

International Arbitration vs. International Adjudication for the Settlement of Disputes Between States and International Organizations

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I. Introduction

Effective legal remedies are a necessary component of a functional accountability regime for international organizations (IOs or organizations). While such remedies should be available to various entities, including individuals, the International Law Association (ILA) has observed that states run the greatest risk of finding themselves in legal disputes with IOs because they have permanent dealings with the organizations through membership links or other means.¹ Presently, however, the options for states and IOs to obtain legally binding settlements to their disputes with each other are limited. The inability of IOs to become parties to contentious International Court of Justice (ICJ) cases, for instance, is frequently lamented.² A related lament is that arbitration is not a reliable option because it depends upon both parties' willingness to arbitrate the particular dispute at issue. Even if a dispute falls within a compulsory arbitration clause in, *e.g.*, an applicable headquarters agreement, the responding party may be able to frustrate or prevent the proceedings by refusing to cooperate.³ Furthermore, it is unlikely that the state would be able to resort to its own courts due to the IO's probable immunity from national court jurisdiction.⁴ The combined result of these circumstances is that, in some instances, there may be no way for a state or IO to obtain a legally binding, third party settlement to a state-IO dispute.

A number of changes must be made to remedy this state of affairs. One of these changes is that IOs must both consent to and utilize binding methods of dispute settlement. This paper considers whether international arbitration or international adjudication might be better suited to state-IO disputes. While it might seem at first blush that IOs would be unlikely to consent to any form of

¹ International Law Association Final Report on the Accountability of International Organizations, Berlin Conference (2004), Appendix: A Role for the International Court of Justice 51; *see also* KAREL WELLENS, REMEDIES AGAINST INTERNATIONAL ORGANISATIONS 224 (2002) (same).

² WELLENS, *supra* note 1 at 236-261; *see also* August Reinisch, *Securing the Accountability of International Organizations*, 7 GLOBAL GOVERNANCE Vol. 2, 131, 139 (2001). Article 34(1) of the Statute of the International Court of Justice limits the Court's contentious jurisdiction to interstate disputes. Statute of the International Court of Justice, 26 June 1945, XV UNCIO 355 art. 34(1).

³ *See* WELLENS, *supra* note 1 at 220. There is also a concern that certain types of disputes, *e.g.*, those involving allegations of human rights violations, are not appropriate for arbitration. Reinisch, *supra* note 1 at 139.

⁴ *See* C.F. AMERASINGHE, PRINCIPLES OF THE INSTITUTIONAL LAW OF INTERNATIONAL ORGANIZATIONS (2d ed. 2005) 482 (stating that "[t]he use of national courts for the settlement of disputes involving the responsibility of organizations is not precluded but likely to be thwarted by claims of immunity of the organization, unless such immunity is expressly or impliedly waived.")

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international jurisdiction, it is notable that states, like IOs, cannot be parties to arbitral or judicial proceedings unless they give their consent. Despite that fact, neither international arbitration nor international adjudication has grounded to a halt. To the contrary, the use of both dispute settlement methods by states has increased dramatically in recent years. States are resorting to established forums more frequently and are creating new forums for the settlement of discrete categories of disputes. As will be shown, related trends include the development of specialized rules and procedures tailored to the subject matter and parties involved, and the creation of specialized forums dedicated to discrete categories of disputes. In light of those developments, it is worthwhile to consider whether existing procedures might also be tailored to the unique nature of state-IO disputes. Improved suitability of the procedures may make IOs more likely to submit to international jurisdiction and at the same time increase the procedures' perceived legitimacy. Such improvements could have a significant favorable impact on the overall accountability regime for IOs.

This paper proceeds as follows. Part II compares arbitration and adjudication generally, sets forth the debate about the suitability and effectiveness of the two methods for disputes involving states and describes recent trends in the use of the two methods. Then, to determine whether IOs and states have comparable reasons for and concerns about consenting to international jurisdiction, and whether existing procedures are suitable for state-IO disputes, Part III compares IOs to states generally and then considers two international procedures that, at least in theory, states and IOs can utilize to settle their disputes with each other: 1) arbitration under the auspices of the Permanent Court of Arbitration (PCA) pursuant to its Optional Rules for Arbitrations Involving International Organizations and States; and 2) the ICJ's so-called "binding" advisory opinion procedure. Part IV sets forth the conclusions.

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II. Arbitration vs. Adjudication: A General Comparison

A. Basic Similarities and Differences

In general, arbitration and adjudication are similar in that they require the consent of the parties and culminate in a third-party decision that is legally binding upon the parties.⁵ They differ primarily in the degree of flexibility that they afford. Arbitral tribunals are often created *post hoc* to address a specific class of disputes, and the parties are frequently permitted to determine, by agreement, the tribunal's terms of reference or *compromis*, composition, seat and procedural rules.⁶ Arbitration has long been used to settle commercial disputes, and the relief granted is often monetary. With respect to the tribunal's composition, it is common for each side to appoint one arbitrator, and for the two appointed arbitrators to then jointly select the third, or "neutral," arbitrator.⁷ Another common feature of arbitration is the option to keep the proceedings confidential.⁸ With respect to international disputes involving states, arbitration is often used where the claims are monetary and arise under bilateral treaties. The Iran-United States Claims Tribunal and the International Centre for Settlement of Investment Disputes (ICSID) are two examples of tribunals that arbitrate such claims. Interestingly, both tribunals also primarily decide claims by non-states, often individuals or corporations, against states.

