Briefing Note

The Secretary General of the Senate of Cambodia

The role of the International Court of Justice in the Settlement of International disputes

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Introduction

This briefing note presents international dispute settlement methods, all with the legal obligation to seek peaceful resolutions. It also emphasizes the lack of unity or consistency of international jurisprudence among international jurisdictions as well as the competing settlement methods. Finally, it aims to provide a better understanding of the role and actions of the International Court of Justice (ICJ).

1. The obligation to seek peaceful settlement of international disputes

Article 2 § 4 of the UN Charter states that the Organization's members "shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations". As a result, changes can be achieved only by agreement and disputes must be resolved peacefully[1]. The obligation is solemnly affirmed by Article 2 § 3 of the Charter which provides that "the Members shall settle their international disputes by peaceful means in such a manner that international peace, security, and justice, are not endangered". The International Court of Justice does refer to this obligation many times[2]. This however applies only to the extent that the continuance of the dispute is not likely to endanger the maintenance of international peace and security.

2. Development of international jurisdictions

In the twentieth century, the idea of international justice progressed and is reflected in the existence of fairly recent and numerous jurisdictions. The obligation to settle disputes peacefully brought about an evolution characterized today by the correlation between peace and justice. However, an international judge does not have the same power as a judge at the national level because its existence depends on the consent of the States. It should be noted that development of more jurisdictions can have negative effects because this reduces the room for negotiation, amicable settlements and delays resolutions of disputes.

Although the courts have multiplied in the last 100 years, it remains today far from a global judiciary.

3. Range of international jurisdictions

Next to the ICJ, the only courts with a universal nature are specialized international tribunals - which have multiplied. An example of this is the establishment of the International Tribunal

[1] The Hague Convention of 18 October 1907 for the settlement of international disputes initiated this principle. This requirement has since been enhanced, and its formulation has been better structured, particularly in the United Nations Charter.

[2] The International Court of Justice reminds it in the beginning of each of the ten orders for provisional measures made in the Kosovo case (Orders of 2 June 1999, § 31-32). In addition, the United Nations General Assembly made two important statements with regard to the judicial settlement:

- The Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the UN Charter (resolution 2625 (XXV) of 24 October 1970),
- The Manila Declaration on the Peaceful Settlement of Disputes (Resolution 37/10 of 15 November 1982).

for the Law of the Sea[3]. Also, international administrative courts have multiplied in various international organizations and international criminal justice took a further significant step forward recently with the establishment by the UN Security Council of two *ad hoc* tribunals[4]. In addition, States (more than 120 States) have negotiated the establishment of a permanent International Criminal Court with the signing of an agreement in Rome on 17 July 1998. There are also a number of regional courts, mostly specialized in the field of human rights[5]. Finally, there are "hybrid" international courts (e.g. the Special Court for Sierra Leone or the Extraordinary Chambers in the Courts of Cambodia).

The types of disputes that these international courts deal with can then be very different[6].

International courts with broad based competence with universal or regional vocation	**International specialized courts with universal vocation**	**International specialized courts with partial vocation**	**Specialized regional courts**	**Arbitration**
International Court of Justice (ICJ) (before Permanent Court of International Justice: PCIJ), Central American Court of Justice, Inter-American Court of Justice, Islamic International Court of Justice.	International Tribunal for the Law of the Sea (ITLOS), Dispute Settlement Body (DSB) for international trade law, International Criminal Court (ICC) for humanitarian law.	Humanitarian law: International Criminal Tribunal for former Yugoslavia (ICTY), International Criminal Tribunal for Rwanda (ICTR), internationalized criminal tribunals (Cambodia, Sierra Leone, Kosovo, East Timor) International administrative law: United Nations Administrative Tribunal (UNAT), International Labour Organization Administrative Tribunal (ILOAT), Administrative Tribunal of the World Bank, etc. (23 in all).	Human rights: European Court of Human Rights (ECHR), Inter-American Commission of Human Rights (IACHR), African Court on Human Rights and Peoples Economy: European Court of Justice (ECJ), Common Court of Justice and Arbitration of OHADA, Court of Justice of Common Market for Eastern and Southern Africa, Court of Justice of the Economic Community of States Central Africa, Court of Justice of the Arab Maghreb Union, Legal Office of APEC (Asian Pacific East Community).	General international arbitration: Permanent Court of Arbitration (PCA) or *ad hoc* arbitration; Specialized international arbitration: International Centre for the Settlement of Investment Disputes (ICSID), Iran-United States Claims Tribunal; Regional Arbitration: OSCE Court of Conciliation and Arbitration, Commission of Mediation, Conciliation and Arbitration of the Organization of African Unity, NAFTA arbitral settlement system, Arbitral Tribunal Central American Common Market.

