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# Between Flexibility and Stability: Ad Hoc Procedures and/or Judicial Institutions?

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# Reconceptualising the Rule of Law in Global Governance, Resources, Investment and Trade

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## *Preface*

**T**HIS BOOK BRINGS together papers presented at the very successful 2013 ILA Regional Conference held in Sounion, Athens on 29–31 August 2013.

The Conference took place against the backdrop of political, social and economic stability, despite the pervasive underlying problems, and resulted in a successful exchange of views and knowledge. It also served as a meeting point of both people and ideas. Lawyers and academics from all over the world, both established figures as well as young researchers, came together and discussed a great variety of issues ranging from philosophical aspects of the rule of law in relation to international law to technical rules of trade law.

The quality of all the papers presented was of such a high level that the need was felt to publish not only the proceedings of the conference but a book. Thirty conference participants revised and submitted their papers for publication, making contributions of great value, and closing a gap in the existing literature. The book addresses important current and cross-cutting issues that have not been adequately dealt with together or in an interdisciplinary manner. Moreover, all of the issues are of relevance both academically as well as to practitioners of public and private international law.

The contributions are organised into three main parts. The first addresses the contemporary challenges of global governance, shedding light both on the actors and processes as well as on the structures and factors of the international community. The second deals with resources in a novel way, approaching it both from the viewpoint of the preservation of the past, looking into cultural heritage, while also according the requisite importance to sharing and maintaining the future through a disciplined approach to natural resources. Finally, the last part explores investment and trade from various angles.

It is hoped that this book will help map out interactions of interrelated topics that are slowly coming to occupy the centre stage of the international law discourse.

Professor Christos Gortsos  
Vice President Hellenic Branch ILA  
Chairman, Organising Committee

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## 2

# *Between Flexibility and Stability: Ad Hoc Procedures and/or Judicial Institutions?*

CHIARA GIORGETTI\*

### I. INTRODUCTION

**T**HE CHOICE BETWEEN the flexibility offered by ad hoc procedures and the stability proper of established judicial institutions poses many interesting questions for those interested in international dispute resolution. This chapter seeks to assess some of these questions and, possibly, to offer suggestions to future parties and their counsel on how to select the most appropriate resolution mechanism to resolve their international inter-state dispute.<sup>1</sup>

To begin with, it is worth noting two important and related trends that characterize contemporary international dispute resolution: first, the increased use of international litigation by diverse international actors, and second, the multiplication of dispute resolution mechanisms.

Indeed, there has been a proliferation of judicial bodies in the international community. More, and more diverse international forums are available to parties. Recently created international judicial bodies include the International Criminal Court, the International Tribunal of the Law of the Sea (ITLOS) and the African Court of Justice and Human Rights. At the same time, more of these forums have a very specialized jurisdiction, including the dispute

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<sup>1</sup> In general, see C Giorgetti (ed), *The Rules, Practice and Jurisprudence of International Courts and Tribunals* (Martinus Nijhoff Publishers, 2012). See also L Malintoppi, 'Methods of Dispute Resolution in Inter-state Litigation: When States Go to Arbitration rather than Adjudication' (2006) 5(1) *Law and Practice of International Courts and Tribunals* 133.

mechanism of the World Trade Organization, the European Court of Human Rights and the arbitration mechanism under the International Convention for Settlement of Investment Disputes (ICSID Convention).

States, the principal actors in the international legal community, are increasingly involved in international litigations. This can be explained simply by observing that, as a result of post-cold war fragmentation, there are more states that have ever growing reciprocal obligations and responsibilities, which in turn create more opportunities for disputes.<sup>2</sup>

In many instances, states act as respondents in international litigation—for example, in investment arbitration or human rights litigation—and so do not have a choice on the forum at the time of each dispute—the choice having been made (usually by treaty) beforehand. However, in inter-state situations, where states are in a position to choose between different forums, how should they decide where to go?

The classic dichotomy is between the flexibility that ad hoc arbitral tribunals offer and the stability provided by standing judicial institutions, like the International Court of Justice (ICJ, the Court).

Ad hoc bodies and judicial institutions include a variety of diverse bodies, including:

- judicial bodies that are permanent structures, like the ICJ and ITLOS, which have a variety of subject matter jurisdictions;
- quasi-judicial bodies, including institutionalized and non-institutionalized arbitral tribunals. The Slovenia/Croatia maritime boundary arbitration presently litigated under the auspices of the Permanent Court of Arbitration (PCA) is an example of the first,<sup>3</sup> the boundary dispute resolved by the Taba arbitration between Egypt and Israel an example of the second;<sup>4</sup> and
- other diverse ad hoc bodies, like the United Nations Claims Commission (UNCC),<sup>5</sup> the Eritrea–Ethiopia Boundaries and Claims Commissions<sup>6</sup> and

<sup>2</sup> See T Buergenthal, 'Proliferation of International Courts and Tribunals: Is it Good or Bad?' (2001) 14 *Leiden Journal of International Law* 267.