By contrast, courts are often created to deal with future disputes. Accordingly, the subject-matter jurisdiction, judges, procedural rules and seat are all generally pre-determined.⁹ Courts are also regarded as being more independent than arbitral tribunals and to that end, the judges are frequently appointed for fixed periods of time.¹⁰ The use of standing judges is also believed to promote the development of a jurisprudence. Compared to arbitration, the relief granted is more

⁵ PETER MALANCZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 281 (7th Rev. ed. 1997).

⁶ IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 703 (7th ed. 2008); MALANCZUK, *supra* note 5, at 293.

⁷ MALANCZUK, *supra* note 5 at 293.

⁸ *Id.*

⁹ *Id.*

¹⁰ See generally Eric A. Posner and John C. Yoo, *Judicial Independence in International Tribunals*, 93 CAL. L. REV. NO. 1, pp. 1-74 (2005); Laurence L. Helfer and Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93 CAL. L. REV. NO. 2, pp. 1-58 (2005).

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commonly non-monetary and the options for confidentiality are more limited.¹¹ Three international courts possessing these characteristics are the ICJ, the World Trade Organization Dispute Settlement Body (WTO DSB) and the International Tribunal for the Law of the Sea (ITLOS). All of those courts primarily decide non-monetary claims between states. Another interesting feature shared by the forums is that they all primarily deal with multilateral rather than bilateral international legal obligations.

B. Arbitration vs. Adjudication for Disputes Involving States

1. The General Debate

Observers have posited various arguments about the comparative effectiveness or suitability of arbitration and adjudication for the settlement of international disputes involving states. At least until the 1990s, there was a general perception that states preferred arbitration to adjudication because the latter has too great an impact upon their sovereignty. Peter Malanczuk, for instance, stated that the “comparative advantages of arbitration [over adjudication] in reaching a binding third-party decision, while at the same time assuring maximum control over the procedure by the states parties to the dispute . . . seem to be obvious.”¹² He also noted that few states have consented to the compulsory jurisdiction of the ICJ, and that the few consents which have been given are limited by far-reaching reservations.¹³ More recently, other observers have argued that arbitration is more effective because of the substantial differences between domestic and international legal systems. In particular, it is contended that courts likely work well in municipal legal systems because people obey the law primarily out of a fear of sanctions, but states have other reasons for obeying the law that courts do not reinforce.¹⁴ A related argument is that courts require a political unity that does not exist among states under normal circumstances.¹⁵ While states may come together in particularly trying times, such as after a war, they are not otherwise sufficiently unified to obey international court decisions that they do not like.¹⁶ Because judges are more independent than arbitrators, it is argued, courts are more

¹¹ MALANCZUK, *supra* note 5 at 293.

¹² MALANCZUK, *supra* note 5 at 293.

¹³ *See* MALANCZUK, *supra* note 5 at 294.

¹⁴ MALANCZUK, *supra* note 5 at 302.

¹⁵ Posner and Yoo, *supra* note 10 at 27-28, 66-67.

¹⁶ *Id.*

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likely to issue decisions that are not satisfactory to all of the parties and compliance is consequently likely to suffer.¹⁷ In addition, it is argued that judicial decisions are unpredictable and that adjudication can be undesirable from an international relations standpoint because taking another state to court may be viewed as an unfriendly act.¹⁸

On the other hand, it has been argued that international adjudication promotes the legitimacy of international law, which in turn promotes international cooperation.¹⁹ It is evident that decisions of arbitral tribunals are not generally cited or considered in the same manner as, for instance, decisions of the ICJ. It has also been argued that states consent to international jurisdiction when they want to strengthen their international commitments, and that courts improve states' credibility more than arbitral tribunals because of their prospective jurisdiction and independence.²⁰ A related argument is that courts are better suited to settle certain types of multilateral disputes, including those that may require a state to significantly change its law, those arising under treaties regulating public goods or global commons, and those in which private parties may have a greater incentive to monitor and enforce compliance.²¹ With respect to the perception that adjudication is "unfriendly," that is arguably the case only because states choose to approach litigation in that spirit.²² International adjudication could instead be viewed as a valuable and amicable means of dispute settlement. Finally, the increase in the number and use of international courts is cited as evidence of their effectiveness.²³

As demonstrated below, states' actual use of various international forums does not support a conclusion that they prefer either arbitration or adjudication as a general matter. As mentioned above, states often use arbitration to settle monetary claims arising under bilateral treaties, and adjudication to settle non-monetary claims arising under multilateral treaties. The following section describes three recent trends international arbitration and international adjudication.

¹⁷ *Id.*

¹⁸ MALANCZUK, *supra* note 5 at 302-303.

¹⁹ THOMAS FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS 29-33 (1990).

²⁰ Helfer and Slaughter, *supra* note 10 at 33.

²¹ *Id.* at 33-42.

²² MALANCZUK, *supra* note 5 at 304.

²³ Helfer and Slaughter, *supra* note 10, at 13-19; *see also* RUTH MACKENZIE, CESARE P.R. ROMANO, YUVAL SHANY AND PHILLIPPE SANDS, MANUAL ON INTERNATIONAL COURTS AND TRIBUNALS xi-xv (2010).

