to Eliminate Illicit Trade in Tobacco Products.

[99] Other examples are the 1985 Vienna Convention for the Protection of the Ozone Layer, the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer, the 1994 United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, the 1998 Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution on Heavy Metals, the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, the 2001 Stockholm Convention on Persistent Organic Pollutants and the 2013 Minamata Convention on Mercury.

[100] An example is Article 14 of the 1992 United Nations Framework Convention on Climate Change, which provides:

"1. In the event of a dispute between any two or more Parties concerning the interpretation or application of the Convention, the Parties concerned shall seek a settlement of the dispute through negotiation or any other peaceful means of their own choice.

2. When ratifying, accepting, approving or acceding to the Convention, or at any time thereafter, a Party which is not a regional economic integration organization may declare in a written instrument submitted to the Depositary that, in respect of any dispute concerning the interpretation or application of the Convention, it recognizes as compulsory ipso facto and without special agreement, in relation to any Party accepting the same obligation:

(a) Submission of the dispute to the International Court of Justice, and/or

(b) Arbitration in accordance with procedures to be adopted by the Conference of the Parties as soon as practicable, in an annex on arbitration.

A Party which is a regional economic integration organization may make a declaration with like effect in relation to arbitration in accordance with the procedures referred to in subparagraph (b) above.

3. A declaration made under paragraph 2 above shall remain in force until it expires in accordance with its terms or until three months after written notice of its revocation has been deposited with the Depositary.

4. A new declaration, a notice of revocation or the expiry of a declaration shall not in any way affect proceedings pending before the International Court of Justice or the arbitral tribunal, unless the parties to the dispute otherwise agree.

79. This formula was first adopted in **1985 in the Vienna Convention for the Protection of the Ozone Layer**, and has been used in a large number of environment treaties since then, the most recent example being the **2013 Minamata Convention on Mercury**. Interestingly, because most environmental treaties include a provision stating that unless otherwise provided their dispute settlement provisions apply to all protocols, this formula also applies to most environmental protocols, including the **1997 Kyoto Protocol to the United Nations Framework Convention on Climate Change** and the **2010 Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity**.[101]

80. The negotiating history for the **1985 in the Vienna Convention for the Protection of the Ozone Layer**, which is the first environmental treaty within the scope of our study to adopt the opt-in mechanism, shows that the parties always intended to have a Compulsory Third-party Mechanism as part of the treaty but, as in past cases, there was disagreement over the forum: ICJ versus arbitration. The opt-in model was initially proposed by an unnamed "expert" at an informal working group to deal with this disagreement.[102] Interestingly, during the negotiations various experts "expressed reservations" with this proposal, with one describing it as "unusual and without clear precedent… [which] might

5. Subject to the operation of paragraph 2 above, if after twelve months following notification by one Party to another that a dispute exists between them, the Parties concerned have not been able to settle their dispute through the means mentioned in paragraph 1 above, the dispute shall be submitted, at the request of any of the parties to the dispute, to conciliation.
6. A conciliation commission shall be created upon the request of one of the parties to the dispute. The commission shall be composed of an equal number of members appointed by each party concerned and a chairman chosen jointly by the members appointed by each party. The commission shall render a recommendatory award, which the parties shall consider in good faith.
7. Additional procedures relating to conciliation shall be adopted by the Conference of the Parties, as soon as practicable, in an annex on conciliation.
8. The provisions of this Article shall apply to any related legal instrument which the Conference of the Parties may adopt, unless the instrument provides otherwise." The other formulation that can be found some environmental treaties is a provision that requires negotiation for all disputes and the ability to "opt-in" to compulsory referral to ICJ or arbitration. See for example the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal.

[101] We note that a number of the environmental treaties follow the approach of specifying a dispute settlement mechanism in the parent treaty and then providing that the mechanism will apply to all protocols to the treaty, unless specified otherwise. Examples are the 1992 Convention on Climate Change and its protocols and the 1992 Convention on Biodiversity and its protocols. In such situations, where the parent convention has included an Opt-in Mechanism, we have also categorized the associated protocols as providing an Opt-in Mechanism. An interesting question that arises with this approach is whether utilisation of the Opt-in Mechanism in respect of the parent convention would also apply to the associated protocols, or whether parties would be free to take a separate approach with respect to associated protocols.

[102] Doc UNEP/WG.110/4, p. 6. The nationality of the expert was not stated.

prove unworkable in practice".[103] It appears that the inclusion of compulsory referral to conciliation was sensibly included during one of the final negotiating sessions, in order to ensure that States would have a Compulsory Third-party Mechanism available, even where they had not opted into ICJ or arbitral tribunal referral (an improvement on the opt-in via optional protocol model which leaves States with no dispute settlement mechanism unless they opt-in). Despite this inclusion, many participating States appended declarations to the Final Act of the Conference expressing their disagreement with the lack of a Compulsory Third-party Mechanism[104] - indicating a lack of understanding of the compulsory nature of the conciliation procedure adopted.

81. Interestingly, despite the extensive use of opt-in mechanisms in environmental treaties, very few States have taken the step of utilising them, even those States that are known to favour compulsory dispute settlement and which have accepted the compulsory jurisdiction of the ICJ. For example, in the **1992 Convention on Biological Diversity** where the convention has been universally accepted with 196 States Parties, only 5 have made declarations accepting the compulsory referral of disputes to the ICJ or arbitration. Similarly, of the 41 States Parties to the **1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes** only 4 have made declarations accepting compulsory referral to the ICJ or arbitration. It would appear that this novel solution, designed to deal with disagreement over the appropriate third party forum, has not been particularly effective.

3. The use of Opt-out Mechanisms

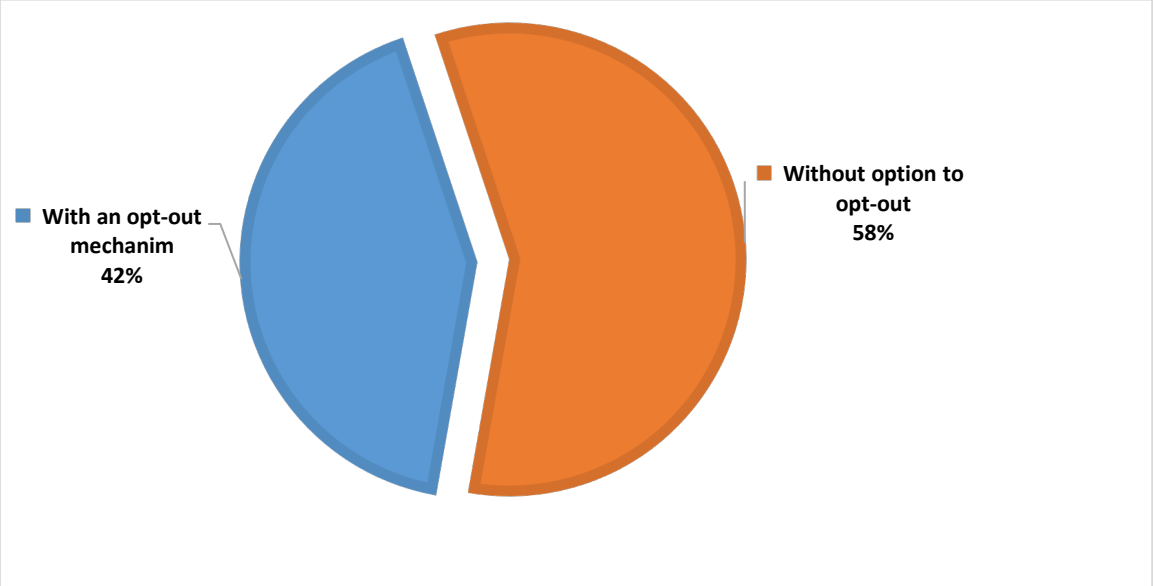
82. Another interesting (and related) feature we identified in our data collection is that some treaties with Compulsory Third-party Mechanisms include a mechanism allowing States Parties to "opt-out" of those obligations either by making a reservation or declaration. As noted above, in this paper we call these opt-out mechanisms.[105] For example, the dispute settlement provision for the **1999 International Convention for the Suppression of the**

[103] *Id*., p. 11.
[104] See Declarations made at the time of adoption of the Final Act of the Conference of Plenipotentiaries on the Protection of the Ozone Layer. The countries that made declarations are: Australia; Austria; Belgium; Canada; Chile; Denmark; Finland; France; Germany; Italy; Netherlands; New Zealand; Norway; Sweden; Switzerland; and the United Kingdom.
[105] As noted above, we have categorised provisions with Opt-out Mechanisms as compulsory, given that unless States Parties take the additional step of opting out, they are bound by the compulsory dispute settlement obligations in the treaty.

Financing of Terrorism provides for compulsory referral to arbitration of all disputes not settled by negotiation, but goes on to allow each state to "at the time of signature, ratification, acceptance or approval of this Convention or accession thereto declare that it does not consider itself bound by paragraph 1 [on compulsory referral to arbitration]."

83. As is shown in **Chart 11** below, in total we found that 42% of the treaties with Compulsory Third-party Mechanisms include an Opt-out Mechanism.