<sup>3</sup> Arbitration between the Republic of Croatia and the Republic of Slovenia, Arbitration Agreement of 4 November 2009, available at <http://www.pccases.com/web/view/3> (accessed 10 February 2016).

<sup>4</sup> Award in Boundary Dispute Concerning the Taba Area (Egypt/Isr) (1988) 27 ILM 1421; see CS Copeland, 'The Use of Arbitration to Settle Territorial Disputes' (1999) 67 *Fordham Law Review* 3073, available at <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=3585&context=flr> (accessed on 12 February 2016).

<sup>5</sup> The UN Claims Commission was created by the UN Security Council for claims for compensation arising out of the invasion of Kuwait by Iraq and brought by individuals, private companies, international organizations and states against Iraq. See, in general, T.J. Feighery, 'The United Nations Compensation Commission', in Giorgetti (n 1 above).

<sup>6</sup> Eritrea and Ethiopia agreed in August 2000 to resolve their boundary dispute and claims arising from the 1998–2000 war by binding international arbitration. The PCA served as registry to both arbitrations. See BD Daly, 'Permanent Court of Arbitration' in Giorgetti (n 1 above); see also the PCA Case Repository, at <http://www.pccases.com/web/> (accessed on 12 February 2016).

the Iran–US Claims Tribunal, created to address and resolve a specific dispute.<sup>7</sup>

When states decide to litigate their legal differences, different factors come into play that can move the balance in favour of arbitration or judicial institution. This chapter aims to highlight some of the factors that should be taken into consideration when choosing an international dispute settlement mechanism.

## II. FLEXIBILITY V STABILITY: THE ABILITY TO CHOOSE THE ARBITRAL TRIBUNAL

One of the main differences between permanent judicial bodies and ad hoc institutions is the ability of the parties in ad hoc arbitrations to directly choose members of the adjudicative body charged to hear their dispute.

At the ICJ, the principal judicial organ of the United Nations and the paramount example of an international judicial body, judges are elected by the UN General Assembly and the Security Council for a renewable term of nine years. The 15 judges who make up the Court are recognized international law experts and represent different legal cultures, as well as geographical and (increasingly) gender diversity.<sup>8</sup>

The method of selection can be mitigated. Occasionally, parties also have the possibility of choosing their judge at the ICJ. This can happen when there is no judge of the same nationality of the parties. In that case, the state that does not have a ‘national judge’ can select an ad hoc judge to hear the case and join the other members of the Court. Similarly, parties can ask to have their case heard by a five-member chamber. In that—rare—occasion, parties can suggest certain members of the Court and their opinion carry considerable weight in the final decision.

Conversely, in arbitration, parties always choose at least some of the members of the tribunal. Generally, arbitration panels are constituted by three arbitrators, each party selecting one arbitrator and the third—and presiding—arbitrator being selected either by the two parties themselves or by an appointing authority. In more complex cases, such as many boundary disputes, the arbitral tribunal may be constituted of five members, and the mechanism for selection generally does not change. Each party selects two arbitrators, and the presiding arbitrator is chosen either by agreement between the two parties or by a designated appointing authority. This selection process affords

<sup>7</sup> The Iran–US Claims Tribunals was created in 1981 by agreement of the parties through the mediation of Algeria to hear individual and sovereign claims between Iran and the US. See, in general, JK Sharpe, ‘Iran–United States Claims Tribunal’ in Giorgetti (n 1 above).

<sup>8</sup> See ICJ Statute, available at <http://www.icj-cij.org/documents/?p1=4&p2=2&p3=0> (accessed 12 February 2016). On the ICJ in general see also SD Murphy, ‘The International Court of Justice’ in Giorgetti (n 1 above).

parties the possibility of choosing arbitrators with specific qualities, including expertise, legal background and languages spoken.

The ability to choose arbitrators is consistently seen by parties as a fundamental feature in favour of arbitration. Parties consistently report that the ability to appoint an arbitrator in international arbitration is a key reason for them to choose that mechanism.

### III. FLEXIBILITY ON RULES OF PROCEDURES

A particular advantage of arbitration over international judicial institutions is that parties can choose their own rules of procedures if they so wish, and tailor them to the specific needs of a specific case.

To a certain extent, this can also be done at the ICJ with a *compromis*—but some rules would still apply in ICJ proceedings (including, for example, Articles 62 and 63 ICJ Statute on third-party intervention, and Article 41 Statute on provisional measures<sup>9</sup>).