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2. Recent Trends in States' Use of International Arbitration and International Adjudication

Perhaps the most significant of the three trends discussed here is the dramatic rise in the use of international arbitration and international adjudication. This is evident from the increased use of existing forums, such as the Permanent Court of Arbitration (PCA) and the ICJ, and from the creation and use of new forums, such as the International Tribunal for the Law of the Sea (ITLOS), to settle discrete categories of disputes. With respect to existing forums, the PCA is a notable example. According to its website, the number of arbitrations that the PCA is presently facilitating exceeds the number that it has facilitated to completion over the past 112 years.²⁴ For its part, the ICJ has decided approximately 124 contentious cases and issued approximately 26 advisory opinions since it began operating in 1946, an average of 1.9 and .4 cases per year respectively, but a remarkable 17 cases are currently pending before the ICJ.²⁵

A second and related trend is the adaptation of existing forums to the evolving nature of international disputes, including the adoption of rules and procedures tailored to the parties and subject matter involved. Again, the PCA should be mentioned. For many years, it facilitated only interstate arbitrations.²⁶ In 1962, however, the PCA began to expand its reach by adopting "Rules of Arbitration and Conciliation for Settlement of International Disputes between Two Parties of Which Only One is a State."²⁷ Those rules were superseded by Optional Rules for such arbitrations adopted in 1993, and the institution's expansion continued in 1996, when it adopted two more sets of Optional Rules, one for arbitrations between international organizations and states and another for arbitrations between international organizations and private parties.²⁸ In 2001, the PCA adopted yet another set of Optional Rules for arbitrations related to natural resources and/or the environment.²⁹

²⁴ Compare http://www.pca-cpa.org/showpage.asp?pag_id=1029 (53 disputes) with <http://www.pca-cpa.org/upload/files/Consolidated%20Annexes.pdf> (50 disputes).

²⁵ See <http://www.icj-cij.org/docket/index.php?p1=3&p2=1>.

²⁶ *Id.*; see also the PCA's "About Us" section on its website, http://www.pca-cpa.org/showpage.asp?pag_id=1027.

²⁷ MACKENZIE *et al.*, *supra* note 23 at 102.

²⁸ *Id.* at 103.

²⁹ *Id.* All of the current rules are available on the PCA's website at http://www.pca-cpa.org/showpage.asp?pag_id=1188.

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The ICJ also attempted to adapt itself to the changing nature of international dispute settlement when it adopted an *ad hoc* chambers procedure in 1978, under which it may decide disputes by a relatively small panel of judges instead of the normal full 15-judge Court, although that procedure has been little used.³⁰ The rules governing arbitrations facilitated by the International Centre for Settlement of Investment Disputes (ICSID) were originally very similar to those used to settle typical commercial disputes, but were amended in 2006 to better reflect the unique nature of international investment arbitration between foreign investors and host states.³¹ As amended, the rules grant the tribunals discretion to accept *amicus* briefs,³² mandate the publication of certain parts of every award, including the tribunal's legal reasoning,³³ and require greater disclosure by potential arbitrators of information relevant to their independence.³⁴ Notably, a comparison of the ICJ to ICSID illustrates that the lines between arbitration and adjudication are to some extent becoming blurred. Finally, the WTO DSB should be mentioned. In the almost fifty years from 1948 through 1994, a total of 432 complaints were filed under the GATT dispute resolution system, the DSB's predecessor, an average of 9.2 disputes a year.³⁵ By contrast, approximately the same number, 424 disputes, have been brought to the new and improved DSB since it began operating in 1995, an average of approximately 27.4 disputes per year.³⁶

Finally, a third trend is the creation of specialized forums for the settlement of discrete categories of disputes. Of the forums mentioned thus far, all of those created since 1965, including ICSID, the Iran-United States Claims Tribunal, ITLOS and the DSB, are dedicated to the settlement of discrete categories of disputes. Notably, the two most-recently created forums, ITLOS and the DSB, are judicial forums that primarily involve interstate disputes arising under multilateral

³⁰ S.M. Schwebel, *Ad Hoc Chambers of the International Court of Justice*, 81 AM. J. INT. L. 831-854 (1987); ICJ Statute art. 26(2) and arts. 2 and 3.

³¹ ICSID Convention and Rules of Procedure for Arbitration Proceedings in ICSID, originally adopted in 1968, revised Sept. 26, 1984, Jan. 1, 2003, and Apr. 10, 2006, *reprinted in* ICSID Convention, Regulations and Rules 99-128 (2006).

³² *Id.* at Rule 37.

³³ *Id.* at Rule 48.

³⁴ *Id.* at Rule 6.

³⁵ Posner and Yoo, *supra* note 10 at 46, *citing* Marc L. Busch and Eric Reinhardt, *The Evolution of GATT/WTO Dispute Settlement in TRADE POLICY RESEARCH* 143, 151 (John M. Curtis and Dan Ciuriak eds. 2003).

³⁶ A list of all WTO disputes and their current status is *available at* http://www.wto.org/english/tratop_e/dispu_e/dispu_current_status_e.htm.

