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THE MEANS OF DISPUTE SETTLEMENT

John Merrills

SUMMARY

The peaceful settlement of disputes occupies a central place in international law and international relations. A range of methods of handling international disputes has been developed and this chapter explains what the relevant techniques and institutions are, how they work, and when they are used. Because important distinctions are to be found between the various diplomatic means of settlement (negotiation, mediation, inquiry, and conciliation) and the legal means of arbitration and judicial settlement, these are examined separately. Also considered is the role of the United Nations and regional organizations.

In the light of current international practice two main conclusions emerge: firstly that enormous progress has been made in refining and developing the means available for dealing with disputes; and secondly that while the various methods have distinctive features which determine how and when they are likely to be used, the key to resolving disputes often lies in their use in combination and interaction.

I. INTRODUCTION

The idea that international disputes should be settled by peaceful means rather than the use of force has a long history. The attempt to construct institutions and develop techniques with this objective is a more recent phenomenon, however, much of what exists today having been created in the twentieth century and a significant proportion since 1945. This chapter is concerned with the result of that effort in the form of the means currently available for resolving international disputes peacefully. Initially, though, and to put the present arrangements in context, two questions need to be considered: what we mean by an 'international dispute', and what the law has to say about States' obligations.

A 'dispute' is a disagreement about something and an 'international dispute' is a

disagreement, typically but not exclusively between States, with consequences on the international plane. However, a dispute is not just any disagreement, but a disagreement about something fairly specific. So the Arab-Israeli problem, for example, is not really a dispute, but because it is so complex is better described as a 'situation'. Of course, 'situations' generally contain specific disputes within them and the international community has to be concerned with both.¹ Nevertheless this chapter is mainly concerned with methods for dealing with disputes, rather than situations, so the distinction is worth bearing in mind.

What sort of specific disagreements qualify as disputes? Or to put the question another way, what is the subject matter of disputes? This is easily answered. International disputes can be about almost anything. A dispute within the European Union, for instance, about the need for closer political integration, would be a dispute about policy. In contrast, most disputes about boundaries or territorial issues involve a disagreement about legal rights. Disputes can also sometimes be about issues of fact. Where was State A's ship when it was intercepted by State B? What was it doing there? Did it have permission? And so on. Clearly these various sources of disagreement (fact, law, and policy) are not mutually exclusive and in many disputes are mixed up together. Separating the different elements, as we shall see, may be a key move in dealing with such disputes effectively.

What, then, are States' legal obligations in this field? A comprehensive statement can be found in an important resolution of the UN General Assembly, the 1982 Manila Declaration on the Peaceful Settlement of International Disputes,² which confirms and elaborates the relevant provisions of the United Nations Charter and the General Assembly's earlier Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States of 1970.³ Thus paragraph 2 of Section I of the Manila Declaration, like Article 2(3) of the Charter, requires every State to 'settle its international disputes exclusively by peaceful means in such a manner that international peace and security and justice, are not endangered'. And paragraph 5, echoing Article 33, lists the means available, calling for States to 'seek in good faith and in a spirit of co-operation an early and equitable settlement of their international disputes by any of the following means: negotiation, inquiry, mediation, conciliation, arbitration, resort to regional arrangements or agencies or other peaceful means of their own choice including good offices'. Acknowledging the range of contingencies, the paragraph then concludes, 'In seeking such a settlement the parties shall agree on such peaceful means as may be appropriate to the circumstances and the nature of their dispute'.

It should also be noted that the Declaration says that in the event of the failure of the parties to reach an early solution 'they shall continue to seek a peaceful solution'

and 'consult forthwith on mutually agreed means' (paragraph 7), adding in the next paragraph that the parties to a dispute and other States 'shall refrain from any action whatsoever which may aggravate the situation so as to endanger the maintenance of international peace and security and make more difficult or impede the peaceful settlement of the dispute . . .'. The obligation, then, is not just to give peaceful methods a try, but to persevere for as long as necessary, whilst at the same time avoiding action which could make things worse. In other words, if a dispute cannot be settled, States must at least manage it and keep things under control. What the various methods are and how they are used will therefore now be considered.

II. DIPLOMATIC METHODS

A. NEGOTIATION

The methods of peaceful settlement listed in the Manila Declaration are not set out in order of priority, but the first mentioned, negotiation, is the most widely used way of dealing with international disputes.⁴ In fact, negotiation is used more often in practice than all the other methods put together. Often, indeed, negotiation is the only means employed, not just because it is normally the first to be tried and is often successful, but also because its advantages may appear so great as to rule out other methods, even where the chances of a negotiated settlement are slight. When other methods are chosen, negotiation is not supplanted but used to resolve instrumental issues, the terms of reference for an inquiry commission, for instance, or the arrangements for implementing an arbitral award.

Since negotiation allows the parties to retain control of a dispute without involving third parties, it is not surprising that governments find it so attractive. However, the decision to negotiate can itself be controversial, acknowledging as it does both the other party's standing and the legitimacy of its interests. Consequently, on sensitive subjects such as sovereignty, if it is possible to negotiate at all, it may be necessary to restrict discussions to relatively uncontentious issues at least to start with, leaving the bigger problems until later. In 1973, for example, the United Kingdom succeeded in negotiating an Interim Agreement during its fishing dispute with Iceland⁵ and following the Falklands War of 1982 was likewise able through diplomatic contact to establish a *modus vivendi* with Argentina (Evans, 1991; Churchill, 1997). It would therefore be a mistake to see negotiation as concerned only with settling international disputes. Its function in 'managing' disputes, ie, containing them in order to preserve other aspects of the parties' relationship, may be equally significant.

Because negotiation is fundamental it should be thought of not so much as a stage

¹ On the significance of 'situations' with particular reference to the role of the United Nations, see Koufa, 1988.