Chart 11: This chart shows the percentage of treaties with Compulsory Third-party Mechanisms that include an opt-out provision

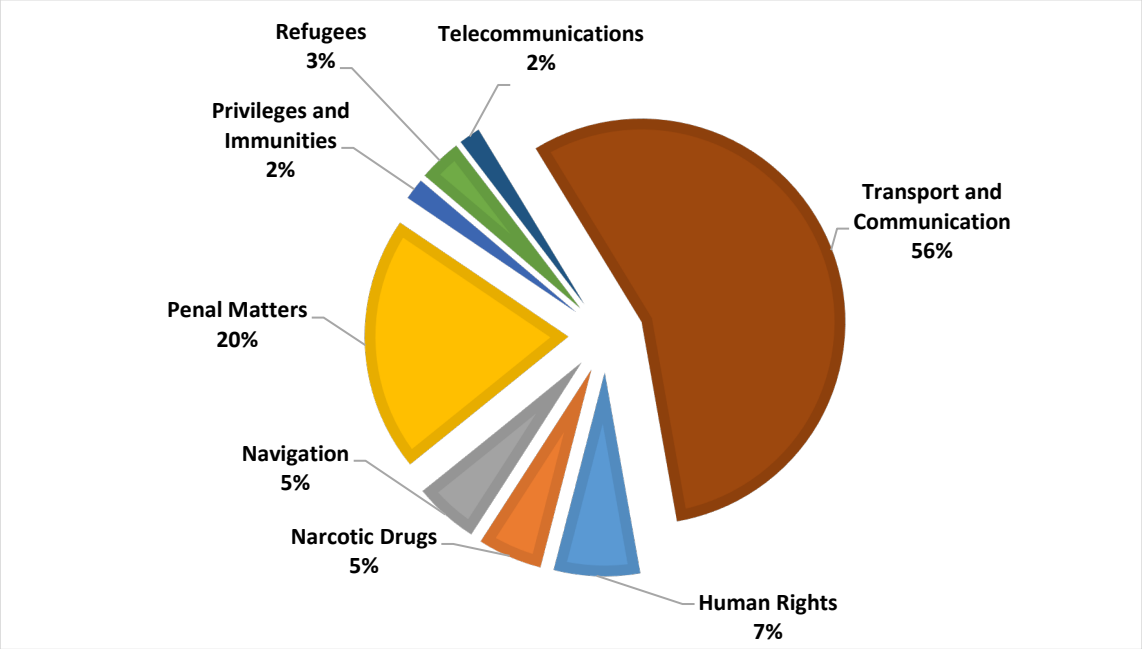


84. That means that of the 140 treaties within the scope of our study that have Compulsory Third Party Mechanisms:

    a. 81 or 58% include Compulsory Third-Party Mechanisms with *no* ability for States Parties to opt-out of those obligations. Given the significance of this finding, we have listed those 81 treaties in **Annex B**.
    b. 59 or 42% include Compulsory Third-Party Mechanisms that States Parties can opt-out of.

85. We looked at those treaties with Opt-out Mechanisms by subject to see if we could identify any trends.

Chart 12: This chart shows treaties with Compulsory Third-party Mechanisms that include an opt-out mechanism broken down by subject area



86. As can be seen from Chart 12 above, Compulsory Third-Party Mechanisms with Opt-out Mechanisms are a major feature of transport and communication treaties—56% of these types of treaties include a Compulsory Third-party Mechanism with an opt-out procedure. This approach has been adopted in 32 such treaties ranging from 1956 to the present, the most recent example being the 2013 Intergovernmental Agreement on Dry Ports.[106] In

[106] Of which Article 10 allows for reservations to be made to its provisions on dispute settlement (which provide for compulsory referral to conciliation of any dispute unable to be settled by negotiation or consultation). Of note, until 2003 all of these treaties included the Opt-out Mechanism in a separate reservation clause. However, that changed with the 2003 Intergovernmental Agreement on the Asian Highway Network, and from then on they were incorporated into the dispute settlement provision: See Article 14(5) which provides: "Any State may, at the time of definitive signature or of depositing its instrument of ratification, acceptance, approval or accession, deposit a reservation stating that it does not consider itself bound by the provisions of the present article relating to conciliation. Other Parties shall not be bound by the provisions of the present article relating to conciliation with respect to any Party which has deposited such a reservation."

addition to transport and communication treaties, opt-out mechanisms are also reasonably common in penal matters,[107] narcotic drugs,[108] human rights[109] and navigation treaties.[110]

87. We also looked at the number of treaties concluded with opt-in clauses by decade. See **Chart 13** below.

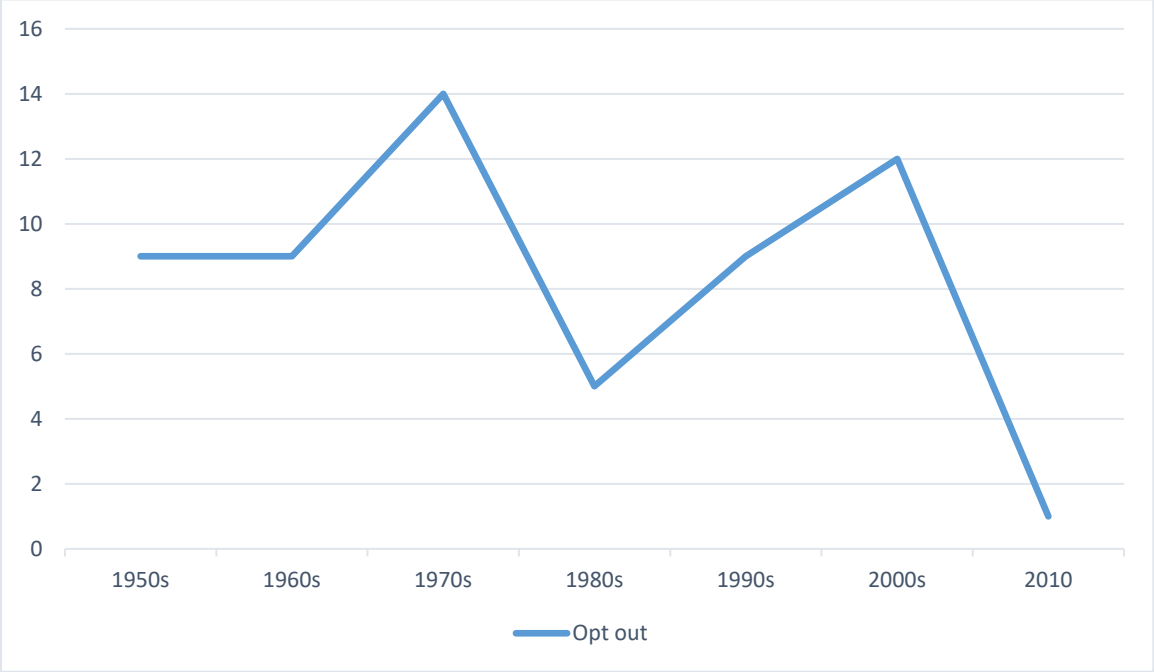
[107] Of the 16 penal matters treaties that provide Compulsory Third-Party Mechanisms, 13 provide for arbitration. All 12 of the Opt-out Mechanisms in the penal matters treaties are from these 13, beginning with the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents. The last of the 13, which does not include an Opt-out Mechanism, is the 2002 Agreement on the Privileges and Immunities of the International Criminal Court.

[108] Of the 3 narcotic drugs treaties that provide Compulsory Third-Party Mechanisms, all 3 provide for referral to the ICJ and include Opt-out Mechanisms, with the 1961 Single Convention on Narcotic Drugs the first to do so. For the two earlier narcotic drugs treaties, the Opt-out Mechanisms are included in the separate provision on reservations. The latest treaty—the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances—follows the human rights approach and includes it in the dispute settlement provision.

[109] Of the 6 human rights treaties that provide Compulsory Third-Party Mechanisms, 4 provide for arbitration. All 4 of the opt-outs (The 1979 Convention on the Elimination of All Forms of Discrimination Against Women, the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the 1990 International Convention on the Protection of the Rights of all Migrant Workers and Members of their families and the 2006 International Convention for the Protection of All Persons from Enforced Disappearance) from human rights treaties are drawn from these 4 arbitration-referral treaties, with the 1979 Convention on the Elimination of All Forms of Discrimination against Women being the first to do so. It was included in this treaty at the suggestion of France as a compromise, again to satisfy those States that were opposed to referral to the ICJ, and was based on the text from the 1979 International Convention against the Taking of Hostages, whose text was based on the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (see above). In the end, the clause provides for compulsory referral to arbitration, but the Opt-out Mechanism remained: UN Doc. A/C.3/34/14, p. 18. Interestingly, the remaining 2 human rights treaties which provide for compulsory referral to the ICJ do not include Opt-out Mechanisms. This is likely to be because those two treaties where concluded in 1948 and 1965 before the South West Africa case eroded States confidence in the ICJ (see para 49 above).

[110] Of the 5 navigation treaties that provide Compulsory Third-Party Mechanisms, 3 provide for compulsory referral to the ICJ. All 3 opt-outs from navigation treaties are drawn from these 3 ICJ-referral treaties, which are included in separate reservation provisions (These are the 1960 Convention Relating to the Unification of Certain Rules Concerning Collisions in Inland Navigation, the 1965 Convention on the Registration of Inland Navigation Vessels, the 1966 Convention on the Measurement of Inland Navigation Vessels). The first to do so was the 1960 Convention relating to the unification of certain rules concerning collisions in inland navigation. The other two navigation treaties, which provide for compulsory referral to conciliation and a treaty body, do not include Opt-out Mechanisms.

Chart 13: This chart shows the number of treaties concluded with opt-in and opt-out clauses by decade



88. As can be seen from **Chart 13** above, there was a rapid increase in the use of opt-in mechanisms between 1960 and 1970, followed by a decline between the 1970s and 1980s. Interestingly this is when opt-in mechanisms were at their peak of popularity (see paragraph 76 above). Then, between the 1980s and 2000s, they rose in popularity again.

89. Again, we were interested to understand the background to these opt-out mechanisms: why were they adopted, how do they relate to opt-in mechanisms, and why have they enjoyed particular surges in popularity?