At the same time, drafting detailed procedural rules is time consuming and complex, and requires expert counsel. Parties and their counsel need to consider many issues, including schedule, possible bi- or tri-furcation of proceedings, sequence and timing of pleadings, organization of proceedings, rules of evidence (including those applying to witnesses), logistical aspects, language, translation of documents and challenges of arbitrators.

Most often, parties in ad hoc proceedings apply the UNCITRAL Rules.<sup>10</sup> The paragraphs below highlight some of the procedural issues in which the choice of the parties in respect of a specific forum matters most.

#### A. Length of Proceedings

The ICJ is often criticized because of the length of its proceedings. The practice of the court has been to fix fairly long time limits for the filing of written pleadings. For example, in the *Oil Platforms* case<sup>11</sup>—filed by Iran in 1992 against the United States—the hearings were held in 2002 and the judgment on the merits rendered in 2003 (11 years after the case was initially filed). One important consideration is that even at the ICJ the parties can, to a large extent, decide the timetable of the proceedings. There are, however, more procedural constraints, for example third party intervention.

Conversely, parties can really speed up proceedings if they so choose. This

<sup>9</sup> All available at <http://www.icj-cij.org/documents/?p1=4&p2=2&p3=0>.

<sup>10</sup> Available at [http://pca-cpa.org/showpage.asp?pag\\_id=1064](http://pca-cpa.org/showpage.asp?pag_id=1064).

<sup>11</sup> *Oil Platforms (Islamic Republic of Iran v United States of America)*, a timeline of the case, as well as all the decisions, is available at <http://www.icj-cij.org/docket/?p1=3&p2=3&case=90&code=op&p3=4>.

happened in the Eritrea/Yemen maritime dispute and Eritrea/Ethiopia boundary proceedings, in which the parties opted for a particularly expedite schedule:

1. Eritrea/Yemen: 11 months for simultaneous exchange of memorials, two months for the replies, three months after that oral proceedings were held. The tribunal was asked to, as far as possible, deliver the award within three months from the end of the oral proceedings. The entire arbitration took only three years.<sup>12</sup>
2. The Eritrea/Ethiopia Boundary Commission was also organized on a tight schedule, which the parties respected—three months to file simultaneous memorials, three months for an exchange of counter-memorials and one month for replies. The award was issued by the tribunal equally expeditiously.<sup>13</sup>

In other cases the parties have also decided to request the tribunal to issue the award within a limited amount of time and have imposed specific time limits on the tribunal.

## **B. Terms of Reference of the Tribunal**

In ad hoc proceedings, parties can agree on specific terms of reference for the arbitral tribunal, which establish the issues to be decided by the tribunal. At the ICJ, this can be done at the time when the parties submit their dispute to the ICJ through a mutually agreed *compromis*.

## **C. Number and Types of Parties**

Ad hoc proceedings allow unique flexibility in terms of the number of parties that can be brought into proceedings. For example, at the UNCC, Iraq was a *sui generis* respondent in cases brought by individuals, international organizations and states, and cases involved mass claims as well as single and multi-party claims.

## **IV. CHOOSING BETWEEN CONFIDENTIALITY AND PUBLICITY**

One important difference between international ad hoc proceedings and proceedings in judicial institutions is confidentiality of proceedings. At the ICJ and in other established proceedings, hearings are open to the public and all submissions—written and oral—as well as all of the Court's decisions, are

<sup>12</sup> In general, see PCA Past Cases (n 6 above).

<sup>13</sup> *Ibid.*

published and readily available from the ICJ website once the hearings are finished.

Conversely, in ad hoc proceedings, parties can choose to keep some (eg written pleadings or oral pleadings) or all of the proceedings confidential. Indeed, the existence of the entire dispute could be kept confidential. This could be of interest especially for politically sensitive issues or to limit possible drawbacks for payments of any future award.

Thus, in sensitive cases, arbitration may be preferable. Parties can decide if and what to open to the public—like the parties choose to do in the *Abey* Arbitration between Sudan and the Sudan's People Liberation Movement/Army.<sup>14</sup> In a recent arbitration between the US and Ecuador, the parties agreed to make the pleadings public, but not the award.<sup>15</sup>

## V. FLEXIBILITY ON APPLICABLE LAW

Parties in ad hoc proceedings also have a certain flexibility to determine the applicable law to their dispute.