² GA Res 37/10 (1982) 21 ILM 449.

³ GA Res 2625 (XXV), (1970) 9 ILM 1292. See further Merrills, 1994.

⁴ For more detailed discussion of negotiation see Merrills, 1998, pp 1-27 and Anderson, 1998b.

⁵ See *Fisheries Jurisdiction (United Kingdom v Iceland)*, *Merits, Judgment*, ICJ Reports 1974, p 3, paras 37-39.

in the conduct of virtually all disputes, but rather as an option available to the parties at any time, for use either alongside, or as part of, other processes. Thus as the International Court indicated in the *Aegean Sea Continental Shelf* case, the fact that negotiations are being pursued during litigation is no bar to the exercise of the Court's powers and *vice versa*.⁶ As a result, it is not at all uncommon for cases to be resolved by negotiation in the course of litigation, as happened in 1996 in the Iran-United States *Aerial Incident* case.⁷ Similarly, a State may decide to take a dispute to a political body like the Security Council or General Assembly, but at the same time continue bilateral discussions. Such twin-track approaches, employing both public and private diplomacy, are perfectly permissible and show the adaptability of negotiation.

Important though negotiation is, it cannot guarantee that a dispute will be settled, or even managed, because it is limited in various ways. It may be impossible if the parties refuse to speak to each other and it will be ineffective if their positions are too far apart, although in both situations, as we shall see, mediation or good offices can help. If a procedure for dealing with the dispute, such as arbitration, has already been agreed, one party may see no point in further negotiation, especially if it is confident of its legal position. More generally, the objective of resolving disputes 'equitably' and in accordance with justice, which are what the Manila Declaration prescribes, sits uneasily with the prospect of having to negotiate in a situation of grossly unequal political power. Accordingly, though negotiation is often called for by the strong, the weak may be justified in declining the invitation.

Negotiation, however, is not always a matter of free choice. Quite apart from the force of circumstances which may mean that refusing to negotiate is not an available option, a State may bind itself to negotiate in a treaty, or find that an obligation to negotiate arises under the general law. In the *North Sea Continental Shelf* cases, for instance, the International Court decided that according to customary international law the delimitation of continental shelf boundaries between neighbouring States 'must be effected by agreement in accordance with equitable principles'.⁸ Of course, an obligation to negotiate on this or any other subject is not the same as an obligation to agree, nor does it exclude recourse to other procedures. What the Court wished to emphasize here was simply that as each party had rights in the disputed area, the boundaries in question were not subject to unilateral determination, and unless resolved by another procedure, had to be settled by negotiation.

The duty to negotiate sometimes laid down in treaties may be compared with related, but lesser obligations which are an alternative. The 1994 World Trade Organization Agreement requires its parties to 'enter into consultations' over trade issues when requested by another party,⁹ which is an obligation to negotiate, whereas

⁶ See *Aegean Sea Continental Shelf, Judgment*, ICJ Reports 1978, p 3, para 29.

⁷ See *Aerial Incident of 3 July 1988, Order of 22 February 1996*, ICJ Reports 1996, p 9. See also (1996) 90 AJIL 278.

⁸ *North Sea Continental Shelf, Judgment*, ICJ Reports 1969, p 3, para 85.

⁹ WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (1994), Article 4(3). Text in (1994) 33 ILM 1226.

the 1982 Law of the Sea Convention calls only for the parties to a dispute to 'proceed expeditiously to an exchange of views' as to the means of settlement to be used.¹⁰ It is, however, worth stressing that just as there is no general duty to consult before taking action which may affect others, so there is no general duty to seek negotiated settlements. The various methods of settlement available in international law are listed as alternatives. Negotiation is simply one and in the absence of a specific duty to negotiate, such as in the WTO Agreement, States can use it or not as they see fit.

Despite this essential qualification, negotiation is an extremely important means of dealing with disputes and international relations would be unimaginably different without it. In almost all cases diplomatic exchanges will have to take place before a disagreement becomes specific enough to be described as a dispute—that is in order for the parties to establish what, if anything, they disagree about. And once it is clear a dispute exists, negotiation will often provide the best prospect of a solution, whether permanent or provisional, and for cases involving major as well as routine friction. It is evident, however, that although negotiation must be regarded as basic, it may not be sufficient, without more, either to resolve a dispute, or even supply a *modus vivendi*. The other methods mentioned in the Declaration must therefore now be considered.

B. MEDIATION

Mediation is essentially an adjunct of negotiation and involves a third party. If the latter does no more than encourage the protagonists to resume negotiations, or simply acts as a channel of communication, the role is described as one of 'good offices'. A mediator, on the other hand, is an active participant, authorized, and indeed expected, to advance his own proposals and to interpret, as well as to transmit, each party's proposals to the other.¹¹ Mediation therefore has much in common with conciliation, although a mediator usually makes proposals informally and on the basis of information supplied by the parties, rather than through independent investigations which are a feature of conciliation. In practice, however, these distinctions tend to be blurred. In a given case it may therefore be difficult to draw the line between mediation and conciliation, or to say exactly when good offices ended and mediation began.

Mediation can only take place if the parties to a dispute consent and a mediator willing to act in that capacity is available. The United Nations and several regional organizations are charged with the resolution of disputes as an institutional objective and as a result the Secretary-General and his regional counterparts often find themselves providing good offices and mediation. Non-governmental organizations too, such as the International Committee of the Red Cross, can act as mediators (Forsythe, 1985). Since it offers an opportunity to become involved in a dispute and to influence its outcome, the role of mediator also has attractions for States, or individuals, with

¹⁰ United Nations Convention on the Law of the Sea (1982), Article 283(1). Text in (1982) 21 ILM 1245.