90. As noted above, **Chart 12** shows that the bulk of opt-out mechanisms have been used in transport and communications. The earliest example we could find within the scope of our study is Article 38 of the **1956 Customs Convention on the Temporary Importation of Commercial Road Vehicles** which provides for compulsory referral of disputes not able to be settled by negotiation to arbitration and includes in the separate reservation a provision allowing parties to make a declaration at the time of signing, ratification or accession "that it does not consider itself as bound by Article 38 of the

Convention."[111] Unfortunately, we were unable to find any records of the negotiating history of that treaty to understand from where this opt-out formulation came, and indeed the negotiating records for most transport and communications treaties do not seem to be available. Without this data, it is difficult to understand the peaks and falls in the use of the opt-out mechanism shown in **Chart 13** above.

91. However, the negotiating history for the **1963 Vienna Convention on Consular Relations** is more revealing. As noted above, the negotiations for that treaty were dominated by developing countries' opposition to any dispute settlement mechanisms providing for compulsory refer to the ICJ on the basis of their "lack of confidence in the impartiality of its judgments",[112] and in the end the parties agreed to an opt-in mechanism via an optional protocol. However, one of the options that was discussed during the negotiations was an opt-out mechanism. This was raised by the Swiss delegation who claimed that an opt-out mechanism was a "superior solution" to an opt-in mechanism because "the text would appear in the convention itself, not in a separate instrument" and that this would "represent a genuine step forward in the progress of international arbitration because the signature of an optional protocol could be avoided or postpone, whereas it was necessary to take a decision in order to make a reserve reservation". [113] The Swiss opt-out proposal attracted many negative comments: Lebanon described it as "too subtle and complicated",[114] the UK described it as "too elaborate for the purposes of the Convention"[115] and Yugoslavia claimed that "allowing States to make [such] reservations" might "place them in an embarrassing position".[116] The only supporter of the Swiss proposal was the Netherlands who said that "for the international lawyer" the Swiss proposal was "more appropriate" because it constituted a "refusal of compulsory jurisdiction—in the form of reservation—which was exceptional".[117]

92. An Opt-out Mechanism was also proposed during negotiations for the **1978 Vienna Convention on Succession of States in respect of Treaties**. Again, these negotiations

[111] Article 39 of the 1956 Customs Convention on the Temporary Importation of Commercial Road Vehicles
[112] 21st Meeting of the Plenary, United Nations Conference on Consular Relations, Doc A/CONF.25/SR.21, p. 88 para 8 (emphasis added).
[113] Page 253 para 19.
[114] Page 253 para 19.
[115] Page 255, page 34.
[116] Page 255 para 41.
[117] Page 255 para 41.

were dominated by strong opposition from developing States to compulsory referral to the ICJ. To deal with these concerns an Opt-out Mechanisms was proposed, but rejected by delegates in favour of an Opt-in Mechanism in light of the so called "stigma" attached to a country choosing to opt-out.[118]

93. Despite this initial negative reaction to Opt-out Mechanisms, as is shown in **Chart 13** above, its use became more common, peaking in the 1970s and 2000s.

94. Interestingly, despite one of the triggers for the use of Opt-out Mechanisms appearing to be developing countries' opposition to the ICJ in the wake of the South West Africa cases (see paragraph 92 above), the great majority of Opt-out Mechanisms (71%[119]) relate to compulsory arbitration provisions. Opt-out Mechanisms are actually much less common for ICJ provisions: only 24%[120] relate to the ICJ. And, they are almost unheard of for conciliation: only 5%[121] relate to conciliation. Indeed, as noted above, the three earliest treaties to contain an Opt-out Mechanism, all of which are transport and communications treaties, provide for compulsory referral to arbitration, and not the ICJ.[122]

95. So how much have Opt-out Mechanisms actually be used by States? In light of the comments noted in paragraph 91 above (that utilising such mechanisms would place States "in an embarrassing position" and subject them to "stigma") we expected that they would be seldom used. However, this does not appear to be the case. While a complete analysis of state practice in relation to Opt-out Mechanisms is beyond the scope of this research (but is something we intend to look at in future—see paragraph 126(a) below), we have examined a couple of examples and found that, unlike Opt-in Mechanisms, the rate of utilization for Opt-out Mechanisms appears to be quite high. For example, of the 189 States Parties to the **1968 United Nations Convention against Illicit Traffic in**

[118] See the comments by Swaziland in Official Records, Vol II, p. 121 para 12.
[119] 42 of the 59 treaties that have Opt-out Mechanisms relate to arbitration.
[120] 14 of the 59 treaties that have Opt-out Mechanisms relate to the ICJ.
[121] 3 of the 59 treaties that have Opt-out Mechanisms relate to conciliation, all of which are transport and communication treaties.
[122] The 1956 Customs Convention on the Temporary Importation of Commercial Road Vehicles, the 1956 Customs Convention on the Temporary Importation for Private Use of Aircraft and Pleasure Boats and the 1956Convention on the Taxation of Road Vehicles for Private Use in International Traffic

Narcotic Drugs and Psychotropic Substances, 25[123] have opted out of the Compulsory Third-party Mechanism, in accordance with Article 32(4) of the treaty. Of the 178 States Parties to the **2003 United Nations Convention against Corruption,** 40[124] have opted-out of the Compulsory Third-party Mechanism, in accordance with Article 66(3) of the treaty. Indeed, we also have anecdotal evidence that some countries have a policy of *always* utilizing Opt-out Mechanisms, where they are available. This is supported by data we have collected in relation to individual country practice (see paragraph 126(a) below) which has shown that China and Vietnam have utilised almost all Opt-out Mechanisms available to them.[125] and so would appear to have a clear preference or policy in this regard. And certainly in the case of China this is consistent with its general position on dispute settlement: that it does not accept the compulsory jurisdiction of the ICJ (see paragraph 51 above).

96. So it seems that contrary to initial expectations, Opt-out Mechanisms have not proved to be embarrassing or stigmatising. Rather, in a bid to deal with States' differing views on the appropriate third-party forum, they have become a feature of a large number of multilateral treaties and, unlike Opt-in Mechanisms, are routinely utilized.

4. Conclusion on Compulsory Third-Party Mechanisms

97. In summary, Compulsory Third-Party Mechanisms can be found in a surprisingly high number of treaties (79%). Of those, we have found more than half to be "pure" compulsory mechanisms, in the sense that they do not provide any mechanism for States Parties to opt-out of these obligations.

[123] Algeria, Andorra, Bahrain, Brunei, China, Cuba, France, Holy See, Indonesia, Iran, Israel, Kuwait, Laos, Lebanon, Lithuania, Malaysia, Myanmar, Peru, Saudi Arabia, Singapore, South Africa, Thailand, Turkey, the US and Vietnam

[124] Algeria, Azerbaijan, Bahamas, Bahrain, Bangladesh, Brunei, China, Colombia, Cuba, El Salvador, Georgia, Grenada, India, Indonesia, Iran, Israel, Kazakhstan, Kuwait, Laos, Malaysia, Malta, Mozambique, Myanmar, Nepal, Oman, Pakistan, Panama, Qatar, Saudi Arabia, Singapore, South Africa, St Lucia, Thailand, Tunisia, United Arab Emirates, US, Uzbekistan, Venezuela, Vietnam and Yemen.

[125] As noted in the Conclusion section below, the Centre for International Law is conducting further research in this area on Asian countries' responses to the treaties with Compulsory Third-Party Mechanisms identified in this study, both in terms of which States have become party to those treaties and whether those that have entered any reservations or declarations in relation to the compulsory dispute settlement obligations. As part of this, we plan to compare Asia's practice to that of Western States in order to test the theory that Asian States are more adverse to compulsory dispute settlement than other States.

98. The most popular compulsory third-party forum is arbitration, although its usage is more concentrated in a specific group of treaty subjects. The ICJ, while much less popular than arbitration (which we attribute to developing countries' lack of confidence in the ICJ following the South West Africa cases in the 1960s), appears in almost all treaty subjects identified in this research. Surprisingly, conciliation committees are almost as popular as the ICJ, but this is mostly attributable to its extensive usage in environmental treaties. Likewise, treaty bodies are only used in a small group of treaty subjects and its popularity is largely attributable to its consistent appearance in commodity treaties.

99. Opt-in and opt-out mechanisms were developed in response to state disagreement over compulsory mechanisms and the appropriate third-party forum (the ICJ vs arbitration), and became more popular as States grappled with this issue in the fallout from the South West Africa cases. The reality is that both types of mechanisms are weakened forms of Compulsory Third-Party Mechanisms: because it seems that many parties opt-out, and few parties opt-in.

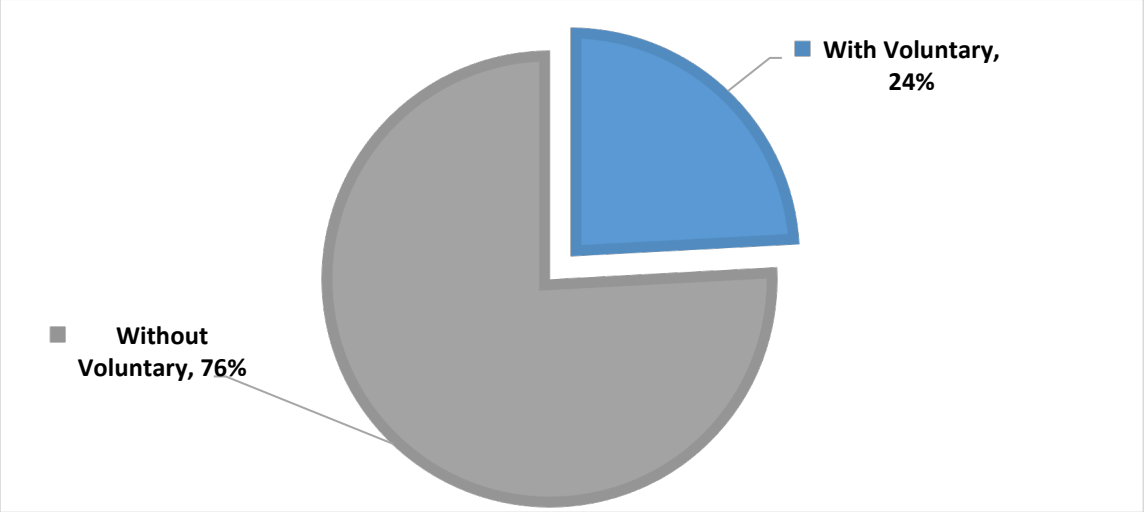
D. Voluntary Third-Party Mechanisms

100. As noted above, Voluntary Third-Party Mechanisms are those that provide for voluntary referral to a third-party where the third-party referral is only able to be triggered with the consent of the respondent party.