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treaties.³⁷ A further notable feature shared by these forums is that they both permit certain IOs to participate in dispute settlement proceedings in at least some circumstances. Under UNCLOS, international organizations may become signatories if a majority of their member states are signatories.³⁸ Both the European Union (EU) and all of its member states are members of the WTO, but the EU generally speaks for the members in WTO meetings and in dispute settlement procedures. The increase in the number of international forums makes the rise in the use of existing forums, such as the PCA and the ICJ, even more notable.

III. Application to IOs

A. A Comparison of States and IOs

The foregoing illustrates that states' use of both international arbitration and international adjudication has increased dramatically in recent years. Assuming international forums permitted IOs to become parties and utilized suitable procedures, could IOs be expected to consent to jurisdiction to the same extent as states? Karel Wellens is of the view that IOs would consent to ICJ jurisdiction if they could because "the advantages for the organisation emanating from such *locus standi* as a potential applicant would probably outweigh the anticipated disadvantages of becoming a respondent in a dispute with a state."³⁹ While the situation may not be as simple as Wellens describes, it is notable that IOs are similar to states in a number of respects. For one, while they may not be "sovereign" in the traditional sense, IOs, like states, execute a number of functions which necessitate some degree of freedom from judicial interference. Their functions, in fact, are state functions which have been transferred from their member states.⁴⁰ Indeed, it has been argued that states create IOs to take advantage of the centralization and independence that they afford, and thereby accomplish goals that they could

³⁷ ITLOS is a permanent court consisting of 21 judges elected for nine-year terms and is one of four options which may be selected to settle a range of disputes under the United Nations Convention on the Law of the Sea (UNCLOS). Thus far, 18 disputes have been submitted to ITLOS. See http://www.itlos.org/start2_en.html. According to the PCA, only six arbitrations have been submitted to the default arbitration procedure. See the PCA's UNCLOS page, *available at* http://www.pca-cpa.org/showpage.asp?pag_id=1288.

³⁸ UNCLOS at Annex IX art. 2.

³⁹ WELLENS, *supra* note 1 at 244.

⁴⁰ See Reinisch, *supra* note 2 at 131.

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not accomplish in a decentralized form.⁴¹ IOs are therefore likely to guard their independence and ability to function in a manner similar to states, and to have similar concerns about consenting to international jurisdiction. The debate about the appropriate level of immunity for IOs is notable in this respect. At a minimum, IOs are entitled to the same degree of “functional immunity” to which states are entitled.⁴² That fact reflects some degree of similarity between states and IOs.

IOs probably also want to establish credibility and avoid “unfriendly acts” like states. In this respect, it is important that IOs are dependent on their member states, albeit to varying degrees. As Professor Reinisch has observed, member states may have powerful political tools at their disposal in disputes with IOs, including voting, withholding or modifying financial contributions and/or, most severely, limiting the organization’s scope of powers in its founding documents.⁴³ Absent the ability to obtain a binding settlement to a dispute in which member states are employing one or more of those tools, an IO’s ability to function could be severely impaired. Similarly, the ability of an IO to function in a particular geographic region could be substantially limited by poor relations with the host state. Moreover, while many disputes involving states are bilateral in nature, it is arguable that any dispute involving an IO is multilateral in nature, even when that dispute is between two member states of the IO.⁴⁴ Thus, IOs may in fact depend on establishing and maintaining credibility and friendly relations to a greater extent than states, at least in some circumstances.

From the foregoing, it is arguable that IOs are similar to states in many respects and would be willing to consent to jurisdiction under circumstances where states would consent. IOs at least appear to be more like states than any other type of entity involved in international arbitration or international adjudication. Thus, the “ideal” dispute settlement procedure from the perspective of IOs is likely to be similar to the “ideal” procedure from the perspective of states. The

⁴¹ Kenneth W. Abbott and Duncan Snidal, *Why States Act through Formal International Organizations*, 42 J. CONFLICT RES., No. 1, 3-32 (1998).

⁴² *Porru v. United Nations Food and Agriculture Organization*, Italy, Tribunal of First Instance (Labour Section), 25 June 1969, 71 ILR 241 (stating that the IO immunity existing under customary international law extends only to an organization’s public law activities, “*i.e.* . . . the activities by which it pursues its specific purposes (*uti imperii*)”, and not to its private law activities, where it “acts on an equal footing with private individuals (*uti privatus*)”); *see also* BROWNIE, *supra* note 6, at 680 (citing cases).

⁴³ Reinisch, *supra* note 2 at 134.

⁴⁴ C.F. Amerasinghe takes this position. *See supra* note 4 at 506.

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procedure should not unduly interfere with the IO's functioning or be perceptibly unfriendly to states, should be credible and should culminate in an authoritative decision. The following section compares two methods presently available to settle state-IO disputes, one arbitral and one judicial, to determine whether two existing procedures have these features.