Article 38 of the ICJ Statute provides the generally recognized enumeration of sources of law for international disputes. It provides that:

The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations;
- d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.<sup>16</sup>

In special cases, parties can direct the tribunal to use a specific body of law. For example, in the *Eritrea/Ethiopia* boundary dispute, the parties asked the tribunal to delimit and demarcate the colonial treaty borders between them based on the pertinent colonial treaties (1900, 1902 and 1908) and applicable international law.<sup>17</sup>

The flexibility to determine the applicable law can be an important argument in favour of ad hoc arbitration in certain cases in which the parties have a predetermined and agreed body of law that they wish to apply. However, choosing the applicable law is no simple matter, and may not be preferable in many other contexts.

<sup>14</sup> *Ibid.*

<sup>15</sup> Documents for both proceedings are available at the website of the PCA, *ibid.*, which acted as registry in both cases.

<sup>16</sup> Art 38, ICJ Statute, available at: <http://www.icj-cij.org/documents/?p1=4&p2=2&p3=0>

<sup>17</sup> For the award and arbitration agreement see PCA Past Cases (n 6 above).

VI. FLEXIBILITY V. STABILITY: THE BINDING NATURE OF THE AWARD, ENFORCEABILITY AND POST-JUDGMENT REMEDIES

Judgments and awards are always final and binding for the parties. Critics, however, point out that international law lacks an enforcement mechanism similar to the police force found in domestic law. The truth is that, as Louis Henkin famously wrote in 1979, 'almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time'.<sup>18</sup> Equally, parties to international disputes respect and apply the final decisions rendered by an international court or tribunal almost of all the time. All parties have a mutual advantage in respecting international judicial decisions. They are, of course, also legally obligated to do so by international law, whether as members of the United Nation or by the agreement they signed to go to arbitration. Failure to comply, therefore, can result in state responsibility for international law violation.

The UN Charter provides at Article 94 that parties must 'comply with the decision of the ICJ' and

if any party to a case fails to perform the obligations incumbent upon it under the ICJ judgment, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendation or decide upon measures to be taken to give effect to the judgment.<sup>19</sup>

Thus, the Security Council can be called upon to play a role in enforcing an ICJ judgment. An important problem, however, is the exercise of a veto by one of the veto-holding members of the Security Council, which could block any enforcement effort. Famously, for example, the US used its veto power to block the enforcement of an ICJ judgment in a case that Nicaragua brought against the US.<sup>20</sup>

This is more problematic in arbitration, which lacks an immediate link to the Security Council. A reference to an enforcing role of the United Nations could, and should, be included in the terms of reference of the tribunal.

Where enforceability may be problematic from the start, established judicial bodies like the ICJ may thus present an advantage.

Established judicial bodies are also preferable when tribunals are needed after the judgment is issued, for example if a clarification, correction or interpretation is needed by the parties. In arbitration, the arbitral tribunal ceases to exist after the award is issued, making it difficult for it to reconvene to hear a post-award request. Differently, the statute of the ICJ includes specific provisions for such situations, thus providing added stability.

<sup>18</sup> L Henkin, *How Nations Behave* (Columbia University Press, 1979).

<sup>19</sup> Art 94, UN Charter, available at <http://www.un.org>.

<sup>20</sup> *Military and Paramilitary Activities in and against Nicaragua (Nic v USA)*—ICJ Judgment of 27 June 1986. For the exercise of the veto power, see UN Security Council, draft resolution, UN Doc S/18428, 28 October 1986, vetoed by the US; UN Security Council meeting 2718, verbatim record, in UN Doc S/PV.2718, 28 October 1986.

## VII. CONCLUSION

International dispute resolution nowadays offers a real menu of options to prospective litigants. The choice of forum in international litigation is a fundamental decision, with important repercussions for the parties. Any such decision must therefore be carefully considered by the parties.

Different forums have different functions and may appeal to different litigants. In general, international dispute resolution is quite flexible and parties have substantial freedom.

Flexibility can play an important role when parties agree to settle their dispute by a binding international law mechanism, and parties can choose specific rules of procedures and applicable law, and—most importantly—have a say on who decides their dispute by selecting members of the tribunal directly. To go to arbitration, states must recognize the existence of a legal dispute and be willing to have it resolved through arbitration.

Standing tribunals like the ICJ have important and unique functions: they provide for compulsory jurisdiction and their public forum may validate decisions for domestic constituencies. Judgments of standing tribunals may also result in better enforceability.

Sometimes, of course, there is no choice, as there is no standing forum that has jurisdiction over the specific dispute. Also, sometimes (albeit rarely) there is only limited choice—a dispute resolution clause may only allow for one forum. In certain situations, arbitration may also be the only option. For example, Article 287 UNCLOS provides that if a party has not chosen by a written statement one of the three settlement methods listed or if the parties have not chosen the same method, the dispute will be resolved by arbitration.

Cost is also always an important consideration, as arbitration can be much more costly than the ICJ, where the cost of the court and the registry is not paid by the parties.