¹¹ For more detailed discussion of mediation see Bercovitch and Rubin, 1992; Merrills, 1998, pp 27–44; Greenberg, Barto, and McGuinness, 2000.

the necessary qualifications. Accordingly, it is not unusual for the course of significant international disputes to be punctuated by offers of mediation from one or more outside sources.

Since mediation cannot be forced on the protagonists, unless they take the initiative and invite outside involvement, an unwillingness even to consider this form of assistance may frustrate the efforts of would-be mediators. If a party is unwilling to negotiate, or to contemplate any modification of its position, its acceptance of mediation (which would imply the opposite) is clearly very unlikely. On the other hand, States normally have an interest in resolving their disputes and while the terms of any settlement are plainly important, intransigence may be too expensive politically for a blank refusal of mediation to be feasible. In 1982, for example, Argentina and the United Kingdom were willing to accept good offices from the UN Secretary-General, and then mediation from the United States, because neither government could afford to alienate potential supporters.¹² It was clear at the time that something of a miracle would be needed to avoid further conflict, but for the sake of appearances, if for no other reason, they had to show willing.

Once mediation has been accepted, the task of the mediator is to devise or promote a solution which both sides can accept. Here much can be achieved by simply providing good offices and facilitating communication, especially if the parties are unable to deal with each other directly. This was the situation in both the Falklands crisis and the Diplomatic Hostages dispute of 1980, where Algeria acted as intermediary between Iran and the United States (Sick, 1985; Slim, 1992). As well as acting as a channel for information, a mediator can remind the parties of their real objectives, or encourage rethinking, and devise suitable compromises, as the Papal mediator in the Beagle Channel dispute eventually succeeded in doing (Laudy, 2000). A powerful mediator may also be able to influence the parties by exploiting his own position, offering inducements to agree in the form of rewards, or indicating that a failure to do so will be costly.

Normally, a mediator's main concern is only to find terms the parties can accept; in some types of mediation, however, any settlement must also meet certain external criteria. Thus according to Article 38 of the European Convention on Human Rights, one of the functions of the European Court of Human Rights is to 'place itself at the disposal of the parties concerned with a view to securing a friendly settlement of the matter *on the basis of respect for human rights*' as defined in the Convention and its Protocols. In this provision, which has its counterpart in other human rights treaties, the Court is, in effect, required to act as mediator, while at the same time respecting the Convention's basic values. A significant number of individual claims have been resolved using the friendly settlement procedure,¹³ demonstrating that mediation with a substantive dimension is both workable and appropriate in the human rights field.

¹² For an account of these initiatives and the subsequent efforts of the President of Peru, see Freedman and Gamba-Stonehouse, 1990, pp 150–323.

¹³ For an account of practice under Article 38 (ex 28) of the European Convention, see Merrills and Robertson, 2001, pp 279–282, 318–319.

As a means of dispute settlement mediation is clearly subject to important limitations. A mediator must be available and the parties must be willing to accept mediation. When mediation has begun the prospects of success rest largely on the parties' readiness to compromise which means that timing is often crucial. In both the Diplomatic Hostages crisis and the Beagle Channel dispute mediation occurred at an opportune moment and a peaceful resolution of the situation was achieved. In the Falklands crisis, on the other hand, the aims of Britain and Argentina were diametrically opposed and as neither was willing to yield on the crucial issue of sovereignty, the matter was eventually resolved by armed conflict.

Mediation, then, is as effective as the disputants allow it to be and their attitudes are likely to be governed by their immediate situation. This restricts the possibilities of mediation, but does not destroy its value. A mediator does more than perfect an inchoate settlement. By facilitating the parties' dialogue, providing them with information and suggestions, identifying and exploring their aims, and canvassing possible solutions, his role may be vital in moving them towards agreement. Success will often be incomplete and failure sometimes unavoidable. The mediator, however, must do his best and trust that the parties reciprocate.

C. INQUIRY

Inquiry in the context of dispute settlement is a term used in two distinct, but related senses. In the broader sense it refers to the process performed whenever a court or other body attempts to resolve a disputed issue of fact. Since most international disputes raise such issues, even if questions of law or policy are also present, it is clear that inquiry in this operational sense must play a large part in arbitration, conciliation, the work of international organizations, and other methods of peaceful settlement. Inquiry can, however, also be used in a narrower sense, not as a process of general relevance and application, but as a specific institutional arrangement which may be selected instead of arbitration or other techniques to establish the facts. In its institutional sense, then, inquiry refers to a particular type of international tribunal, known as the commission of inquiry and introduced by the 1899 Hague Convention.¹⁴

The delegates to the first Hague Peace Conference were prompted to address the issue of fact-finding by an incident the year before in which the unexplained destruction of the United States battleship *Maine* had precipitated a Spanish-American war. In an effort to minimize such problems in the future the Conference suggested the appointment of international commissions of inquiry for impartial fact-finding and arrangements to this effect were incorporated in the 1899 Hague Convention. Soon afterwards in 1904 they were used for the first time in a curious episode known as the Dogger Bank incident when the Russian fleet, wrongly believing it was under attack, fired on and damaged a number of British trawlers. A commission of inquiry

¹⁴ For more detailed discussion of inquiry see Bar-Yaacov, 1974; Merrills, 1998, pp 44–62.

appointed by the two governments established that a mistake had been made and on payment of suitable compensation the incident was declared closed (Bar-Yaacov, 1974, pp 72–81).

The Dogger Bank episode was a striking example of the value of fact-finding in the settlement of international disputes. However, it also revealed certain weaknesses in the provisions of the Hague Convention which were conspicuously lacking in detail. Accordingly, the Hague Convention of 1907 expanded the earlier scheme with a series of Articles devoted to organization and procedure. These arrangements were then used in a group of cases over the next two decades involving incidents at sea, where once again establishing the facts enabled the disputes to be disposed of.¹⁵ This was also the outcome in the *Red Crusader* case¹⁶ in 1962 in which the United Kingdom and Denmark set up an inquiry commission to deal with a dispute arising out of an attempt to arrest a British trawler.