[3] Subsequent to the entry into force of the Montego Bay Convention of 10 December 1982.
[4] One for the former Yugoslavia (Resolution 827 of May 25, 1993), the other for Rwanda (Resolution 955 of November 8, 1994).
[5] European Court of Human Rights, Inter-American Court of Human Rights, African Court on Human Rights.
[6] There are, for example, distinction for competency between validity and responsibility, civil or criminal.

4. Lack of unity among international jurisdictions

In addition to a variety of international courts as mentioned above, there is a lack of unity among justice systems. There is no "one" international justice model. The creation of each court observes its own autonomy and each jurisdiction is independent from the others. In other words, they are not subordinate to other courts, and none are required to follow or comply with the case law (precedent) of another jurisdiction[7].

It should be noted that there is also the potential for competition among courts and risks of conflicts between jurisdictions and / or case law. However, risks of direct conflicts between courts are quite low because most litigants do not choose their international judge. The risks of indirect conflict resulting when two judges are seized on different aspects of the same case or when two judges are seized on the same legal issue are however higher[8]. In practice, courts are vigilant to ward off conflicts. It is not uncommon for jurisdictions to use each other's jurisprudence. In this respect, prestige or the seniority of an institution has a significant influence. For example, the WTO Appellate Body quotes extensively from the ICJ[9].

4.1. Autonomous jurisdictions

These jurisdictions are the Permanent Court of International Justice, International Tribunal for the Law of the Sea and the International Criminal Court which are briefly described below.

4.1.1. Permanent Court of International Justice (PCIJ)

Although the Statute of the PCIJ was unanimously approved by the General Assembly of the League of Nations, it has independent legal status and was not embedded into the Covenant of the League of Nations[10].

[7] Moreover, there is between them no coordination mechanism, like reference to preliminary question (*question préjudicielle*). Such absence cannot be explained by the fact that they have clearly partitioned areas of intervention but by the lack of full consolidation of international law.

[8] The risks of disputes, at their core, concern substantive law. It was thus observed that the European courts, ECHR and ECJ had already developed diverging jurisprudence of general international law, for example on the rules of treaty interpretation which had led to what so-called "war of human rights."

[9] Vigilance therefore essentially takes the form of a reverence to the ICJ. For example, the precautionary principle as a general principle of law or customary rule when it was raised before the WTO Appellate Body (European Communities - Measures Concerning Meat and Meat Products (Hormones), WT / DS26 / AB / R, WT / DS48 / AB / R). There are demonstrations of this kind in the decisions of the International Tribunal for the Law of the Sea or in the reports of the WTO Appellate Body, or in the decisions of criminal courts. The references to the jurisprudence of the PCIJ and the ICJ are common and abundant. Another example when ITLOS was referred in its judgment of 1 July 1999 in the case of the Vessel Saiga (No. 2) to the judgment of the PCIJ in the case concerning *Certain German Interests in Polish Upper Silesia* and the one made by the same court in the case of the *Chorzow Factory*, as well as the judgment of the ICJ in the *Gabcikovo-Nagymaros*..

[10] This solution is better understood if it is connected to the fact that the United States had not ratified the Covenant. It was indeed the intention of leaving them the possibility to be still party to the Statute of the PCIJ. But United States did not choose to be part of it, and this possibility was finally used by Monaco and Liechtenstein.

