Law and policy of international courts and tribunals

Section B: Non-adjudicatory dispute resolution processes

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Contents

Chapter 3: Diplomatic means of dispute settlement

Introduction

This chapter addresses various processes for the resolution of international disputes. The processes surveyed in this chapter have in common that they do not, as a general rule, result in a legally binding outcome (although the parties to the dispute may themselves subsequently decide to embody the resolution of the dispute in a legally binding instrument).

Article 33 of the UN Charter sets out the main mechanisms for the peaceful settlement of international disputes. It provides:

> 'The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.'

The means enumerated in Article 33 are generally characterised as diplomatic (or non-adjudicatory) and legal (or adjudicatory) means:

Diplomatic means include **negotiation**

Essential reading

paras 1–31 39–45

para. 125 ff

para. 56

Useful further reading

> 'The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.'

Collier and Lowe note that '[t]here is in one sense a progression evident in that list as it moves from negotiation to the International Court. The processes tend to become more formal. The extent to which third parties are involved in settling the dispute between the parties increases.' (Collier and Lowe, p.7) However, they proceed to note that 'the tendency to think of the various settlement procedures as a pyramid up which states climb, from the base of negotiations to the apex of the ICJ, is quite wrong' (Collier and Lowe, p.8).[1]

The various mechanisms and processes referred to in Article 33(1) of the UN Charter, and explored in this chapter, are alternatives – they may be selected and used separately or, on occasion, in combination, with a view to finding a resolution to the dispute.

Bear in mind that because of the consensual nature of international adjudication and arbitration (see Section A, Chapters 1–5 and Section B, Chapter 4), the diplomatic means of dispute settlement do not generally operate under the 'shadow of law' as Chinkin puts it, in contrast to alternative dispute resolution (ADR) mechanisms such as mediation at the domestic level (see Chinkin in the Essential reading for Chapter 4, pp.126–127). In many instances the diplomatic means of dispute settlement may be the only means available to settle the dispute because procedural impediments bar recourse to adjudication. They may also provide the means through which parties to a dispute can eventually agree to submit the dispute, or aspects of it, to a court or tribunal for a binding decision.

3.2 Negotiation

Essential reading

paras 1–31 39–45

their resolution. Treaties frequently refer to negotiation as the principal means of attempting to settle a dispute. For example, as noted in Chapter 1, Article 27 of the Convention on Biological Diversity provides that disputes between parties as to the interpretation or application of the Convention should be settled by negotiation, and that if agreement cannot be reached by negotiation the parties to the dispute may have resort to other peaceful means. Article 283 of the UN Convention on the Law of the Sea (UNCLOS) provides that the parties to a dispute arising under UNCLOS should proceed expeditiously to an exchange of views regarding settlement by negotiation or other peaceful means.

The means through which negotiations are conducted are at the discretion of the parties to the dispute. They generally take place through diplomatic channels, but may also be conducted in the context of intergovernmental organisations or through specially convened summit meetings.

Negotiations are not always directed at full settlement of every aspect of the dispute. They may be directed at different goals, for example:

- the avoidance of a dispute (through prior consultations and agreement)
- the management of an existing dispute (for example, negotiations to agree on an appropriate dispute settlement mechanism, or to define the parameters of the dispute)
- the implementation of a judgment or award.

These possibilities are considered further below.

3.2.1 Dispute avoidance

Prior consultation and negotiation on an or institutionalised

- Such consultation mechanisms may be institutionalised – for example, the 1909 Boundary Waters Treaty between the US and Canada established the International Joint Commission, which is still in existence and provides a forum to help prevent and resolve disputes relating to the use and quality of boundary waters.

The World Trade Organization (WTO) Dispute Settlement Understanding (DSU) (see Section A, Chapter 4) also incorporates an obligation to enter into consultations prior to entering into the adjudicative phase of the dispute settlement mechanism (WTO DSU, Article 4). Certain WTO provisions also contain so-called 'transparency' provisions on notification of proposed trade measures, which can also be seen as mechanisms to ensure prior notice and consultation, with a view to avoiding potential trade disputes. See, for example, WTO Agreement on the Application of Sanitary and Phytosanitary Measures, Annex B (this is available at: http://www.wto.org).