Following the 1907 Hague Convention the United States concluded treaties with France and Great Britain, known as the Taft treaties, providing for commissions of inquiry with expanded powers and a further series, known as the Bryan treaties, featuring further variations. A number of other States concluded agreements along similar lines. All this treaty practice failed to produce a sequence of inquiries like those generated by the Hague Conventions, although in 1992 one of the Bryan treaties was used in the *Letelier and Moffitt* case¹⁷ to resolve a dispute over compensation between the United States and Chile. But if in terms of case law the significance of these bilateral treaties was negligible, they were important more generally because the idea of combining inquiry with the power to make recommendations produced the institutional arrangement known as conciliation described further in the next section.

Inquiry is clearly a very flexible method having been used both for 'pure' fact-finding, as in some of the early cases, and for situations where legal questions were prominent, as in *Letelier and Moffitt*. Why, then, it is so rarely used? One explanation is that today when an inquiry is needed it can sometimes be carried out through an international organization without using the Hague Conventions. The Security Council, for example, sets up fact-finding commissions from time to time, as do the Specialized Agencies and in 1993 the World Bank introduced a unique Inspection Panel procedure¹⁸ to investigate development projects. These institutional developments account, at least in part, for the relatively small number of cases using the Hague procedure. There is, however, a more fundamental explanation.

All forms of third party settlement have proved less popular than was once anticipated. The root of the problem is that States are often less interested in settling a

dispute than in having their views prevail. It is therefore only when certain special conditions are satisfied that there is usually scope for setting up an inquiry commission. These are that the disputed issue is largely one of fact, that no other procedure is being employed and, most important of all, that the parties are willing to accept that their version of events may be shown to be wrong. Such a combination evidently does not occur very often. When it does, the highly satisfactory outcome of the *Red Crusader* episode shows that the international commission of inquiry can still produce useful results.

D. CONCILIATION

Conciliation has been defined as:

A method for the settlement of international disputes of any nature according to which a Commission set up by the Parties, either on a permanent or an ad hoc basis to deal with a dispute proceeds to the impartial examination of the dispute and attempts to define the terms of a settlement susceptible of being accepted by them, or of affording the Parties with a view to its settlement, such aid as they may have requested.¹⁹

If mediation is essentially an extension of negotiation, conciliation puts third party intervention on a formal footing and institutionalizes it in a way comparable, but not identical, to inquiry or arbitration. For the fact-finding exercise that is the essence of inquiry may or may not be present in conciliation, while the search for terms 'susceptible of being accepted by the parties' but not binding on them, contrasts sharply with arbitration and forms a link between conciliation and mediation.

Like other institutional methods, conciliation is normally entrusted to commissions containing several members. However, it is also possible to refer a dispute to a single conciliator and this procedure was adopted in 1977 when Kenya, Uganda, and Tanzania asked the experienced Swiss diplomat, Dr Victor Umbricht, to make proposals for distributing the assets of the former East African Community (EAC). As the extent of the assets was unknown, the conciliator had to begin by conducting a wide ranging inquiry, first to identify and then to value them, after which he could consider their distribution. Although in the final negotiated settlement the division of assets differed slightly from that proposed by Dr Umbricht, it is clear that his activities, which included mediation as well as conciliation and inquiry, and extended over seven years, made a vital contribution to the eventual settlement (Umbricht, 1984).

A more straightforward dispute which was resolved at about the same time involved a commission of the type familiar from previous conciliations. In 1980 Iceland and Norway set up a commission to make recommendations with regard to the dividing line for the area of continental shelf between Iceland and Jan Mayen Island. The Commission was instructed to take into account Iceland's 'strong

¹⁵ For a summary of these cases see Bar-Yaacov, 1974, pp 141–179; Merrills, 1998, pp 47–51.

¹⁶ The text of the Commission's Report can be found in 35 ILR 485. For discussion of the case see Bar-Yaacov, 1974, pp 179–196; Merrills, 1998, pp 52–55.

¹⁷ *Letelier and Moffitt* case (Chile-United States), 88 ILR 727 and (1992) 31 ILM 1. For comment see Merrills, 1998, pp 55–58.

¹⁸ See Bradlow, 1993–94; Chinkin, 1998, pp 134–137; Collier and Lowe, 1999, pp 119–121. The Inter-American Bank and the Asian Development Bank have established similar panels.

¹⁹ The quotation is from Article 1 of the Regulations on the Procedure of International Conciliation, adopted by the Institute of International Law in 1961. For more detailed discussion of conciliation see Cot, 1972; Bar-Yaacov, 1974, pp 198–248; Merrills, 1998, pp 62–88.

economic interests' in the sea areas in question, along with various other factors. Following a detailed investigation of geological and other evidence, the Commission proposed both a boundary line and a joint development agreement for the area where oil deposits might exist (Churchill, 1985; Richardson, 1988). This recommendation, typical of the kind of constructive compromise which conciliation can generate, was accepted by the parties and in 1981 was incorporated in a treaty which ended the dispute.