101. Of the 178 treaties within the scope of our study that have a dispute settlement provision, only 43 (or 24%) include a Voluntary Third-Party Mechanisms. See Chart 14 (below).[126] This is much lower than Compulsory Third-Party Mechanisms, which as noted above can be found in 79% (see paragraph 52 above).

Chart 14: This chart shows the percentage of treaties with dispute settlement provisions which have Voluntary Third-Party Mechanisms

[126] See the United Nations Conference on Diplomatic Intercourse and Immunities, Vienna, Austria, 37th meeting of the Committee of the Whole, document number A/CONF.20/C.1/SR.37 page 221, para 59.



102. Interestingly, there is only one treaty within the scope of our study that includes *only* a Voluntary Third-Party Mechanism. It is the **1928 International Convention relating to Economic Statistics**, which enables Parties to submit disputes "by mutual consent" to a Treaty Body (in this case the Economic and Social Council), which is tasked with giving an "advisory opinion" on the question at issue. Rather, it is more common to find Voluntary Third-Party Mechanisms in dispute settlement provisions that contain other mechanisms too. An example is Article VIII of the **1946 Convention on the Privileges and Immunities of the United Nations** which has both a Compulsory Third-party Mechanism, as well as a Voluntary Third-Party Mechanism, providing for compulsory referral of disputes to the ICJ, "unless in any case it is agreed by the parties to have recourse to another mode of settlement".

103. An important question arises as to the point of including Voluntary Third-Party Mechanisms in dispute settlement provisions. Given that arguably parties are able to do anything by consent, what does the inclusion of a Voluntary Third-Party Mechanism really add to a dispute settlement provision? Indeed, when it was proposed to include a provision providing for voluntary referral to the ICJ during the negotiations for the **1961 Vienna Convention on Diplomatic Relations** (as one way to deal with disagreements over whether to provide for referral to the ICJ or arbitration) many delegates were highly critical. The Swiss delegate said such a provisions would be "worthless".[127] He was supported by the French delegate who claimed that "one could not make the competence

[127] See the United Nations Conference on Diplomatic Intercourse and Immunities, Vienna, Austria, 37th meeting of the Committee of the Whole, document number A/CONF.20/C.1/SR.37 page 221, para 59.

of a tribunal dependent upon the signature of a compromise, in other words, on the goodwill of the other party".[128] In addition the UK delegate claimed "To state…that States could submit their disputes to the ICJ at the request of both parties would make the article quite meaningless and be a retrograde step".[129] In the end, delegates decided that an opt-in mechanism in the form of a separate optional protocol[130] was a better compromise solution than a Voluntary Third-party Mechanism. So it would seem that Voluntary Third-Party Mechanisms are considered, at least by some, to be even weaker than opt-in mechanisms (which themselves are considered to be weak and ineffective by some and, as noted above, have typically only been used as compromise solutions where there is disagreement on the appropriate third-party forum and/or whether any such referral should be compulsory—see paragraphs 74 to 81 above).

104. So are Voluntary Third-Party Mechanisms simply worthless and meaningless? On one level they can be seen as suggestive of the route parties should follow to address disputes. While not compulsory, they are a clear indication of what many negotiating parties considered to be an appropriate mechanism for those types of disputes and are probably an indication of the type of compulsory mechanism that some of the negotiating parties pushed for, but failed to achieved. As noted above, Voluntary Third-Party Mechanisms are typically adopted as a compromise solution to divergent views on the appropriate dispute settlement mechanism, much like Opt-in and Opt-out Mechanisms.

105. Separately, it could be argued that by identifying a mechanism that the parties can follow by agreement, the intention of such provisions is to exclude all other mechanisms, even where the parties consent to them. For example, it could be argued that for the **1928 International Convention relating to Economic Statistics** (which, as noted above, provides that Parties can submit disputes "by mutual consent" to a Treaty Body) if the disputing parties do not agree to submission of the dispute to a Treaty Body, that they there are no other options available to them. However, such a literal interpretation is unlikely to

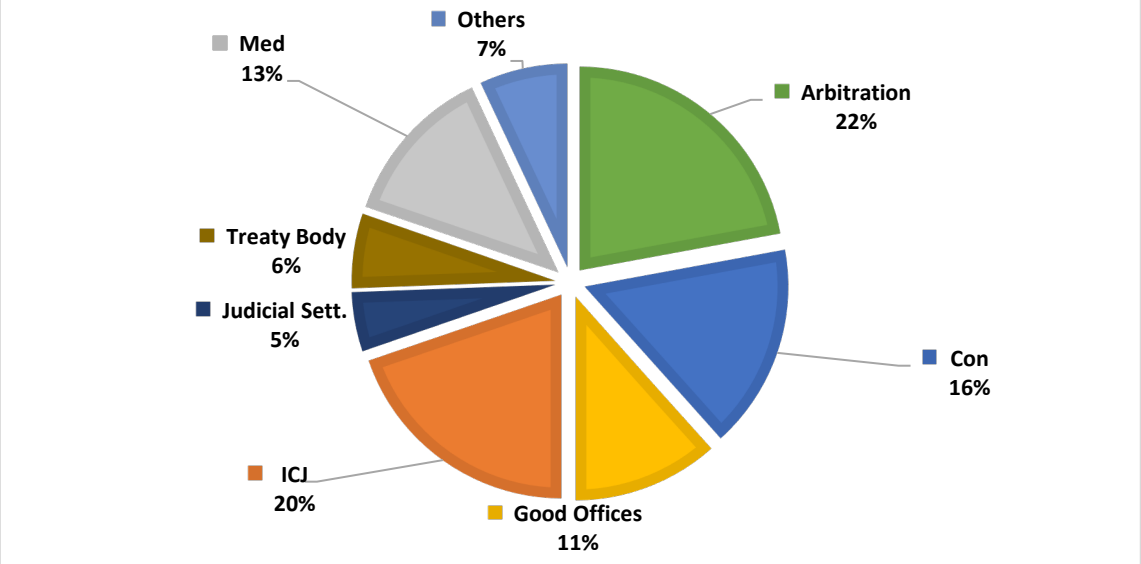
[128] See the United Nations Conference on Diplomatic Intercourse and Immunities, Vienna, Austria, 37th meeting of the Committee of the Whole, document number A/CONF.20/C.1/SR.37 page 222, para 7.
[129] See the United Nations Conference on Diplomatic Intercourse and Immunities, Vienna, Austria, 37th meeting of the Committee of the Whole, document number A/CONF.20/C.1/SR.37 page 222, para 7.
[130] The 1961 Optional Protocol to the 1961 Vienna Convention on Diplomatic Relations, which provides a dispute settlement mechanism—compulsory referral to the ICJ—that parties to its parent convention can opt-in to by ratifying the Optional Protocol. Parties to the Convention that have not ratified the Optional Protocol are not bound by the dispute settlement obligations in the Optional Protocol.

be used in practice: where disputing parties are able to agree on a mechanism that may resolve their dispute, who would object, even if it was not strictly in accordance with the particular dispute settlement provision?

1. Type of forum preferred by Voluntary Third-Party Mechanisms

106. To see if we could shed any light on these issues, we looked at the various types of fora used in Voluntary Third-Party Mechanisms. See **Chart 15** (below).

Chart 15: This chart presents a breakdown of the types of third-party fora[131] provided for in Voluntary Third-Party Mechanisms[132]



107. The first thing that struck us was that there is a greater range of fora provided for in Voluntary Third-Party Mechanisms. Whereas the fora provided for in Compulsory Third-Party Mechanisms are limited to the ICJ, arbitral tribunals, conciliation committees and

[131] Note that for the purpose of this chart, the group "others" includes fora other than those specified including regional bodies, committees of experts and other principal organs of the UN.
[132] As noted in paragraph 99, in collecting this data we were not able to follow the same method that we used for Compulsory Third-Party Mechanisms. This is because, unlike Compulsory Third-Party Mechanisms, most Voluntary Third-Party Mechanisms specify more than one forum. As a result, we recorded every instance a forum was mentioned in a Voluntary Third-Party Mechanism, rather than trying to identify a default or primary forum as we did for Compulsory Third-Party Mechanisms.

Treaty Bodies, Voluntary Third-Party Mechanisms include all of those categories as well as mediation, Good Offices and judicial settlement.[133]

108. We would like to highlight that in collecting our data for **Chart 15** we were not able to follow the same method that we used for Compulsory Third-Party Mechanisms. This is because, unlike Compulsory Third-party Mechanisms, almost all Voluntary Third-Party Mechanisms specify more than one forum. A classic example is the **1961 Single Convention on Narcotic Drugs,** which provides a multitude of fora including "mediation, conciliation, arbitration, recourse to regional bodies, judicial process or other peaceful means of their own choice".[134] As a result, we recorded every instance a forum was mentioned in a Voluntary Third-Party Mechanism, rather than trying to identify a default or primary forum as we did for Compulsory Third-Party Mechanisms (see paragraph 54 above).