B. A Comparison of Two Procedures

1. Arbitration Under the PCA's Optional Rules for Arbitration Involving International Organizations and States

The PCA was established by the 1899 Convention for the Pacific Settlement of International Disputes (1899 Hague Convention) and has the distinction of being the first permanent global dispute settlement institution.⁴⁵ That distinction, however, comes with a caveat. The PCA is not a classical arbitral tribunal and does not itself arbitrate disputes. Instead, it facilitates arbitrations by, for example, maintaining a list of potential arbitrators designated by the parties to the 1899 and 1907 Hague Conventions and hosting oral proceedings.⁴⁶

In its 2004 Final Report on the Accountability of International Organizations, the ILA recommended that IOs continue to insert compulsory arbitration clauses into their agreements with both states and non-states broadly providing for the arbitration of "any" dispute the parties are unable to resolve by other means.⁴⁷ That practice is standard with respect to most, if not all, agreements concluded by IOs. The ILA further recommended that the arbitrations be governed by the PCA's 1996 Optional Rules for Arbitration Involving International Organizations and States (IO Rules).⁴⁸

The ILA's endorsement of the IO Rules suggests that it regards them as preferable to other arbitration rules from an accountability standpoint. The Rules themselves are an adapted form of the UNCITRAL rules, which the United Nations negotiated in 1976 for international commercial arbitrations. Among other things, the modifications are intended to "reflect the public law character of disputes involving [IOs] and States, and diplomatic practice appropriate to such

⁴⁵ MACKENZIE *et al.*, *supra* note 23 at 99, 102. The 1899 Convention was subsequently revised by the 1907 convention of the same name (1907 Hague Convention).

⁴⁶ *Id.* at 102

⁴⁷ ILA Final Report at 49.

⁴⁸ *Id.* The PCA's Optional Rules are available at <http://www.pca-cpa.org/upload/files/IGO2ENG.pdf>.

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disputes.”⁴⁹ Some notable features include that the rules are potentially applicable to disputes involving an IO and any state—the state need not be a member state of the IO or a party to one of the Hague Conventions—and that the parties may choose tribunals composed of one, three or five arbitrators. Under the UNCITRAL Rules, three-member tribunals are the default but the parties may agree to use a sole arbitrator.⁵⁰

Most of the additional modifications from the UNCITRAL Rules are minor, although they bear mentioning. The tribunals have more discretion with respect to hearings under the IO Rules than they do under the UNCITRAL rules. Under the former, the tribunal must hold hearings for the presentation of evidence by witnesses or for oral argument if a party so requests at “any *appropriate* stage of the proceedings.”⁵¹ The word “appropriate” does not appear in the corresponding UNCITRAL rule, apparently mandating a hearing for the receipt of evidence or oral argument whenever a party requests one.⁵² That difference may reflect an attempt to prevent procedural abuses which could interfere with the functioning of either the state or the IO party to a dispute, or an attempt to control costs. The IO Rules notably also eliminate the possibility of awarding attorneys’ fees to the prevailing party.⁵³ Another interesting difference is that the parties may remove the issue of interim measures from the scope of the arbitration under the IO Rules, but do not appear to have the same flexibility under the UNCITRAL rules.⁵⁴ Finally, the parties have less discretion with respect to the applicable law under the IO Rules than they do under the UNCITRAL Rules; however, IO tribunals appear to have greater discretion to decide cases *ex aequo et bono* than UNCITRAL tribunals.⁵⁵ In this respect, the IO Rules specify that the tribunal must apply the rules of the IO at issue, the law governing any agreement or relationship between the parties and, where appropriate, the general principles governing the law of IOs and the general rules of international law, while the UNCITRAL rules permit the parties to choose the applicable law.⁵⁶ By contrast, however, the IO Rules provide that the applicable

⁴⁹ Optional Rules, *supra* note 55 at Introduction, p. 97.

⁵⁰ *Id.* at Introduction, p. 97 and arts. 1(b). Compare IO Rule art. 5 and UNCITRAL Rule 5. The UNCITRAL Rules are available at [http://www.pca-cpa.org/upload/files/UNCITENG\(1\)\(1\).pdf](http://www.pca-cpa.org/upload/files/UNCITENG(1)(1).pdf).

⁵¹ IO Rules art. 15(2).

⁵² UNCITRAL Rules art. 15(2).

⁵³ Compare IO Rule 38 and UNCITRAL Rule 38(e).

⁵⁴ Compare IO Rule 26(1) and UNCITRAL Rule 26(1).

⁵⁵ Compare IO Rule 33 and UNCITRAL Rule 33.

⁵⁶ Compare IO Rule 33(1) and UNCITRAL Rule 33(1).

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law provision “shall not prejudice the power of the arbitral tribunal to decide a case *ex aequo et bono*, if the parties agree thereto”, while the UNCITRAL rules permit such decisions only if the parties expressly authorize the tribunal and the decision is permitted by the applicable law.⁵⁷

Overall, the IO Rules are similar to the UNCITRAL Rules in many respects. That fact is explained to some extent in the Introduction to the IO Rules, which states that “[e]xperience in arbitrations since 1981 suggests that the UNCITRAL Arbitration Rules provide fair and effective procedures for peaceful resolution of disputes involving international organizations and States, even though they were originally designed for commercial arbitration.”⁵⁸ The procedures are therefore similar to classical arbitration procedures.⁵⁹ The arbitrators are appointed by the parties, the parties may choose to keep the proceedings and awards confidential, and no provision is made for *amicus curiae* participation.⁶⁰ Because of the possibility of confidentiality, there is no way of knowing whether, and if so how many times, the IO Rules have been used. The PCA’s website contains a partial list of concluded and pending arbitrations, but none of the listed disputes appear to be between states and IOs.⁶¹ As of the date of this paper, the website stated that eighteen disputes were pending to which a state, state-controlled entity or intergovernmental organization was a party but, of course, none of those disputes are necessarily between states and IOs. Notably, however, in at least one instance, an IO sought to arbitrate a dispute with a state pursuant to an arbitration clause in an applicable headquarters agreement but the state (the United States) declined to arbitrate the dispute. In the ICJ’s advisory opinion on the *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, the Court opined that the dispute fell within the arbitration clause and that the United States was accordingly required to submit the dispute to arbitration.⁶²

⁵⁷ Compare IO Rule 33(2) and UNCITRAL Rule 33(2).