Bilateral agreements providing for the reference of future disputes to conciliation were quite common in the League of Nations era after the First World War, but are now quite rare. When States use conciliation in a bilateral treaty today it is therefore usually in order to deal with a specific dispute, as in the two cases just mentioned. Multilateral treaties, however, show a quite different pattern and in recent practice agreements providing for conciliation, often in conjunction with other procedures, have been concluded on a variety of topics. Among treaties demonstrating the relevance of conciliation to dispute settlement in different fields are the 1969 Vienna Convention on the Law of Treaties, the 1981 Treaty establishing the Organization of Eastern Caribbean States, the 1982 Convention on the Law of the Sea, and the 1992 Convention on Biological Diversity.²⁰

The 1987 Montreal Protocol on Substances that Deplete the Ozone Layer is also worth mentioning here as it establishes a novel 'non-compliance procedure', constituting a special kind of conciliation. Under the procedure an Implementation Committee consisting of ten parties to the Protocol hears submissions relating to a party's non-compliance which may be put forward by the Secretariat or any other party. The Committee may then make recommendations 'with a view to securing an amicable solution of the matter on the basis of respect for the provisions of the Protocol'. Chinkin (1998, p 129) points out that a process such as this, dealing as it does with disputes both 'in-house' and informally, is particularly suitable for an evolving regulatory regime, as it can reflect the expectations and understandings of the parties, but at the same time avoid crystallizing the law in a fast changing area.

The Law of the Sea Convention, which includes conciliation as part of elaborate arrangements for the settlement of disputes, lays down the procedure to be followed in setting up commissions, together with details of their organization and jurisdiction.²¹ Other multilateral treaties contain similar provisions, though with various differences of detail. For States wishing to establish an ad hoc commission the United Nations General Assembly has produced a set of model rules covering all aspects of conciliation which were approved in 1995. In the following year the Permanent Court of Arbitration produced its own optional rules for States wishing to use the Court and the United Nations Commission on International Trade Law (UNCITRAL) adopted rules in 1980 for conciliation in international commercial disputes.²²

Although conciliation is now regularly included in provisions on dispute settlement, the number of cases in which it has actually been used remains very small. Moreover, since a commission's proposals are not binding, even when conciliation is attempted, there can be no guarantee it will be successful. Conciliation, nevertheless, has a value. Compulsory procedures of any kind, by their very existence, tend to discourage unreasonable claims, while conciliation in practice has proved particularly useful for disputes like the *Jan Mayen* case where the main issues are legal, but the parties are seeking an equitable compromise. Like inquiry, the process from which it developed, conciliation offers a procedure adaptable to a variety of needs and shows the advantage to be gained from a structured involvement of outsiders in the settlement of international disputes.

III. LEGAL METHODS

A. ARBITRATION

The oldest of the legal methods of dispute settlement is arbitration, the origins of which in current international practice can be traced back to the 1794 Jay Treaty between Great Britain and the United States. A distinctive feature of arbitration is that the parties themselves set up a tribunal to decide a dispute, or a series of disputes, usually on the basis of international law, and agree to treat its decisions as binding. Since form is subordinate to function in international relations, variations on the basic pattern are possible, but the standard form of arbitration is now well-established and regularly used for many kinds of international disputes.²³

Traditionally, arbitration has been used for disputes in which the issues are legal and the need to remove an obstacle to good relations makes the idea of a binding settlement attractive. Territorial and boundary disputes, for example, often fall into this category. Because the parties define the question to be answered and can specify the basis of the decision, they exercise a degree of control over the process which is a further advantage. Moreover, the parties are entitled to choose the arbitrators. Although this, like other elements of an arbitration, requires agreement and so may cause delay, it means that the dispute will eventually be decided by a tribunal which the parties believe they can trust, a factor of fundamental importance in international litigation. Over the years the reference of disputes to arbitration has generated a significant and influential case law, prominent awards including those in the *Tinoco* case²⁴ (1923), the *Island of Palmas* case²⁵ (1928), and the *Trail Smelter* case²⁶ (1938-41). More recently, the value of arbitration has been further demonstrated in the *Taba*

²⁰ For an outline of current treaty practice and other recent developments see Merrills, 1998, pp 74-84.

²¹ For analysis of these arrangements and their relation to the Convention's other provisions see Merrills, 1998, pp 178-180.

²² See the Annex to GA Res 35/52, 4 December 1980 and Collier and Lowe, 1999, p 31.

²³ For useful surveys of the development and current role of arbitration see: Simpson and Fox, 1959; Gray and Kingsbury, 1992; Merrills, 1998, pp 88-121; Collier and Lowe, 1999, pp 189-279.

²⁴ 1 RIAA 369.

²⁵ 2 RIAA 829.

²⁶ 3 RIAA 1905.

case²⁷ (1988) between Egypt and Israel, where a land boundary was in issue, the *St Pierre and Miquelon* case²⁸ (1992) between Canada and France, involving a marine boundary, and the two-stage *Red Sea Islands* case²⁹ (1998–99) between Eritrea and Yemen, where territorial sovereignty and maritime delimitation were both in issue. Among notable arbitrations where boundary issues were not involved are the *La Bretagne* case³⁰ (1986) between Canada and France, the two arbitrations in the *Rainbow Warrior* case (1986 and 1990) between France and New Zealand, and the *Heathrow Airport* case³¹ (1992–93) between the United Kingdom and the United States.

Arbitration, like conciliation, is a method which can be employed ad hoc when a dispute arises,³² or provided for in advance by appropriate arrangements in a treaty. It is therefore to be found in the dispute settlement provisions of multilateral and bilateral conventions on a wide variety of subjects, as either an optional or a compulsory procedure, and often in combination with other methods. The 1982 Law of the Sea Convention, for example, gives a very prominent role to arbitration, as do the 1992 Stockholm Convention on Conciliation and Arbitration within the CSCE and a number of recent conventions concerned with the environment.³³ In the World Trade Organization's dispute settlement system, similarly, though the general emphasis is on panel proceedings (described below), arbitration is also an option and for certain disputes is even mandatory (Merrills, 1998, pp 214–216).