109. As shown in **Chart 15**, arbitration and the ICJ are equally popular in Voluntary Third-party Mechanisms. This is very different to Compulsory Third-party Mechanisms for which arbitration is by far the most popular forum (see paragraph 55 above). While the ICJ stopped being used as a forum for Compulsory Third-party Mechanisms following the South West Africa cases, this was not the case for Voluntary Third-party Mechanisms. Rather the opposite occurred and post-1970 it became quite common for treaties to provide for voluntary referral to the ICJ.[135] This trend may be attributable to the South West Africa cases phenomena, which resulted in developing States being strongly opposed to any compulsory referral to the ICJ (see paragraph 61 for details). This also supports the view that Voluntary Third-party Mechanisms are a weak mechanism, that are generally only adopted as a negotiated compromise, in cases where some States feel strongly that they wanted a reference to a particular forum to be retained in the provision, even if they cannot achieve agreement to it being a Compulsory Third-party Mechanism.

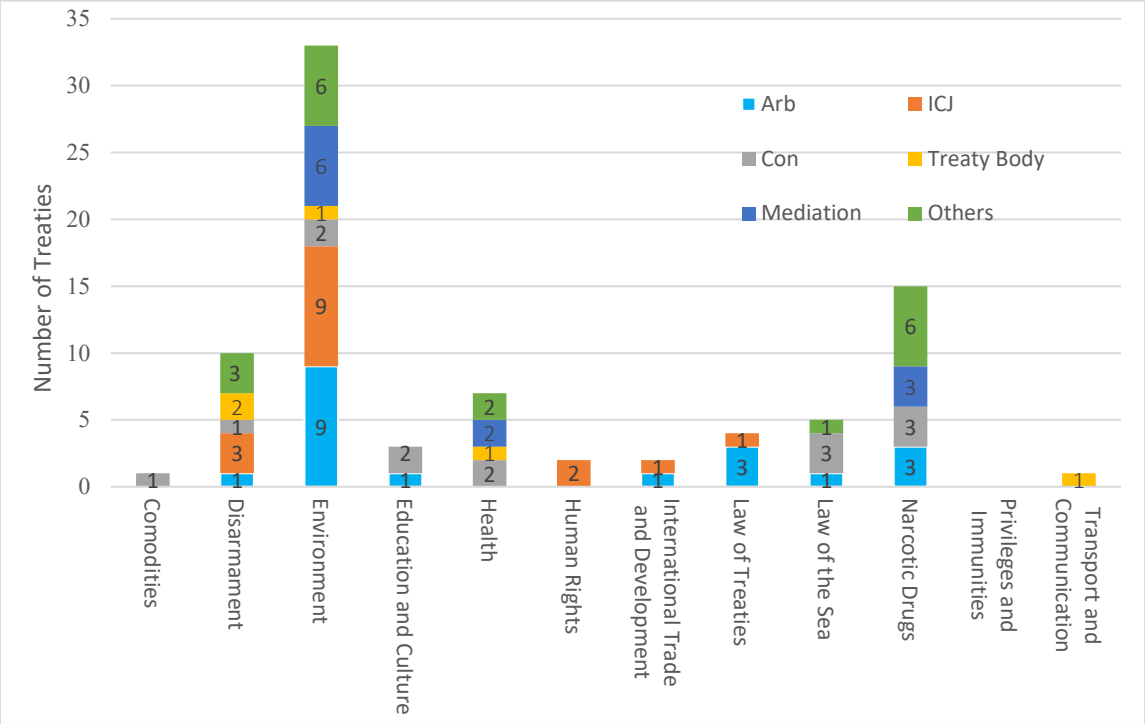
[133] Although note there is one treaty with Compulsory Third-Party Mechanism providing for Good Offices.
[134] Article 48 provides: "1. If there should arise between two or more Parties a dispute relating to the interpretation or application of this Convention, the said Parties shall consult together with a view to the settlement of the dispute by negotiation, investigation, mediation, conciliation, arbitration, recourse to regional bodies, judicial process or other peaceful means of their own choice. 2. Any such dispute which cannot be settled in the manner prescribed shall be referred to the International Court of Justice for Decision."
[135] Note in this chart the category "others" includes judicial settlement, good offices and more broadly, other bodies such as regional bodies, expert panels, consultative committee of experts and the Economic and Social Council.

110. The next most popular forum is conciliation at 16%, Mediation at 13% and Good Offices at 11%.

Types of Voluntary Third-Party Mechanism used for each treaty subject

111. We also looked at the types of Voluntary Third-Party Mechanisms used for each treaty subject—see **Chart 16** (below)—and found generally a very wide spread.

Chart 16: This chart shows the different fora provided for in Voluntary Third-party Mechanisms according to subject groups[136]



112. Unlike with Compulsory Third-Party Mechanisms, where particular treaty subjects strongly favour particular fora (see paragraph 40 above), this was not the case with Voluntary Third-Party Mechanisms. Indeed, a number of treaty subjects included Voluntary Third-Party Mechanisms providing for referral to all five different fora, including environment and disarmament. In general, arbitration, ICJ and conciliation exist

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as a Voluntary Third-Party forum in almost all the treaty subjects. Mediation is less common, and is observed only in narcotic drugs and health treaties.

2. Conclusion on Voluntary Third-Party Mechanisms

113. In summary, Voluntary Third-Party Mechanisms are much less common than Compulsory Third-Party Mechanisms. While Voluntary Third-party Mechanisms arguably add very little to a dispute settlement clause (because parties are able to do anything by consent anyway) in some cases they appear to have been included as part of a compromise solution, where a group of parties have felt strongly about identifying a particular third party mechanism. If nothing else, such a provision may be a useful indicator of the third party mechanism parties believed to be most appropriate.

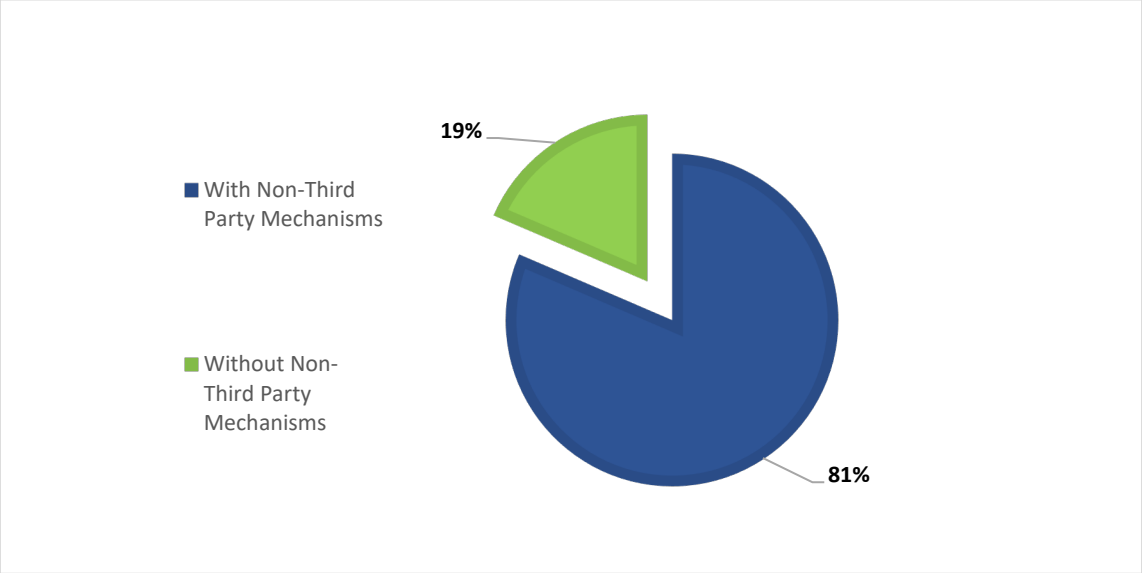
E. Non Third-Party Mechanisms

114. The final category of dispute settlement mechanism we collected data on was Non Third-party Mechanisms. As noted above (see paragraph 48c), these are provisions providing for negotiation and consultation, where the parties are to resolve the dispute themselves, without the assistance of a Third Party.[137]

115. Of the 178 treaties within the scope of our study that have a dispute settlement provision, 145 (or 81%) include a Non Third-Party Mechanism. See **Chart 17** below. In terms of the types of Non Third-Party Mechanisms, there are only two: negotiation and consultation, with the vast majority of provisions within the scope of our study referring to negotiation.

[137] As noted above in paragraphs 36 to 38, while we have separately collected data on Non Third-party Mechanisms, in doing so we have not differentiated between compulsory and voluntary mechanisms. As such, this category includes both compulsory and voluntary provisions.

Chart 17: This chart shows the percentage of treaties with dispute settlement provisions that have Non Third-party Mechanisms



116. As with Voluntary Third-Party Mechanisms, most of these appear in dispute settlement provisions with other mechanisms. Of the 178 treaties within our study that have dispute settlement provisions, we found only 14 that include *only* Non Third-Party Mechanisms. A notable example is the **1947 General Agreement on Tariffs and Trade** which provides only for consultation.[138] The other treaties providing only for Non Third-Party Mechanisms are more recent environment and disarmament treaties dating from 1979.[139] Interestingly, the environment treaties in this category are all those that do not follow the **1985 Vienna Convention for the Protection of the Ozone Layer** formulation (see paragraph 57(c) above).

[138] Article XXII of the 1947 GATT provides: "1. Each contracting party shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, such representations as may be made by another contracting party with respect to any matter affecting the operation of this Agreement. 2. The CONTRACTING PARTIES may, at the request of a contracting party, consult with any contracting party or parties in respect of any matter for which it has not been possible to find a satisfactory solution through consultation under paragraph 1."