⁵⁸ IO Rules, Introduction.

⁵⁹ See *supra* at 2-3.

⁶⁰ See, e.g., IO Rules, arts. 6-8 (appointment of arbitrators) and 25(4) (hearings held *in camera* unless the parties agree otherwise).

⁶¹ See http://www.pca-cpa.org/showpage.asp?pag_id=1029.

⁶² Advisory Opinion, I.C.J. Reports 1988, p. 12. The case concerned a United States law which prohibited the establishment or maintenance of a Palestinian Liberation Organization (PLO) office within the jurisdiction of the United States. The law was of concern to the United Nations (UN) because a PLO Observer Mission to the UN had an office at the UN Headquarters in New York.

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Finally, it is notable that the IO Rules are virtually identical to the PCA's Optional Rules for Arbitrating Disputes Between States (State Rules). With the exception of some minor variations to reflect fundamental differences between states and IOs, *e.g.*, the applicable law provision in the State Rules does not require the application of any IO rules, the texts are non-distinguishable.⁶³ Indeed, the Introduction to the State Rules contains a remarkably similar statement to that in the IO Rules' Introduction that they were modified to reflect the "public international law character of disputes between States, and diplomatic practice appropriate to such disputes." Thus, in the drafters' view at least, interstate and state-IO disputes call for procedures slightly different from those applicable to traditional commercial disputes, but are sufficiently similar to each other that the same rules may be applied.

2. "Adjudication" Under the ICJ's Advisory Opinion Procedure

The ICJ was established by the Charter of the United Nations in 1945 and began operating in 1946.⁶⁴ It is similar to the PCA in that its subject matter jurisdiction is not limited to any particular category of disputes. The ICJ is the most well-known international forum, and often receives greater praise for its contribution to the development of international law than to its contribution to the peaceful settlement of international disputes. Ian Brownlie, for instance, states that the Court has made a "reasonable" contribution to the latter "[g]iven the conditions of its existence," but goes on to state that it has been influential "in the development of international law as a whole."⁶⁵ Other observers state that the Court has been very effective only with respect to "mid-level disputes", including border disputes, disputes about the allocation of shared natural resources and diplomatic protection cases, but has "played an extremely important role in the development of international law."⁶⁶

⁶³ The PCA's Optional Rules for Arbitrating Disputes Between States are *available at* <http://www.pca-cpa.org/upload/files/2STATENG.pdf>.

⁶⁴ Charter of the United Nations, 26 June 1945, XV UNCIO 335 (UN Charter); MACKENZIE *et al.*, *supra* note 23 at 4.

⁶⁵ BROWNLIE, *supra* note 6 at 724-725.

⁶⁶ MACKENZIE *et al.*, *supra* note 23 at 35-36.

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While the Court's contentious jurisdiction is restricted to interstate disputes, it has additional jurisdiction to issue advisory opinions on legal questions submitted to it by the General Assembly and the Security Council, and other United Nations organs and "specialized agencies" duly authorized by the General Assembly.⁶⁷ Numerous IOs have been so authorized and interestingly, it is the ILA's view that the authorization obligates the IO to request an advisory opinion if a member state claims that it has exceeded its powers or otherwise acted contrary to law.⁶⁸ Thus, if a member state of one of the authorized IOs finds itself in a legal dispute with the IO, it can try to convince the IO to seek an advisory opinion on the matter from the ICJ.⁶⁹ If the IO is unwilling to request such an opinion or is not authorized to do so, the member state could alternatively try to convince the General Assembly, Security Council or some other authorized agency to make the request. One concern about the advisory opinion procedure is that it permits the requesting entity to formulate the question presented without the input of the other entity or entities involved.⁷⁰

Unlike the PCA's IO Rules, the ICJ's advisory opinion procedure does not appear to have been specifically created for or tailored to state-IO disputes. The procedure is arguably not intended to be a contentious dispute settlement method at all, but a means for the Court to advise other UN organs and thereby assist them in the performance of their functions.⁷¹ Even when it is used for that purpose, the advisory opinion procedure is controversial. It is the view of some, for instance, that the provision of legal advice to political organs is an executive rather than a judicial function.⁷² It has also been argued that such opinions could be treated as "mere

⁶⁷ Statute of the International Court of Justice art. 34 and Chapter IV; UN Charter art. 96.