4.1.2. International Tribunal for the Law of the Sea (ITLOS)

Its creation is largely due to the mistrust of the southern States (e.g., mainly States in Africa and South-East Asia) to the ICJ (at that time, they were still reeling from the judgment of the International Court of Justice in the 1966 *South West Africa* case that revealed a particularly conservative tendency of the Court). They wanted the creation of a court that specialized in the Law of the Sea that could encompass any interstate disputes in this area. The creation of the court resulted in a complex framework involving so-called "forum shopping". Under it, States are able to choose their courtroom between ITLOS, ICJ or different forms of arbitration when a dispute arises regarding the law of the sea. The court became operational on 1 October 1996 and had its first case in late 1997.

4.1.3. International Criminal Court (ICC)

The ICC was established by the Rome Statute and came into force on July 1, 2002. Cambodia signed the Statute on 23 October 2000 and ratified it on 7 January 2002. The ICC is independent from other international organizations[11], and the Rome State created an international organization that serves as a receptacle for the ICC which is the only objective of this organization.

4.2. Courts attached to international organizations

There are a large number of these courts compared to the above mentioned bodies some of which are explained below.

4.2.1. International Court of Justice (ICJ)

Article 7 § 1 of the UN Charter notes that this Court is one of the six principal organs of the organization. The Court is a permanent body rooted in the Charter. Article 7 § 1 and Article 92 of the Charter provides that the ICJ "shall be the principal judicial organ of the United Nations". It is an integral part of the peaceful settlement system established by the Charter. Furthermore, the ICJ Statute is annexed to the United Nations Charter. Therefore, any State that becomes a member of the United Nations becomes *ipso jure* party to the Statute of the ICJ.

However, the status as principal judicial body does not mean compulsory jurisdiction of the Court. Jurisdiction depends on agreements and/or declarations as described in Section 4.3.1 below.

4.2.2. WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (WTO Dispute Settlement Understanding: DSU).

One of the main agreements reached in 1994 (i.e., The Marrakesh Declaration, April 15, 1994) and incorporated in the WTO Charter is the Understanding on Rules and Procedures Governing the Settlement of Disputes. This Memorandum operates under the auspices of a special body of the WTO, the Dispute Settlement Body (DSB). It is composed of one

[11] Although it has an agreement with the UN, and largely depends on, especially through the role of the Security Council.

representative per Member State of the WTO and is therefore a type of political-diplomatic organ. The MOU also establishes a Standing Appellate Body, as well as *ad hoc* Panels. Unambiguous, these organs are an integral part of the WTO.

4.2.3. European Court of Justice (ECJ)

The ECJ is a European institution governed by European treaties. There is little ambiguity about the connection between the ECJ and the organization of the European Union. That court has competence in the areas of preserving EU institutions, and overseeing the free flow of goods, people and capital.

4.3. Compulsory jurisdiction

The issue raised here is that of the difference between agreed jurisdiction and compulsory jurisdiction of the courts. In arbitration, the matter of jurisdiction is different because the arbitral tribunal can work only upon consent of the States.

In the case of the compulsory jurisdiction, there is acceptance of the jurisdiction (that is to say, 'power') of a given court *a priori* and globally for more or less specified categories of possible disputes. In the case of compulsory jurisdiction, jurisdiction is granted on a case by case basis and only after the dispute has arisen. Therefore, jurisdiction may be granted in various ways.

It is clear that when a court is established by treaty, each State is free to join or not. Logic suggests that the court becomes binding on the parties to the treaty. However, there is often a choice between accepting or not accepting compulsory jurisdiction (e.g., ICJ), or between the courts (e.g., ITLOS). Nevertheless, many jurisdictions are now mandatory in a conventional system and member States of organizations have no choice but to come under the jurisdiction of the organization (e.g., Dispute Settlement Body, European Court of Justice, and the European Court of Human Rights since Protocol 11 of European Convention on Human Rights and Fundamental Freedoms).