3.2.2 Dispute management

Where full settlement of a dispute cannot be achieved by negotiation, there may be nonetheless a possibility to negotiate partial or interim solutions. For example, Articles 74 and 83 of the UN Convention on the Law of the Sea require parties to that Convention to try to agree provisional arrangements of a practical nature where they are unable to agree upon the delimitation of maritime boundaries. Such arrangements are without prejudice to the final delimitation. See Anderson in the Essential readings, 'Negotiation of a ', p.117.

Where states are unable to negotiate a full settlement of the dispute, they may well negotiate as to appropriate ways to try to resolve vention 6uai theh is sion to tiateu
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the establishment of the Commission with the agreement of the two states could not therefore be considered in itself in any way incompatible with the continuance of parallel proceedings before the court. (, Judgment of 24 May 1980, paras 39–43, available at http://www.icj-cij.org.)

Some provisional measure orders of the International Tribunal for the Law of Sea, made pending constitution of an arbitral tribunal to decide a dispute, have directed parties to a dispute to exchange views and/or information, or to conduct studies. Such measures may facilitate amicable settlement of the dispute.[2]

In a speech to the Sixth Committee of the UN General Assembly in October 2005, the President of the ICJ observed that

> 'While the Court's function is to decide disputes through the application of international law, its principal objective is the peaceful settlement of disputes. Therefore the Court welcomes any attempt by States to settle their dispute by peaceful means even if that settlement takes place outside the Court. If the negotiations fail, the Court naturally regains its role of ultimate legal arbitrator. Even the simple fact that a case is on the docket of the Court can act as an incentive for parties to negotiate a settlement to their dispute in accordance with international law.'[3]

3.2.4 The role of negotiation in the implementation of judgments or arbitral awards

Gabcikovo-Nagymaros

Negotiations may also be required after arbitral or judicial proceedings in order to determine how to implement an award or judgment. **For example**:

In the case, the ICJ made certain findings as to the legal positions of the parties to the dispute but stated that '[t]he Parties will have to seek agreement on the modalities of the execution of the Judgment in the light of this determination, as they agreed to do in Article 5 of the Special Agreement [to submit the dispute to the Court]'. (case, Judgment, para. 131, available at http://www.icj-cij.org). It went on to state that '[i]t is not for the Court to determine what shall be the final result of these negotiations to be conducted 35 nment [to submit the dd to she .2994 TD99467ae wthe Court t-sha w.j4wmselvhe parcertn act as-e

Gabcikovo-Nagymaros case, Judgment, para. 126, available at http://www.icj-cij.org).

'During this dispute both parties have called upon the assistance of the Commission of the European Communities. Because of the diametrically opposed positions the Parties took with regard to the required outcome of the trilateral talks which were envisaged, those talks did not succeed. When, after the present judgment is given, bilateral negotiations without preconditions are held, both parties can profit from the assistance and expertise of a third party. The readiness of the parties to accept such assistance would be evidence of the good faith with which they conduct bilateral negotiations in order to give effect to the Judgment of the Court' (case, Judgment, para. 143, available at http://www.icj-cij.org).

Mediation and/or good offices may also play an important role in the implementation of judgments and awards. See section 3.3 below.

3.3 Mediation and good offices

Essential reading

Useful further reading

3.3.1 Features of mediation

Mediation involves the intervention of a third party, acting as a go-between or channel of communication for the parties to the dispute and/or seeking actively to assist the parties to resolve their dispute by making proposals. Merrills notes that the mediator generally makes proposals informally and on the basis of information supplied by the parties, rather than on the basis of his or her own investigations.

Key aspects of mediation therefore include:

- The involvement of a third party (i.e. there must be a willing third party mediator, acceptable to both parties to the dispute).
- The consent of the parties to the dispute (i.e. they must request mediation, or accept an offer of mediation by a third party).
- The process is essentially non-legal (e.g. the mediator may informally put forward proposals that may be acceptable to

parties to resolve dispute but not based on an analysis of their legal positions).

- The process is non-binding (i.e. the parties retain control of the outcome of the mediation).