The use of arbitration to decide inter-State disputes must be distinguished from its use in a related context, to deal with disputes between a State on one side and an individual or corporation on the other. In cases of this type, known as mixed arbitrations,³⁴ the tribunal's jurisdiction may derive from a contract rather than a treaty, but in either event has international implications that are likely to be significant. The Iran-US Claims Tribunal,³⁵ for example, was set up in 1981 to handle a large number of disputes arising from the Islamic revolution in Iran and has jurisdiction over both inter-State and private claims. Its decisions, which now run to more than thirty volumes, not only show the value of arbitration as a procedure for resolving serious and complex disputes of a commercial character, but because the Tribunal has had to address issues such as expropriation and State responsibility, also have made a significant contribution to international law (Aldrich, 1998; Ameli, 1998).

²⁷ 80 ILR 224.

²⁸ 95 ILR 645.

²⁹ (2001) 40 ILM 900 and 983.

³⁰ 90 RGDIP 713.

³¹ United States–United Kingdom Arbitration Concerning Heathrow Airport User Charges, 102 ILR 216.

³² Most of the cases mentioned in the text were ad hoc arbitrations, several of which utilized the facilities of the Permanent Court of Arbitration. For a discussion of the Court's work see Merrills, 1999.

³³ See Merrills, 1998, pp 116–118; 180–185 and for the use of conciliation in earlier treaties Sohn, 1982–83.

³⁴ For a good account of mixed arbitration, including the work of the International Centre for the Settlement of Investment Disputes (ICSID), and the related topic of international commercial arbitration, see Collier and Lowe, 1999, pp 45–84.

³⁵ For a more detailed account of the Tribunal and its work see Brower, 1998.

Arbitration, then, is an important means of handling international disputes. It does, however, have significant limitations. As we shall see in the next section, States are reluctant to make general commitments to judicial settlement and for much the same reasons often resist the idea of arbitration. When a specific dispute arises, however, negotiation or another diplomatic method may be preferred on the ground that it keeps the solution firmly in the hands of the parties. Another limitation concerns enforcement. Although arbitration produces a binding decision, it can be difficult to ensure that the losing party carries out the award. This does not mean that arbitral decisions are widely disregarded, but nonetheless is a real weakness. Ways of encouraging compliance are available and can be useful, but the answer really lies with the protagonists. Arbitration, like other means of settling disputes in a world of sovereign States, relies for its effectiveness on responsible behaviour from the parties.

B. THE INTERNATIONAL COURT OF JUSTICE

Judicial settlement involves the reference of disputes to permanent tribunals for a legally binding decision. It is listed in the Manila Declaration after arbitration, from which it developed historically, and is currently available through a number of courts with general or specialized jurisdiction. The only court of general jurisdiction is the International Court of Justice (ICJ) at The Hague, details of which will be found in Chapter 18. Courts with specialized jurisdiction include human rights courts and various tribunals considered in the next section and the European Court of Justice (ECJ), a regional organ with extensive powers over the member States of the European Community, Community organs, and natural or legal persons. It is interesting to note that the ECJ and the other specialized courts have all been created since 1945 and reflect the increasing complexity of international relations. Our review must begin, however, with the ICJ.³⁶

The Court's authority to decide cases is conferred by its Statute and is based on the principle of consent. It is therefore open to States to agree to take future disputes, or any particular dispute, to the Court by concluding a treaty in appropriate terms, or to make a unilateral acceptance of jurisdiction in the form of a declaration under Article 36(2) of the Statute, known as the Optional Clause.³⁷ In the event of a disagreement as to whether jurisdiction has been accepted the matter is decided by the Court, whose decision, according to Article 36(6), is final. Only States may be parties in cases before the Court, although under Article 65 it may also give advisory opinions on legal questions for the benefit of international organizations.

The Court is composed of fifteen judges who are elected for nine-year terms by the Security Council and General Assembly of the United Nations. The Statute requires

³⁶ For more detailed treatment of the International Court and its work see Merrills, 1998, pp 121–170; Collier and Lowe, 1999, pp 124–189 and the essays in Muller, Raic, and Thuranszky, 1997.

³⁷ For discussion of the Optional Clause, with particular reference to recent State practice, see Merrills, 1993.

the judges to be broadly representative of 'the main forms of civilization and of the principal legal systems of the world', but they sit as independent judges, not as representatives of their national States. However, if a party to a dispute does not currently have a judge of its nationality on the Bench, it is entitled to appoint an ad hoc judge who becomes a member of the Court for that case only. Cases are normally heard by the full Court, but if the parties wish, they can instead refer it to a smaller chamber (normally five judges). The composition of a chamber is in practice determined by the parties, making the process similar in this respect to arbitration.³⁸

The Court's function is described in Article 38(1) of the Statute as 'to decide in accordance with international law such disputes as are submitted to it . . .' and the list of materials which follows, beginning with 'international conventions' and ending with 'judicial decisions' and 'the teachings of . . . publicists', has come to be seen as the core of modern international law. As well as interpreting and applying the law, the Court must, of course, also resolve any issues of fact that may be necessary and for this purpose receives and assesses documentary or other evidence brought forward by the parties, the quantity of which may sometimes be extremely large. This may include the evidence of witnesses or experts and the Court itself may decide to visit the scene as happened in 1997 in the *Danube Dams* case.³⁹

Under Article 38(2) of the Statute the Court may at the request of the parties give a decision *ex aequo et bono* instead of on the basis of law. However, this provision, which blurs the distinction between adjudication and conciliation, has never been used. A less drastic alternative is to refer a case to the Court for a decision on an agreed basis. Like the chambers procedure, this again brings adjudication close to arbitration, although the Court's powers must always be exercised within the Statute. A further possibility is for the Court to extend its function on its own initiative by utilizing equitable considerations of various kinds. Whilst this is not a licence for freewheeling judicial legislation, it introduces an element of flexibility into the Court's decisions which can sometimes be useful (Weil, 1996).