⁶⁸ IOs which have been authorized to seek advisory opinions include, among others, the International Labor Organization, Food and Agriculture Organization, UN Educational, Scientific and Cultural Organization, World Health Organization, International Monetary Fund, International Civil Aviation Organization, UN Industrial Development Organization and the International Atomic Energy Agency. MACKENZIE *et al.*, *supra* note 23 at 17 n.94. The existence of the obligation was expressed in an International Law Association Resolution adopted in 1957. *See* International Law Association Final Report on the Accountability of International Organizations, *supra* note 1 at Appendix: A 51, *citing* Resolution adopted by the ILA: ILA Report of the 47th Conference, held at Dubrovnik, 26 August-1 September 1956, London, 1957, p. 104.

⁶⁹ *See* ILA 2004 Final Report, *supra* note 1 at Appendix 51.

⁷⁰ *See* WELLENS, *supra* note 1 at 233.

⁷¹ MACKENZIE *et al.*, *supra* note 23 at 18.

⁷² A number of United States jurists, for instance, took this view when the ICJ's predecessor, the Permanent Court of International Justice, was created. *See* Michla Pomerance, *The ICJ's Advisory*

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utterances” and detrimentally impact the Court’s authority or, on the other hand, be treated as authoritative without the consent of the affected party, and thus bring compulsory jurisdiction in through the advisory opinion “back door.”⁷³ Thus, the use of the procedure to settle contentious disputes that do not fall within the ICJ’s contentious jurisdiction, including state-IO disputes, is particularly controversial.⁷⁴

The ICJ’s procedure for advisory proceedings is similar to its procedure for contentious proceedings. In both types, the Court notifies all states entitled to appear before the Court of the proceeding, and begins with a written phase.⁷⁵ In advisory proceedings, however, the ICJ Statute further provides for the Court to invite states and other IOs that, in its view, would provide information relevant to the dispute, to furnish written submissions.⁷⁶ Another difference between the proceedings is that hearings appear to be mandatory in contentious proceedings but discretionary in advisory proceedings.⁷⁷ Overall, the ICJ has more procedural flexibility with respect to advisory proceedings than it does with respect to contentious ones, although the Court is to be “further guided by the provisions . . . which apply in contentious cases to the extent [the ICJ] recognizes them to be applicable.”⁷⁸ Given the intended purpose of advisory opinions, it is questionable whether the Court would ever find it appropriate to decide a dispute *ex aequo et bono* in that context, which it may do in contentious proceedings with the parties’ consent.⁷⁹ Advisory opinions, like opinions in contentious cases, may include dissenting opinions and are read in public and made publicly available.⁸⁰

Jurisdiction and the Crumbling Wall Between the Political and the Judicial, 99 AM J. INTL. L. NO. 1, 26, 27 (2005).

⁷³ *Id.*, citing John Bassett Moore, Memorandum of 18 February 1922, 1922 PCIJ (ser. D) No. 2, at 398.

⁷⁴ See MACKENZIE *et al.*, *supra* note 23 at 18 (citing cases).

⁷⁵ Statute of the ICJ arts. 40(3), 43 and 66.

⁷⁶ *Id.* at art. 66(2). In contentious proceedings, states other than those parties to the dispute may seek to intervene in certain circumstances, and the Court may request IOs and other entities to provide expert opinions. See arts. 50, 62 and 63.

⁷⁷ Compare ICJ Statute art. 43(1) (“The procedure shall consist of two parts: written and oral) with art. 66(2) (Court may notify other states and IOs that it will be prepared to receive written submissions or oral statements).

⁷⁸ ICJ Statute art. 68.

⁷⁹ ICJ Statute art. 38(2).

⁸⁰ ICJ Rules art. 107 and ICJ Statute, arts. 57 and 58.

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It cannot be said that the “binding” advisory opinion procedure, as it is sometimes called, has been frequently used. The ICJ has issued only 27 advisory opinions since it began operating in 1946, and only four of those opinions appear to have been requested by IOs.⁸¹ Moreover, a number of the advisory opinions involving IOs review decisions issued by international administrative tribunal decisions, which typically decide employee-IO disputes, not state-IO disputes. At least two advisory opinions, *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*⁸², and *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*,⁸³ clearly involved state-IO disputes, but that is a very small number within the already small number of advisory opinions issued by the ICJ overall.

3. Comparative Analysis

The foregoing procedures have some similarities, but are quite different overall. Consistent with the traditional differences between arbitration and adjudication, the IO Rules afford the parties significant flexibility and permit them to keep the proceedings confidential, while the ICJ advisory opinion procedure gives the parties little flexibility and no option of confidentiality. From the standpoint of avoiding undue interference in IO functioning, the arbitration option would appear to be preferable from the standpoint of IOs, even though only the PCA’s procedure culminates in a legally binding decision. As discussed below, the weight afforded to ICJ opinions gives them greater force than arbitral awards, such that an adverse ICJ opinion has the potential to be more disruptive to an IO than an adverse arbitral award, even though the former would be “advisory” and the latter would be “binding.”

An interesting possible consequence of the advisory nature of the ICJ procedure, however, is that it may appear less hostile than alternatives, such as the PCA procedure, with binding force. In the best case, both parties would want an advisory opinion and the IO would make the request. In those circumstances, the degree of hostility between the parties should be minimized. In addition, there would be no “compulsory jurisdiction through the advisory opinion back door”

⁸¹ The ICJ’s list of advisory opinions, organized by the requesting entity, is *available at* <http://www.icj-cij.org/docket/index.php?p1=3&p2=4&p3=1>.