4.3.1. Agreed jurisdiction: ICJ

The principle regarding agreed jurisdiction is consent. In other words, a State cannot be sued before the Court unless it has consented. This is what the ICJ has reiterated resolutely on many occasions[12]. Various techniques can be used to establish the compulsory jurisdiction of the Court. The ways are varied may include:

4.3.1.1. through an *ad hoc* agreement concluded by the parties after the dispute has arisen, which is by far the easiest situation for the Court[13]

To date, there are fifteen cases before the Court by compromise, some of which were major cases: the North Sea Continental Shelf (1969), Continental Shelf Tunisia - Libya (1982),

[12] See, for example: PCIJ, *Chorzow Factory*, judgment of 13 September 1928: Series A, No. 17, p. 37.
[13] Compromise is provided for in Article 40 of the Statute.

Territorial Dispute Chad - Libya or Project Gabcikovo-Nagymaros Hungary - Slovakia (1997).

4.3.1.2. by the inclusion of an arbitration clause in a particular treaty (about two hundred and sixty bilateral or multilateral treaties of this type are counted by the Court)[14].

Most relevant conventions are standard conventions on trade between States but the recent trend is for the Court's to have competence on multilateral conventions with broader objects[15].

4.3.1.3. by participating in an agreement on the settlement of disputes

This is not strictly speaking an arbitration clause since the treaty is fully intended to deal with dispute settlement. Nevertheless, the effect on the jurisdiction of the Court is the same.

4.3.1.4. or by way of an optional declaration of acceptance of compulsory jurisdiction

This is the preferred way. This unilateral declaration (according to Article 36 § 3) indicates the categories of disputes referred to the Court; there validity (usually 5 or 10 years) and the notice period which may be necessary in cases of denunciation.

4.3.2. Compulsory jurisdictions

Compulsory jurisdiction is the simplest. States parties to an agreement for a dispute settlement system have no choice and referral to a court will be automatic.

4.3.2.1. Dispute Settlement Body (DSB)

The jurisdiction of the Dispute Settlement Body is binding and does not need further consent from WTO Member States. The court is part of the "package" under the principle of a single agreement that prohibits a choice among different branches of the WTO.

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[14] Some traps are for States, like the 1963 Protocol - now denounced by the United States – on the Convention on Consular Relations. These treaties are sometimes old treaties which established the jurisdiction of the PCIJ before the war and which have not been broken off since. Because of the succession from the PCIJ to the ICJ, these treaties are still valid. For example, France and Canada are still bound by a treaty of 12 May 1933 concerning the rights of national and issues of trade and navigation which includes an Article 20 providing for the jurisdiction of the PCIJ.

[15] Thus, there are the jurisdiction of the Court for the 1980 Convention on the Conservation of Flora and Fauna of Antarctica; the 1988 Convention on the Fight against Illicit Traffic in Narcotic Drugs and Psychotropic Substances and the 1989 Convention against the recruitment and use of mercenaries. The most famous of these multilateral treaties providing for the jurisdiction of the Court is probably the Vienna Convention of 1969 on the Law of Treaties which indicates the possibility of seizing the Court in its Article 66 in case of dispute on *jus cogens* (with an alternative possibility for arbitration). This clause was even the condition of acceptance of the concept of *jus cogens* by the West.
The jurisdiction of the Court provided for in such treaties is not an academic question. Thus, Libya has relied on a clause in the Montreal Convention of 1971 on the Suppression of Unlawful Acts against the Safety of Civil Aviation, to refer to the Court in the dispute which opposed the US and in the UK in the so-called *Lockerbie* case.

4.4. Single-litigant jurisdictions and multi-litigants jurisdictions

4.4.1. Single-litigant jurisdictions: ICJ, ICC

Article 34 of the ICJ Statute is clear on this point: only States "may be parties before the Court". In other words, neither private individuals nor international organizations can be parties to contentious proceedings before the Court. The latter situation is generally explained by a distrust of the States in respect of international organizations and especially by the fear that they can be the cause of disputes they would not want. In addition to the ICJ, the ICC is also an example of a single-litigant jurisdiction (only individuals, not States).

4.4.2. Multi-litigants jurisdictions

Some jurisdiction like DSU or ITLOS can have different types of litigants (States, individuals, private entities).

5. The means for reaching a peaceful settlement of international disputes

With regards to reaching a peaceful settlement, the parties to a dispute have a number of choices including the involvement or not of a third party, a solution based or not based on law, binding decisions or not, etc. These are discussed below.