When the Court decides a case its judgment is binding on the parties and is final and without appeal. Whether it actually resolves the dispute, however, depends partly on whether the parties accept it, that is are prepared to treat it as binding, and partly on the precise question referred. States may, for example, decide to use the Court only to obtain a ruling on applicable rules and principles,⁴⁰ or to determine whether a dispute is subject to compulsory arbitration⁴¹ and in cases such as these further steps may be needed to achieve a final settlement. As regards the acceptance of decisions, difficulties can sometimes arise, especially where the unsuccessful party

³⁸ For discussion of this and other aspects of the chambers procedure see Ostrihansky, 1988; Valencia-Ospina, 1996.

³⁹ *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Order of 5 February 1997, Judgment, ICJ Reports 1997, p 7.

⁴⁰ As in the *North Sea Continental Shelf*, Judgment, ICJ Reports 1969, p 3.

⁴¹ As in *Ambatielos, Merits*, Judgment, ICJ Reports 1953, p 10.

has sought to challenge the Court's jurisdiction. On the other hand, disputes are often taken to the Court and resolved there without acrimony because the States concerned want a settlement. In such cases repudiation of the decision would merely return the dispute to the political arena and therefore be self-defeating.

C. OTHER COURTS AND TRIBUNALS

Among the various courts with specialized jurisdiction the most spectacular developments have unquestionably been those associated with human rights tribunals, notably the European Court of Human Rights at Strasbourg and the Inter-American Court in San José. Before 1970 the former was rarely employed and the American Court was not inaugurated until 1979. Today, however, the European Court, which was reconstructed in 1998, has a flourishing jurisprudence⁴² and although the American Court is not as busy, it has made its mark with both contentious cases and advisory opinions (Harris and Livingstone, 1998). The work of these courts stems mainly from cases brought by individuals, but both courts have jurisdiction over inter-State disputes and deal with such cases from time to time. More importantly, as human rights are now an international issue, procedures for adjudicating claims help to promote friendly relations whether or not they are brought by States. The activities of human rights courts thus certainly fall within the Manila Declaration.

Courts with specialized jurisdiction of a quite different type are to be found in the 1982 Law of the Sea Convention. For among several new institutions created by the Convention is a new court, the International Tribunal for the Law of the Sea (ITLOS), and a separate subsidiary organ, the Sea-Bed Disputes Chamber (SBDC).⁴³ ITLOS reflects the preference which many States had for a special tribunal to handle disputes arising out of the new law contained in the 1982 Convention, and starting with the *M/V Saiga* case⁴⁴ in 1997, the Court has begun to develop its own distinctive jurisprudence. In the same way the SBDC was set up because the complex arrangements in the Convention for exploiting the deep sea-bed were thought unsuitable for adjudication in the main Tribunal. Unlike its parent body, however, the SBDC has no case law, as yet.

The arrangements pertaining to the organization and jurisdiction of ITLOS and the SBDC and the choice of law to be applied are set out in great detail in the 1982 Convention and show the thinking behind their creation. Among points particularly worth noting are that the jurisdiction of ITLOS is based on the principle of free choice of means, since it depends upon States making a declaration nominating

⁴² For an account of the Court and its work, including the changes made in 1998, see Merrills and Robertson, 2001.

⁴³ On the arrangements relating to ITLOS and its place in the dispute settlement arrangements of the Convention, see Merrills, 1998, pp 170–197; Anderson, 1998a; Collier and Lowe, 1999, pp 84–96; and Eiriksson, 2000.

⁴⁴ (1998) 37 ILM 360.

the Tribunal as their preferred option. The SBDC, on the other hand, has a jurisdiction which is automatically accepted by all the parties to the Convention. Both tribunals, unlike the International Court, are open not just to States, but also to other entities, including organizations, and each is permitted to split into smaller chambers, in order to provide the parties, if they wish, with some of the advantages of arbitration.

Functioning in a quite different sphere of operation is the dispute settlement system of the World Trade Organization, set up when the Organization was created in 1994. This complex system exists to deal with disputes concerned with trade agreements and utilizes consultations between the parties, mediation, conciliation, and arbitration in elaborate provisions details of which must be sought elsewhere.⁴⁵ At the centre of the system is an arrangement for referring disputes to panels made up of independent experts whose role resembles that of arbitrators. Panel reports are then liable to review by the members of an organ called the Appellate Body, which further emphasizes the juridical nature of the process.

A feature of the WTO system is that the principle of free choice of means, normally so important in dispute settlement, is largely absent. Whilst States are encouraged to settle disputes by agreement, if they fail to do so, the complaining party is entitled to request a panel. When the panel has reported, recourse to the Appellate Body is again a matter of right, and when the litigation stage is complete, a political organ, called the Dispute Settlement Body, takes over to ensure implementation. Notice also that by subscribing to the WTO Agreement States not only forgo the remedy of self-help, but also undertake to use its procedures exclusively. So, for example, if a dispute could be dealt with either through the WTO, or through a regional system, the former should be given priority.

Although the WTO system is relatively new, it is in constant use and has already proved its worth. Trade disputes are complex, often involve shifts in economic and political forces and are capable of arousing strong passions. If this makes peaceful methods for resolving such disputes essential, it also means that methods which encourage accommodation are no less important than those that seek to enforce rules. That is why the WTO system features diplomatic as well as legal processes. Moreover, in international trade law, as elsewhere, adjudication works best when rules are not just applied impartially, but also command general acceptance. As the fairness of trade rules depends on the policies of the major players in the WTO, their responsibility as legislators underpins its system for dealing with disputes.