[139] 1979 Convention on Long-range Transboundary Air Pollution, 1984 Protocol to the 1979 Convention on Long-range Transboundary Air Pollution on Long-term Financing of the Co-operative Programme for Monitoring and Evaluation of the Long-range Transmission of Air Pollutants in Europe (EMEP), 1985 Protocol to the 1979 Convention on Long-Range Transboundary Air pollution on the Reduction of Sulphur Emissions or their Transboundary Fluxes by at least 30 per cent, 1988 Protocol to the 1979 Convention on long-range transboundary air pollution concerning the control of emissions of nitrogen oxides or their transboundary fluxes, 1991 Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution concerning the Control of Emissions of Volatile Organic Compounds or their Transboundary Fluxes, 1996 Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (Protocol II as amended on 3 May 1996) and the 2003 Protocol on Explosive Remnants of War to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects (Protocol V).

117. Rather, it is much more common to find Non Third-Party Mechanisms in dispute settlement provisions that contain other mechanisms too. A large number of dispute settlement provisions in our study include a procedural requirement that parties attempt to settle disputes by Non-Third-party Mechanisms before any third-party mechanism can be triggered. A classic example is Article 29 of the **1979 Convention on the Elimination of All Forms of Discrimination against Women** which provides that "any dispute between two or more States Parties concerning the interpretation or application of the present Convention which is not settled by negotiation shall, at the request of one of them, be submitted to arbitration" [emphasis added]. It has been said that such procedural requirements are desirable as even if the dispute is eventually referred to a third-party body, negotiation can help to define the points at issue.[140]

118. Unsurprisingly, there are only a very small number of treaties with Compulsory Third-Party Mechanisms that do not include a Non Third-Party Mechanism. Of those, the majority simply provide that disputes "not settled by other means" can be referred to the third-party forum, thereby providing parties with the option to pursue consultation or negotiation (or any other dispute settlement method) before triggering the third-party forum. An example is the Article 38 of the **1951 Convention relating to the Status of Refugees** which provides: "Any dispute between Parties to this Convention relating to its interpretation or application, which cannot be settled by other means, shall be referred to the International Court of Justice at the request of any one of the parties to the dispute."

119. The small number of provisions that contain only a Compulsory Third-Party Mechanism include the **1948 Convention on the Prevention** and **Punishment of the Crime of Genocide**,[141] the **1958 Convention on Fishing and Conservation of the Living Resources of the High Seas**,[142] the **1949 Revised General Act for the Pacific Settlement**

[140] Anthony Aust "Modern Treaty Law and Practice" Cambridge Books Online, "Dispute Settlement and Remedies" chapter 20 page 353

[141] Article IX States: "Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute."

[142] Article 9(1) provides: "Any dispute which may arise between States under Articles 4, 5, 6, 7, and 8 shall, at the request of any of the parties, be submitted for settlement to a special commission of five members, unless the parties agree to seek a solution by another method of peaceful settlement, as provided for in Article 33 of the Charter of the United Nations."

of International Disputes[143] as well as a few commodity and international trade and investment treaties.[144] Interestingly, a literal interpretation of many of these provisions would suggest that parties cannot attempt negotiations or consultations, but rather must immediately refer any dispute to the specified third-party forum. One of the most striking examples is Article 41 of the **1949 Revised General Act for the Pacific Settlement of International Disputes** which provides: "Disputes relating to the interpretation or application of the present General Act, including those concerning the classification of disputes and the scope of reservations, shall be submitted to the International Court of Justice". A literal interpretation of the lack of reference to any Non-Third-party Mechanism, coupled with the use of binding language, would be that if a party has a dispute about the international or application of that treaty they have no choice but to submit it to the ICJ.[145]

120. So why would a dispute settlement provision be worded so as to allow a party to take a dispute to the ICJ where they have not even attempted to first resolve it through negotiation or consultation? Unfortunately, the negotiating history of the **1949 Revised General Act** and its 1928 predecessor shed no light on these issues.

121. In summary, Non Third-Party Mechanisms are rarely stand-alone. There are only a few examples of dispute settlement provisions, mostly found in environmental treaties, which only contain Non Third-Party Mechanisms. Rather, Non Third-party Mechanisms are most commonly found as a procedural prerequisite to triggering Compulsory Third-party Mechanisms. There are only two types provided for in the treaties within the scope of this study: negotiation and consultation.

[143] Article 41 provides: "Disputes relating to the interpretation or application of the present General Act, including those concerning the classification of disputes and the scope of reservations, shall be submitted to the International Court of Justice."
[144] These all generally follow the same formulation. An example is 1973 Agreement establishing the Asian Rice Trade Fund and the 1977 Agreement establishing the International Tea Promotion Association, both of which provide on dispute settlement: "Any question of interpretation or application of the provisions of this Agreement (including rules and regulations framed under this Agreement) arising between any member and the Rice Fund or between two or more members of the Rice Fund shall be submitted to the Board of Directors for decision and their decision shall be final."
[145] Unfortunately, the negotiating history of the 1949 Revised General Act and the 1928 Act on which it was based shed no light on these issues.

IV. CONCLUSION

122. The key finding of this paper is that, contrary to popular belief, the great majority (79%) of multilateral treaties with a dispute settlement provision have Compulsory Third-Party Mechanisms, meaning that one party can trigger the third-party mechanism without first having to gain the consent of the other disputing party. Of those: (i) more than half (58%) are "pure" Compulsory Third-Party Mechanisms, in the sense that they do not enable States Parties to opt-out of these obligations; and (ii) the majority provide for compulsory referral to arbitration.

123. So, while China for example has claimed in the context of its UNCLOS dispute with the Philippines in relation to the South China Sea that all third-party dispute settlement procedures should be based on the consent of both parties,[146] this study has shown that in fact, the majority are not. There are a great many treaties which provide Compulsory Third-Party Mechanisms which do not require consent and, in fact, China is a party to many of them.[147]

124. Some may question the significance of these findings given that Compulsory Third-Party Mechanisms in multilateral treaties are rarely utilised.[148] Numerous theories have been put forward to rationalise the lack of interest by States in invoking compulsory third-party mechanisms. The realist theory is that it is because inter-state disputes usually relate to

[146] Statement of the Ministry of Foreign Affairs of the People's Republic of China on the Award on Jurisdiction and Admissibility of the South China Sea Arbitration by the Arbitral Tribunal Established at the Request of the Republic of the Philippines, 2015/10/30, available at: http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1310474.shtml - see para 1.
23 June 2016: Chinese Official explains Why China says no to arbitration over South China Sea "Arbitration requires the consent of the two concerned parties but the Philippines went ahead against international practice. Given that the arbitration is out of a series of illegal actions, China says no to illegal actions. How can this be a violation of international law? The logic here is absurd", Zhou explained. "China is a builder and guardian of present international order. China's stance of non-acceptance of and nonparticipation not only secures its own interests but also preserves the right of other countries facing a similar situation", said Zhou. Available at: http://news.xinhuanet.com/english/2016-06/23/c_135460639.htm

[147] China is party to 51 treaties with Compulsory Third-Party Mechanisms, although it has tended to utilise Opt-out Mechanisms wherever available.

[148] There have been numerous theories put forth to rationalise the lack of interest in invoking compulsory third-party dispute settlement provisions in a treaty. The realist theory reasons that this is due to the fact that the disputes usually relates to issues of fundamental security, where States are more comfortable finding solutions to it outside such mechanisms. See Todd L. Allee, Paul K. Huth, "Legitimizing Dispute Settlement: International Legal Rulings as Domestic Political Cover. 100:2, 2006, American Political Science Review, 219. On the other hand, some argue that the attitude of States is instead dependant on the substantive regime relevant to the dispute. See Natalie Klein, Who Litigates and Why in The Oxford Handbook of International Adjudication, Cesare P.R. Romano, Karen J. Alter and Chrisanthi Avgerou (Oxford, 2013), 578.

issues of fundamental security, for which States are more comfortable finding solutions outside of such third party mechanisms.[149]

125. Whatever the reason for States' reluctance to invoke compulsory third party mechanisms, as has been observed by a former legal adviser who was closely involved with the negotiation of the **1969 Vienna Convention on the Law of Treaties**:

> The chief value of the automatic procedures for settlement of disputes…lies not in their precise content but in their mere existence. Paradoxically, the less they are utilised the more effective they will be. No state is anxious to indulge in lengthy and expensive international conciliation or litigation. This imposes a very heavy burden upon Foreign Offices and upon their legal advisers, with the outcome far from certain. What is important—what is indeed crucial—is that there should always be in the background, as a necessary check upon the making of unjustified claims, or upon the denial of justified claims, automatically available procedures for the settlement of disputes.[150]

126. As eluded to in the introduction, the intention is for this paper to be the first in a series looking at issues related to the dispute settlement mechanisms in international treaties. Further issues that we intend to focus on, or are interested in, include:

a. **Individual State responses to Compulsory Third-Party Mechanisms:** We would like to explore ASEAN countries' responses to the treaties with Compulsory Third-Party Mechanisms identified in this study, both in terms of whether those States have become party to those treaties and, in cases where they have, whether they have entered any reservations or declarations in relation to the Compulsory Third-Party Mechanism. As part of this, we plan to compare ASEAN and Asian practice to the West in order to test the theory that Asia is more averse to compulsory dispute settlement than other regions.

b. **Compulsory conciliation mechanisms:** We were surprised by the number of treaties that provide for compulsory referral to conciliation (of the 140 treaties with

[149] See Todd L. Allee, Paul K. Huth, "Legitimizing Dispute Settlement: International Legal Rulings as Domestic Political Cover. 100:2, 2006, American Political Science Review, 219.
[150] I Sinclair, "The Vienna Convention on the Law of Treaties", 2nd edition, Manchester 1984, p 235.