The level of intervention of the mediator may vary from case to case. Mediation can comprise a means of **facilitating negotiation** (e.g. the good offices of the UN Secretary-General – see below, section 3.3.2) or incorporate a **more active role** for the mediator in advancing proposals aimed at compromise. Merrills refers to mediation as 'adjunct to negotiation'. Touval and Zartman have suggested that mediation can cover a variety of **different strategies**:

- communication (e.g. facilitating negotiations between the parties where they cannot deal directly with each other)
- formulation (e.g. suggesting potentially mutually acceptable proposals for settlement)
- manipulation (e.g. pushing or influencing the parties to the dispute towards a particular outcome).[4]

As indicated in Merrills, there are many **examples** of mediation in international disputes When you read Chapter 2 of Merrills, **note** the identity of the mediator in the different cases discussed – for example, the mediator may be:

- an individual (e.g. the Pope (acting through an envoy) in the Argentina-Chile Beagle Channel dispute)
- a state (e.g. Algeria in the dispute between Iran and the US; or the US in the Falklands dispute between the United Kingdom and Argentina)
- a regional, international or non-governmental organisation (e.g. the World Bank in the dispute between India and Pakistan over the Indus River; the European Community in the Yugoslav crisis).

3.3.2 Good offices

The distinction between mediation and good offices may be blurred. In general terms, good offices may be characterised as rather less proactive than mediation – involving the facilitation of negotiation rather than actively seeking and proposing solutions. However, the distinction is rarely clear-cut – there are various diverse examples of the exercise of the UN Secretary-General's good offices function in international disputes. These are discussed in the chapter by Franck in the Essential readings, as well as in Merrills, Chapter 2. Franck emphasises the important role of the good offices function of the UN Secretary-General as a 'catalyst for compromise, a formulator of implementing procedures and institutional structures, a symbol of fairness which makes it less politically dangerous for adversaries to compromise' (readings, p.211).

Good offices may facilitate the implementation of judgments or awards of international courts and tribunals. For example, the UN Secretary-General has been involved in efforts to implement the judgment of the ICJ in the Land and Maritime Bounty case between Cameroon and Nigeria. In this regard, the Secretary-General established a Mixed Commission to address aspect of implementation of the judgment.[5]

Activity 3.1

3.4 Fact-finding and inquiry

Essential reading

3.4.2 Commissions of Inquiry under the Hague Conventions

The 1899 Hague Convention provided for commissions of inquiry in cases of differences of an international nature involving neither honour nor vital interests, and arising from a difference of opinion on points of fact, to 'facilitate a solution of these differences by elucidating the facts by means of an impartial and conscientious investigation' (1899 Hague Convention, Article 9). After early experience with the inquiry (see Merrills, pp.47–48), the provisions on commission of inquiry were further elaborated in the 1907 Hague Convention (see section III, 1907 Hague Convention).

The Permanent Court of Arbitration has developed Optional Rules for Fact-Finding Commissions of Inquiry (1997). These build on the provisions of the 1899 and 1907 Hague Conventions to provide a self-contained procedural framework. Further information is available at http://www.pca-cpa.org.

3.4.3 Fact-finding and inquiry in international organisations

Fact-finding and inquiry continue to play an important role in international relations. However, as Merrills notes, in practice commissions of inquiry as provided in the Hague Conventions have been little used. Instead, commissions of inquiry have tended to be established under the auspices of international organisations, such as the League of Nations, the United Nations or the International Civil Aviation Organization. For example, in 1999 the UN Commission on Human Rights called on the UN Secretary-General to establish an international commission of inquiry in relation to

request of a party to the conflict only with the consent of the other party concerned. The Commission submits a report on findings of fact with such recommendations as it may deem appropriate. By 2004, 68 states parties to the Protocol had made declarations under Article 90 recognising the competence of the International Fact-Finding Commission.

- Article 33 of the **1997 Convention on Non-Navigational Uses of International Watercourses** provides that in the event of a dispute between two or more parties concerning the interpretation or application of the Convention, the parties shall seek to reach agreement by negotiation, or through good offices, mediation or conciliation, through joint watercourse institutions, or by agreeing to submit the dispute to arbitration or the ICJ. If they are unable to settle the dispute in such a way within six months, the dispute shall be submitted to impartial fact-finding. Article 33 sets out basic procedural rules for the establishment and operation of a Fact-finding Commission. The Commission is to submit a report to the parties concerned setting forth its findings and reasons and such recommendations as it deems appropriate for an equitable solution of the dispute, which the parties concerned must consider in good faith.