5.1. The principle of free choice

Excluding special rules agreed to between the States concerned, no one mode is specifically designated to resolve certain types of disputes. Article 33 of the UN Charter reflects this situation by listing the various methods for settling disputes[16]. There are: negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement; or any other peaceful means chosen by the parties to the dispute.

In addition, States can also agree by special agreement that they will use a specific way to settle a dispute.

5.2. Non-judicial and judicial means

Peaceful means of dispute settlement is usually divided into two categories. The first is political/ diplomatic and does not involve legal actions and are those that lead to a specific solution relating to politics or diplomacy. Resolution of these usually involves negotiation, good offices, mediation, investigation and conciliation. The second type of dispute involves legal action. This means that a solution is based on legal rules which fall within arbitration and judicial settlement guidelines. In relation to this, Article 38 of the Statute of the ICJ says

[16] The freedom of choice of means for settlement is provided explicitly in the Manila Declaration on the Peaceful Settlement of Disputes. Following its point I § 3, "international disputes shall be settled on the basis of sovereign equality of States and in accordance with the principle of free choice of means in accordance with obligations under the Charter of United Nations and with the principles of justice and international law ". In the same spirit as the Charter, the Declaration draws the attention of States "on the facilities offered by the International Court of Justice for the settlement of legal disputes" and provides with incentives for States to develop the jurisdiction of the Court (point II, § 5).

it is its duty "to decide in accordance with international law such disputes as are submitted to it".

5.2.1. Jurisdictional means

In this category there are two main types of dispute resolution are used: arbitration and judicial settlement. They have in common the fact that resolutions are normally reached on international law and are binding on the parties. These resolution methods are characterized by the fact that in arbitration, the composition of the arbitral body is determined by the parties while in the case of judicial settlements there is a pre-constituted composition of the tribunal with pre-designated judges (except for the right to have *ad hoc* judges at the ICJ).

5.2.2. Non-judicial means

Unless it is expressly prohibited, it is not uncommon that different modes are used to settle disputes. This reflects the extreme pragmatism of international law that favors the effective resolution of disputes in relation to the harmonious relationship between the legal and / or political processes. Thus, and most often, the fact that a third-party settlement, judicial or otherwise, is underway does not prevent the parties to continue to negotiate in parallel and seek an amicable agreement. If they succeed, then they can still interrupt the process.

Secondly, the use of several methods of settlement is sometimes imposed. Most often, it is imposed in an attempt to negotiate using mediation or arbitration before using the judicial mode. Thus, it is not uncommon that before a dispute is referred to a judicial body it must be preceded by an attempt at mediation or arbitration/conciliation[17].

Conclusion

The UN Members States settle their international disputes by peaceful means in such a manner that international peace, security, and justice, are not endangered. This is the purpose of the International Court of Justice and the various other international jurisdictions. However, a range of international jurisdictions, principles of free choice for States and international organizations to go before courts, lack of unity among international jurisdictions and permanent possibility for litigants to use other means for reaching a peaceful settlement of international disputes are limiting the role of the International Court of Justice, which is nevertheless extensively quoted from other jurisdictions and arbitral tribunals as its prestige and seniority has a significant influence.

This leads to a series of policy options that UN Members States lawmakers could adopt:
national lawmakers could adopt ratification law and legislation to consent and establish the compulsory jurisdiction of the International Court of Justice to allow their States to better perform in seeking peace and security;
because only States can be parties before the Court, the interest of States are safeguarded and not be put in jeopardy because of international organizations that can have conflicting interests (ex.: European Union versus EU Members States is a possible scenario before the European Court of Human Rights). Therefore, national lawmakers could support the jurisdiction of the International Court of Justice; and

[17] See eg Article 26 of the Stockholm Convention of 15 December 1992 on Conciliation and Arbitration.

as the International Court of Justice as well as other international jurisdictions are not always able to address international disputes in a timely manner and in a way that achieves an amicable settlement, national lawmakers could support other initiatives such as negotiation, conciliation, mediation or arbitration.

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