Compulsory Third-party Mechanisms, 16% provide for compulsory referral to conciliation). This was especially surprising given the dearth of information available on inter-State conciliation as compared to other fora, especially arbitration and the ICJ. As one academic has noted: "Inter-State conciliation is at the same time a common element in international dispute settlement and an unknown quantity".[151] We accordingly intend to examine the conciliation procedures provided for in multilateral treaties and compare and contrast them with other forms of inter-State dispute settlement.

c. **The relationship between State acceptance of the optional clause in Article 36 of the Statute of the ICJ and treaties that provide for compulsory referral to the ICJ.** In many of the treaty negotiations covered in this paper we found States objecting to compulsory referral to the ICJ on the basis that not all States have yet accepted the optional clause declaration in the Statute of the ICJ. Indeed, we found some delegates arguing that clauses providing for compulsory referral to the ICJ would be redundant because the case would still "have to be referred to the Court by both parties, as the Court's statute required".[152] Are these concerns legitimate? Is there any issue with a state that has not accepted the general optional clause accepting, perhaps as a first step towards compulsory jurisdiction, the obligation of compulsory referral to the ICJ in a limited field covered by a specific treaty?

d. **Compulsory referral to Treaty Bodies**: We were also surprised at the number of treaties that provide for compulsory referral to a Treaty Body. This practice is not just limited to obscure treaties - it is a feature of some very prominent treaties, the best example being the **1998 Rome Statute of the International Criminal Court**, which provides for compulsory referral of any dispute not able to be settled by negotiation to the Assembly of States Parties, which is a body made up of State Parties. As noted in this paper, Treaty Bodies are very different to the other compulsory third-party fora identified in this paper, including the ICJ, arbitration and conciliation: unlike these other bodies, Treaties Bodies are not made up of neutral, legal experts. Rather, they

[151] Sven MG Koopmans "Diplomat Dispute Settlement: the use of inter-state conciliation" 2008, Cambridge University Press, page 1.
[152] See for example the United Nations Conference on Diplomatic Intercourse and Immunities, Vienna, Austria, 37th meeting of the Committee of the Whole, document number A/CONF.20/C.1/SR.37 page 222, para 5.

are typically political bodies, made up of all the parties to the treaties, so the likelihood of political considerations creeping into decision making would seem high. In light of this, it would be interesting to explore further why States Parties would want such provisions in multilateral treaties and whether it is wise and/or practical to task a Treaty Body (made up of potentially hundreds of States Parties) to make decisions on disputes between two States Parties.

e. **Dispute settlement mechanisms for disputes between States and International Organisations:** This paper has looked at mechanisms for resolving disputes about the application and interpretation of a treaty between States. In light of the growing powers and functions of international organisations and treaty secretariats, it would also be worthwhile to explore mechanisms for resolving disputes between States and international organisations, especially as such disputes are only likely to become more common.

f. **The relationship between compliance and dispute settlement mechanisms.** An interesting observation we made in this study is that treaties with sophisticated compliance mechanisms seem less likely to contain a dispute settlement provision (see paragraph 45(c)). This is particularly so for human rights and disarmament treaties. In light of this, it would be interesting to explore further the relationship between compliance and dispute settlement mechanisms in international treaties.

g. **Treaties deposited with UN specialised agencies and depositories of other major treaties**.[153] The present research is confined to treaties deposited with the UN Secretary-General. Research encompassing other depositories such as International Civil Aviation Organization, the International Maritime Organisation and other specialized agencies and States which act as depositories to major treaties could be useful as a comparative exercise to the findings of our present research.

[153] Examples of States acting as depository for major treaties include the United States. See http://www.state.gov/s/l/treaty/depositary/index.htm#WORLD.

Annex A:
List of multilateral treaties for which the UN Secretary-General is depositary that contain a Compulsory Third-party Mechanism

A. 61 Treaties with Compulsory Third-party Mechanisms providing for referral to Arbitration

- 1952 International Convention to Facilitate the Crossing of Frontiers for Passengers and Baggage Carried by Rail
- 1952 International Convention to Facilitate the Crossing of Frontiers for Goods Carried by Rail
- 1952 International Convention to Facilitate the Importation of Commercial Samples and Advertising Material
- 1954 Additional Protocol to the Convention concerning Customs Facilities for Touring, relating to the Importation of Tourist Publicity Documents and Material
- 1954 Convention concerning Customs Facilities for Touring
- 1954 Customs Convention on the Temporary Importation of Private Road Vehicles
- 1956 Convention on the Taxation of Road Vehicles Engaged in International Goods Transport
- 1956 Convention on the Taxation of Road Vehicles Engaged in International Passenger Transport
- 1956 Convention on the Taxation of Road Vehicles for Private Use in International Traffic
- 1956 Customs Convention on the Temporary Importation for Private Use of Aircraft and Pleasure Boats
- 1956 Customs Convention on the Temporary Importation of Commercial Road Vehicles
- 1957 European Agreement concerning the International Carriage of Dangerous Goods by Road (ADR)
- 1957 European Agreement on Road Markings
- 1958 Agreement concerning the Adoption of Uniform Technical Prescriptions for Wheeled Vehicles, Equipment and Parts which can be Fitted and/or be Used on Wheeled Vehicles and the Conditions for Reciprocal Recognition of Approvals Granted on the Basis of These Prescriptions
- 1958 Customs Convention concerning Spare Parts Used for Repairing EUROP Wagons

- 1960 European Convention on Customs Treatment of Pallets used in International Transport
- 1965 Convention on Transit Trade of Land-locked States
- 1970 Agreement on the International Carriage of Perishable Foodstuffs and on the Special Equipment to be Used for such Carriage (ATP)
- 1970 European Agreement concerning the Work of Crews of Vehicles Engaged in International Road Transport (AETR)
- 1971 European Agreement supplementing the Convention on Road Signs and Signals opened for signature at Vienna on 8 November 1968
- 1971 European Agreement supplementing the Convention on Road Traffic opened for signature at Vienna on 8 November 1968
- 1972 Customs Convention on Containers
- 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents
- 1973 Protocol on Road Markings, additional to the European Agreement supplementing the Convention on Road Signs and Signals opened for signature at Vienna on 8 November 1968
- 1975 Agreement on Minimum Requirements for the Issue and Validity of Driving Permits (APC)
- 1975 Customs Convention on the International Transport of Goods under Cover of TIR Carnets (TIR Convention)
- 1975 European Agreement on Main International Traffic Arteries (AGR)
- 1979 Convention on the Elimination of All Forms of Discrimination Against Women
- 1979 International Convention Against the Taking of Hostages
- 1982 International Convention on the Harmonization of Frontier Controls of Goods
- 1982 United Nations Convention on the Law of the Sea
- 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- 1985 European Agreement on Main International Railway Lines (AGC)
- 1989 International Convention Against the Recruitment, Use, Financing and Training of Mercenaries
- 1990 International Convention on the Protection of the Rights of all Migrant Workers and Members of their families

- 1991 European Agreement on Important International Combined Transport Lines and Related Installations (AGTC)
- 1994 Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982
- 1994 Convention on the Safety of United Nations and Associated Personnel
- 1994 Lusaka Agreement on Co-operative Enforcement Operations Directed at Illegal Trade in Wild Fauna and Flora
- 1995 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks
- 1996 Agreement on the Establishment of the International Vaccine Institute
- 1996 European Agreement on Main Inland Waterways of International Importance (AGN)
- 1997 Agreement concerning the Adoption of Uniform Conditions for Periodical Technical Inspections of Wheeled Vehicles and the Reciprocal Recognition of such Inspections
- 1997 Agreement on the Privileges and Immunities of the International Tribunal for the Law of the Sea
- 1997 International Convention for the Suppression of Terrorist Bombings
- 1997 Protocol on Combined Transport on Inland Waterways to the European Agreement on Important International Combined Transport Lines and Related Installations (AGTC) of 1991
- 1998 Protocol on the Privileges and Immunities of the International Seabed Authority
- 1998 Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations
- 1999 International Convention for the Suppression of the Financing of Terrorism
- 2000 European Agreement concerning the International Carriage of Dangerous Goods by Inland Waterways (ADN)
- 2000 Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime
- 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime
- 2000 United Nations Convention against Transnational Organized Crime
- 2001 Agreement on International Roads in the Arab Mashreq

- 2001 Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime
- 2002 Agreement on the Privileges and Immunities of the International Criminal Court
- 2003 Agreement on International Railways in the Arab Mashreq
- 2003 United Nations Convention against Corruption
- 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property
- 2005 International Convention for the Suppression of Acts of Nuclear Terrorism
- 2006 International Convention for the Protection of All Persons from Enforced Disappearance
- 2012 Protocol to Eliminate Illicit Trade in Tobacco Products

B. 33 Treaties with Compulsory Third-party Mechanisms providing for referral to the ICJ

- 1923 Convention for the Suppression of the Circulation of, and Traffic in, Obscene Publications, as amended on 12 November 1947
- 1926 Slavery Convention, as amended by the Protocol amending the Slavery Convention
- 1946 Constitution of the World Health Organization
- 1946 Convention on the Privileges and Immunities of the United Nations
- 1947 Convention on the Privileges and Immunities of the Specialized Agencies
- 1948 Convention on the Prevention and Punishment of the Crime of Genocide
- 1949 Agreement for Facilitating the International Circulation of Visual and Auditory Materials of an Educational, Scientific and Cultural Character
- 1949 Revised General Act for the Pacific Settlement of International Disputes
- 1950 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others
- 1951 Convention Relating to the Status of Refugees
- 1953 Convention on the International Right of Correction
- 1953 Convention on the Political Rights of Women
- 1954 Convention Relating to the Status of Stateless Persons