A specific type of fact-finding mechanism, the World Bank Inspection Panel and similar mechanisms, are considered in Chapter 5 below.

3.5 Conciliation

Essential reading

Activity 3.2

Consider

3.5.2 The conciliation procedure

Conciliation procedures may vary, comprising in some instances written and oral proceedings, or no formal 'pleadings' as such. Some treaties contain specific conciliation rules.

Activity 3.3

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3.5.3 Conciliation in international treaties

Conciliation generally plays a significant role in dispute settlement provisions in multilateral treaties. In treaties, conciliation may be one among a number of optional dispute settlement mechanisms, or it may be mandatory (on request of one party) where other mechanisms have failed to resolve the dispute. For example, as noted in Section A, Chapter 2, and in Chapter 1, in the 1992 Convention on Biological Diversity, a dispute must be submitted to conciliation at the request of one party to the dispute where other diplomatic means have failed to provide a solution, and where the parties have not agreed to submit the dispute to arbitration or adjudication. The 1969 Vienna Convention on the Law of Treaties, in Article 66, provides for the submission of disputes concerning the application or interpretation of certain provisions of the Vienna Convention to conciliation in accordance with the procedure set out in the Annex to the Convention.

Conciliation also plays an important role in the dispute settlement system of the 1982 UN Convention on the Law of the Sea (UNCLOS). The dispute settlement provisions of the UNCLOS have been referred to in Section A, Chapter 2 and Section B, Chapter 1.

Under Article 284 of UNCLOS, parties may agree to seek to resolve a dispute between them by conciliation. There is also the possibility of compulsory conciliation in UNCLOS. As noted in Chapter 1 above, Article 298 UNCLOS allows states to exclude certain disputes, including those relating to sea boundary delimitation, from the compulsory procedures entailing binding decisions in Article 287. If a state opts to do this, Article 298 imposes an obligation in certain circumstances to accept instead submission of the dispute to conciliation under Annex V, section 2 UNCLOS. Where a dispute is submitted to conciliation under Annex V, section 2, the parties are then under an obligation to negotiate an agreement on the basis of the report of the conciliation committee. If they do not, then unless they otherwise agree they must, by mutual consent, submit the question to one of the binding procedures provided in Article 287 of UNCLOS.

Activity 3.4

Activities 3.5–3.6

3.5

3.6

3.6 The choice of dispute resolution process

The preference of a state for one of the above mechanisms, or for arbitral or judicial proceedings, for the settlement of any particular dispute is likely to depend on a number of factors, including:

- the subject-matter of the dispute
- the identity of the other disputing party (or parties)
- the availability of the various mechanisms.

States may be influenced for example, by a need or desire to:

- maintain general friendly relations with the other party to the dispute
- retain some control over the outcome of the dispute
- address the concerns of specific domestic interest groups
- address the concerns of other interested states or international organisations.

On a more practical level, they may be influenced by factors such as the costs and/or duration of any proceedings.

As Anderson notes (Essential reading, p.112), the principal advantage for states of negotiation as a means for the settlement of international disputes is that they retain control over the outcome – parties to the dispute remain free to negotiate on any terms they wish. States may however progress quickly towards looking to judicial settlement if they see no hope of reaching a negotiated settlement (for example, the case in the ICJ). Similarly, the availability of negotiation as a possible means of dispute settlement presupposes that there are bilateral relations between the parties to the dispute. Where no such relations exist, or they are strained, the involvement of a third party through mediation or good offices may be a more viable option, where a suitable and acceptable third party mediator is available.

Complex international disputes often involve a suite of dispute settlement processes: for example, as described by Merrills (in Chapter 2), mediation has played a significant role in high profile disputes such as those in the former Yugoslavia. In such circumstances, the possibility of an international court or tribunal resolving all aspects of the dispute may be remote, but nonetheless discrete aspects of the dispute may still form the subject of a case before such a body.

Reminder of learning outcomes

Sample examination questions

Question 1

Question 2

Advice on answering the questions

Question 1

Question 2

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Activity 3.4