⁸² Advisory Opinion, I.C.J. Reports 1988, p. 12. *See supra* at 12.

⁸³ Advisory Opinion, I.C.J. Reports 1980, p. 73.

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problem in such cases because both the state and the IO would have chosen to submit the issue to the ICJ. On the other hand, there is a possibility of both increased hostility and the backdoor problem if an IO declines to request an advisory opinion, and the state tries to persuade the General Assembly or other authorized entity to request it. On the whole, however, it is interesting that the advisory opinion procedure, in contrast to traditional adjudication, could appear equally if not more friendly than arbitration. That fact may make it very attractive to IOs, at least in certain circumstances.

An interesting difference for purposes of this analysis is that the PCA procedure was specifically designed for contentious state-IO disputes while the ICJ procedure was not so designed. It could be argued that the ICJ procedure is similar to the PCA procedure in that it was designed to address public law issues, but the fact that it is not intended for contentious disputes arguably detrimentally impacts its credibility to the extent that it is used to settle such disputes. On the other hand and as mentioned above, ICJ opinions, including advisory ones, are typically afforded significantly greater weight than arbitral awards. That fact probably outweighs the lack of specific tailoring to state-IO disputes from a credibility standpoint. It also probably outweighs the binding nature of PCA awards in terms of obtaining an authoritative decision. Indeed, it has been argued that ICJ advisory opinions are the functional equivalent of declaratory judgments and have practical consequences for both the parties to the dispute and public opinion.⁸⁴ Arbitral awards are rarely given such weight and furthermore can be kept confidential. If, for instance, an IO finds itself in a controversial dispute with a number of its member states, it may prefer to have the dispute settled by the ICJ rather than a PCA-facilitated arbitral panel. The weight afforded to the opinion would be particularly important in those circumstances, and would likely outweigh the binding nature of an arbitral award.

⁸⁴ ILA 2004 Final Report, *supra* note 1 at at 52, *citing* M. Pomerance, *The Advisory Role of the International Court of Justice and its "Judicial" Character: Past and Future Prisms*, in A. Muller, D. Raic and J. Thuransky (Eds.), *THE INTERNATIONAL COURT OF JUSTICE: ITS FUTURE AFTER FIFTY YEARS* 300 (1997), *citing* Judge Winiarski's *Dissenting Opinion in the Peace Treaties Case*.

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IV. Conclusion

Arbitration pursuant to the PCA's IO Rules and "adjudication" pursuant to the ICJ's "binding" advisory opinion procedure are two options that, at least in theory, are presently available for the settlement of state-IO disputes. Both have advantages and disadvantages. Arbitration under the IO Rules may appear advantageous to IOs because they may regard it as less intrusive than the ICJ's advisory opinion procedure, but the latter may be attractive because it may seem less unfriendly than arbitration and/or because the ICJ opinion is likely to be afforded greater weight than an arbitral award.

The use of both international arbitration and international adjudication by states has increased dramatically in recent years. Because IOs are similar to states in many respects, it is reasonable to assume that both methods may also have an important role to play in the settlement of disputes involving IOs. With respect to states, arbitration is often used to settle monetary claims arising under bilateral treaties, and adjudication is often used to settle non-monetary disputes arising under multilateral treaties. Further consideration should be given to whether those distinctions are also relevant in disputes involving IOs. It seems at least plausible that arbitration under the PCA's IO Rules is better suited to the former category, and the ICJ's advisory opinion procedure is better suited to the latter. If that is the case, IOs should be encouraged to use each method, but for different, specific categories of disputes.

In addition, further consideration should be given to whether the existing procedures can be better tailored to the unique nature of state-IO disputes. As mentioned above, such tailoring is one recent trend in international arbitration and international adjudication which may be a factor in the increased use of the dispute settlement methods by states. Such tailoring may also improve the perceived legitimacy of a given procedure. While the PCA deserves credit for developing rules specific to state-IO arbitrations, it is striking that the rules are nearly identical to its rules for interstate disputes. Some consideration should be given to whether any differences between states and IOs warrant modifications to the IO Rules. Similarly, the ICJ should consider whether any specific rules or procedures might improve the suitability of its advisory opinion procedure to state-IO disputes when it is so used.

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Finally, the creation of specialized forums for the settlement of discrete categories of disputes is another trend in international arbitration and international adjudication. Again, because IOs are similar to states, it is reasonable to consider how these forums' procedures may be made more suitable to state-IO disputes.

The foregoing analysis focused on the limited question of what might be done to encourage IOs to consent to and use international forums. Of course, many other changes must be made before an effective dispute settlement regime for state-IO disputes can become a reality. One important other change is that international forums which have not already done so must permit IOs to become parties to contentious disputes with states. Karel Wellens has discussed the importance of this change in the context of the ICJ,⁸⁵ but it should also be brought about in other international forums. In the meantime, the procedures that are available for the settlement of state-IO disputes, including arbitration pursuant to the PCA's IO Rules and the ICJ's advisory opinion procedure, should be improved. Such improvements could both increase the likelihood that IOs would submit to the procedures and enhance the procedures' perceived legitimacy. Either or both could have a favorable impact on the overall accountability regime for IOs.

⁸⁵ WELLENS, *supra* note 1 at 236-262.

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