- 1956 Convention on the Contract for the International Carriage of Goods by Road (CMR)
- 1956 Convention on the Recovery Abroad of Maintenance
- 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery
- 1957 Convention on the Nationality of Married Women
- 1960 Convention relating to the Unification of Certain Rules concerning Collisions in Inland Navigation
- 1961 Convention on the Reduction of Statelessness
- 1961 International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations
- 1961 Single Convention on Narcotic Drugs, as amended by the Protocol amending the Single Convention on Narcotic Drugs
- 1965 Convention on the Registration of Inland Navigation Vessels
- 1965 International Convention on the Elimination of All Forms of Racial Discrimination
- 1966 Convention on the Measurement of Inland Navigation Vessels
- 1967 Protocol Relating to the Status of Refugees
- 1968 Convention on Road Signs and Signals
- 1968 Convention on Road Traffic
- 1971 Convention on Psychotropic Substances
- 1973 Convention on the Contract for the International Carriage of Passengers and Luggage by Road (CVR)
- 1978 Protocol to the Convention on the Contract for the International Carriage of Goods by Road (CMR)
- 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations
- 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances
- 2008 Additional Protocol to the Convention on the Contract for the International Carriage of Goods by Road (CMR) concerning the Electronic Consignment Note

C. 22 Treaties with Compulsory Third-party Mechanisms providing for referral to Conciliation

- 1969 Vienna Convention on the Law of Treaties
- 1974 Convention on a Code of Conduct for Liner Conferences
- 1978 Vienna Convention on Succession of States in Respect of Treaties
- 1985 Vienna Convention for the Protection of the Ozone Layer
- 1987 Montreal Protocol on Substances that Deplete the Ozone Layer
- 1992 Convention on Biological Diversity
- 1992 United Nations Framework Convention on Climate Change
- 1994 Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution on Further Reduction of Sulphur Emissions
- 1994 United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa
- 1997 Kyoto Protocol to the United Nations Framework Convention on Climate Change
- 1998 Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution on Heavy Metals
- 1998 Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution on Persistent Organic Pollutants
- 1998 Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade
- 1999 Protocol to the 1979 Convention on Long-range Transboundary Air Pollution to Abate Acidification, Eutrophication and Ground-level Ozone
- 2000 Cartagena Protocol on Biosafety to the Convention on Biological Diversity
- 2001 Stockholm Convention on Persistent Organic Pollutants
- 2003 Intergovernmental Agreement on the Asian Highway Network
- 2006 Intergovernmental Agreement on the Trans-Asian Railway Network
- 2010 Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity
- 2010 Nagoya-Kuala Lumpur Supplementary Protocol on Liability and Redress to the Cartagena Protocol on Biosafety
- 2013 Intergovernmental Agreement on Dry Ports
- 2013 Minamata Convention on Mercury

D. 13 Treaties with Compulsory Third-party Mechanisms providing for referral to a Treaty Body

- 1948 Convention on the International Maritime Organization
- 1973 Agreement establishing the Asian Rice Trade Fund
- 1977 Agreement establishing the International Tea Promotion Association
- 1983 Statutes of the International Centre for Genetic Engineering and Biotechnology
- 1994 Convention on Customs Treatment of Pool Containers used in International Transport
- 1995 Grains Trade Convention
- 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their destruction
- 1998 Rome Statute of the International Criminal Court
- 2006 Convention on the International Customs Transit Procedures for the Carriage of Goods by Rail under Cover of SMGS Consignment Notes
- 2006 International Tropical Timber Agreement
- 2010 International Cocoa Agreement
- 2012 Food Assistance Convention
- 2015 International Agreement on Olive Oil and Table Olives

E. 11 Treaties with Compulsory Third-party Mechanisms providing for referral to Other Bodies and Forums

- 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas
- 1965 Agreement establishing the Asian Development Bank
- 1969 Agreement establishing the Caribbean Development Bank
- 1976 Agreement establishing the International Fund for Agricultural Development
- 1976 Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD)
- 1979 Constitution of the United Nations Industrial Development Organization
- 1980 Agreement establishing the Common Fund for Commodities
- 1994 Agreement to establish the South Centre

- 1996 Agreement Establishing the Bank for Economic Cooperation and Development in the Middle East and North Africa
- 1997 Convention on the Law of the Non-Navigational Uses of International Watercourses
- 2001 Agreement on Succession Issues*

*This Agreement allows States to refer their disputes to an independent person of their choice, a Standing Joint Committee (which is a Treaty Body) or an expert. Because the majority of the options are Other Bodies and Forums, we have classified this Agreement as such.

Annex B:

List of 81 multilateral treaties for which the UN Secretary-General is depositary that contain a Compulsory Third-party Mechanism without an option to opt-out

- 1923 Convention for the Suppression of the Circulation of, and Traffic in, Obscene Publications, as amended on 12 November 1947
- 1926 Slavery Convention, as amended by the Protocol amending the Slavery Convention
- 1946 Constitution of the World Health Organization
- 1946 Convention on the Privileges and Immunities of the United Nations
- 1947 Convention on the Privileges and Immunities of the Specialized Agencies
- 1948 Convention on the International Maritime Organization
- 1948 Convention on the Prevention and Punishment of the Crime of Genocide
- 1949 Agreement for Facilitating the International Circulation of Visual and Auditory Materials of an Educational, Scientific and Cultural Character
- 1949 Revised General Act for the Pacific Settlement of International Disputes
- 1950 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others
- 1951 Convention Relating to the Status of Refugees
- 1952 International Convention to Facilitate the Crossing of Frontiers for Passengers and Baggage Carried by Rail
- 1952 International Convention to Facilitate the Crossing of Frontiers for Goods Carried by Rail
- 1952 International Convention to Facilitate the Importation of Commercial Samples and Advertising Material
- 1953 Convention on the International Right of Correction
- 1953 Convention on the Political Rights of Women
- 1954 Additional Protocol to the Convention concerning Customs Facilities for Touring, relating to the Importation of Tourist Publicity Documents and Material
- 1954 Convention concerning Customs Facilities for Touring
- 1954 Convention Relating to the Status of Stateless Persons
- 1954 Customs Convention on the Temporary Importation of Private Road Vehicles
- 1956 Convention on the Recovery Abroad of Maintenance

- 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery
- 1957 Convention on the Nationality of Married Women
- 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas
- 1958 Customs Convention concerning Spare Parts Used for Repairing EUROP Wagons
- 1961 International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations
- 1965 Agreement establishing the Asian Development Bank
- 1965 Convention on Transit Trade of Land-locked States
- 1965 International Convention on the Elimination of All Forms of Racial Discrimination
- 1969 Agreement establishing the Caribbean Development Bank
- 1969 Vienna Convention on the Law of Treaties
- 1972 Customs Convention on Containers
- 1973 Agreement establishing the Asian Rice Trade Fund
- 1974 Convention on a Code of Conduct for Liner Conferences
- 1976 Agreement establishing the International Fund for Agricultural Development
- 1976 Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD)
- 1977 Agreement establishing the International Tea Promotion Association
- 1978 Vienna Convention on Succession of States in Respect of Treaties
- 1979 Constitution of the United Nations Industrial Development Organization
- 1980 Agreement establishing the Common Fund for Commodities
- 1982 United Nations Convention on the Law of the Sea
- 1983 Statutes of the International Centre for Genetic Engineering and Biotechnology
- 1985 Vienna Convention for the Protection of the Ozone Layer
- 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations
- 1987 Montreal Protocol on Substances that Deplete the Ozone Layer
- 1992 Convention on Biological Diversity
- 1992 United Nations Framework Convention on Climate Change
- 1994 Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982

- 1994 Agreement to establish the South Centre
- 1994 Convention on Customs Treatment of Pool Containers used in International Transport
- 1994 Lusaka Agreement on Co-operative Enforcement Operations Directed at Illegal Trade in Wild Fauna and Flora
- 1994 Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution on Further Reduction of Sulphur Emissions
- 1994 United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa
- 1995 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks
- 1995 Grains Trade Convention
- 1996 Agreement Establishing the Bank for Economic Cooperation and Development in the Middle East and North Africa
- 1996 Agreement on the Establishment of the International Vaccine Institute
- 1997 Agreement on the Privileges and Immunities of the International Tribunal for the Law of the Sea
- 1997 Convention on the Law of the Non-Navigational Uses of International Watercourses
- 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their destruction
- 1997 Kyoto Protocol to the United Nations Framework Convention on Climate Change
- 1998 Protocol on the Privileges and Immunities of the International Seabed Authority
- 1998 Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution on Heavy Metals
- 1998 Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution on Persistent Organic Pollutants
- 1998 Rome Statute of the International Criminal Court
- 1998 Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade
- 1999 Protocol to the 1979 Convention on Long-range Transboundary Air Pollution to Abate Acidification, Eutrophication and Ground-level Ozone
- 2000 Cartagena Protocol on Biosafety to the Convention on Biological Diversity

- 2001 Agreement on International Roads in the Arab Mashreq
- 2001 Agreement on Succession Issues
- 2001 Stockholm Convention on Persistent Organic Pollutants
- 2002 Agreement on the Privileges and Immunities of the International Criminal Court
- 2003 Agreement on International Railways in the Arab Mashreq
- 2006 Convention on the International Customs Transit Procedures for the Carriage of Goods by Rail under Cover of SMGS Consignment Notes
- 2006 International Tropical Timber Agreement
- 2010 International Cocoa Agreement
- 2010 Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity
- 2010 Nagoya-Kuala Lumpur Supplementary Protocol on Liability and Redress to the Cartagena Protocol on Biosafety
- 2012 Food Assistance Convention
- 2013 Minamata Convention on Mercury
- 2015 International Agreement on Olive Oil and Table Olives