D. THE PLACE OF LEGAL METHODS

To understand the significance of arbitration or other legal methods and how they are used in practice it is important to appreciate at the outset that courts and

⁴⁵ There is already a large literature on the WTO system, including a detailed treatment by Petersmann, 1997. For more concise treatments see Merrills, 1998, pp 197–220 and Collier and Lowe, 1999, pp 94–104.

tribunals do not operate in isolation, but regularly interact with political institutions and processes. So, for example, the reference of a dispute to the ICJ may be prompted by the efforts of a regional organization, negotiations may be necessary to establish the question asked, and may well continue on substantive matters once litigation is in progress. At the post-adjudication stage, likewise, technical assistance from the UN, or further negotiations, perhaps assisted by a mediator, may be needed to deal with boundary demarcation, or similar issues concerning implementation.⁴⁶

When considering the role of adjudication it is also as well to recognize that courts and tribunals have no all-embracing ability to solve international problems, but occupy a specialized place among the instruments of dispute settlement. Not only are they limited to deciding disputes and so lack competence to deal with broader 'situations', but as their normal function is to decide cases by applying law, many problems are unsuited to adjudication because they do not raise legal issues. Thus the International Court has indicated that as a general rule it cannot deal with issues requiring, say, a political or economic assessment, rather than a legal decision, and by the same token will decline to answer questions which are moot or only of historical interest.⁴⁷

What, then, is the value of legal methods? Because the decisions of courts and tribunals are binding, litigation is a good way of disposing of troublesome issues the resolution of which is considered to be more important than the actual result. Conversely, when the result is all-important adjudication is likely to be unattractive because it is simply too risky, a point which is reinforced by the fact that adjudication is not merely dispositive, but tends to produce a winner-takes-all type of solution. This explains why States are notoriously reluctant to make a general commitment to take their disputes to the International Court, but may be willing to do so in individual cases. It also explains the popularity of ITLOS and the WTO panels system, which are designed for a specific purpose, where the parties' commitments are defined and the judges have special expertise.

Are international courts capable of deciding disputes with a strong political element? The answer is to be found in a firmly established principle which is really quite basic to international adjudication. It is that courts and tribunals are set up to resolve legal issues and so, provided a case presents a legal issue, they are not prevented from deciding it merely because it also has political elements.⁴⁸ It is easy to see that such an attitude is essential if adjudication is to function. All

⁴⁶ For discussion of the post-adjudication phase in the Honduras/Nicaragua *Arbitral Award* case (1960) and the Libya/Chad, *Territorial Dispute* case (1994), in both of which political organizations were involved, see Rosenne, 1997, pp 265–269 and 274–276; Merrills, 2000, pp 898–901.

⁴⁷ See *Haya de Torre, Judgment*, ICJ Reports 1951, p 71; *Northern Cameroons, Preliminary Objections, Judgment*, ICJ Reports 1963, p 15; *Nuclear Tests (Australia v France), Judgment*, ICJ Reports 1974, p 253, and *Nuclear Tests (New Zealand v France), Judgment*, ICJ Reports 1974, p 457.

⁴⁸ For discussion of the cases in which this point has been made, including the *Diplomatic Staff in Tehran* case and the *Nicaragua* case, see Merrills, 1998, pp 155–159.

disputes between States have political elements because States are political bodies. Therefore to concede that a case could not be decided if it had political elements would be to enable any case to be blocked. Quite rightly, this absurd conclusion has been rejected.

Since international disputes often have both a legal and a political dimension, it is no surprise to find that on occasion disputes are referred to legal and political institutions simultaneously. The Tehran hostages dispute, for example, between the United States and Iran was considered by both the ICJ and the UN Security Council in 1980 and there have also been cases involving regional organizations. Such cases clearly raise the question of the relation between the legal and the political process, on which the Court's view, as might be expected, is that each has its own sphere and neither is entitled to priority as a matter of principle.⁴⁹ This is useful as far as it goes, but leaves open questions such as how far the legality of the Security Council's actions may be challenged before the Court, a problem to which as yet there is no clear answer.⁵⁰

When the parties to a dispute decide to employ adjudication by, for example, concluding an arbitration agreement, or jointly referring a case to the International Court they are, in effect, agreeing that the legal and political aspects of the dispute should be separated. When, on the other hand, a case is referred unilaterally, it may be because the parties view the dispute differently, the applicant seeing the legal aspect as paramount, but the respondent emphasizing its political aspects and so regarding it as unsuitable for adjudication. As already noted, a court can decide such a case, notwithstanding the conflict of characterization, but does so by isolating the legal element, thereby effecting a 'depoliticization' which the parties were unable to achieve consensually.

The point just made is critical because it means that although courts and tribunals are competent to deal with disputes which present legal issues, however complex their political background, the party whose concerns are with the non-legal elements of the dispute may be unwilling to accept the decision. This clearly limits the contribution which adjudication can make to the resolution of international disputes in practice. It is also why appreciating the interaction of legal and political processes is so vital and why, when describing the WTO system, we drew attention to both the role of consultation and the need for trade rules which all States can regard as legitimate. It is not enough to have courts and tribunals capable of handing down legal decisions. Persuading States to use them, and making their decisions effective, are problems grounded in the political context.

⁴⁹ For discussion of the 1993 *Genocide* case and earlier cases in which this point has been made see Merrills, 1998, pp 233–238.

⁵⁰ For discussion of the 1992 *Lockerbie* cases which raised this point see Akande, 1997; Merrills, 1998, pp 249–252.

IV. INTERNATIONAL ORGANIZATIONS AND DISPUTE SETTLEMENT

A. REGIONAL ORGANIZATIONS

The reference in the Manila Declaration to 'resort to regional agencies or arrangements' relates to bodies such as the Organization of American States (OAS), the Organization of African Unity (OAU), NATO, and the EEC, which are recognized in Article 52(2) of the UN Charter as relevant to the settlement of local disputes.⁵¹ There is no reference in the Declaration's list to the UN's own procedures, although these are covered in some detail in later provisions which, as well as mentioning the ICJ, deal also with the Security Council and the General Assembly. Thus the Declaration acknowledges the role of international political organizations in dispute settlement at both the regional and universal levels.

One of the main functions of regional organizations is to provide governments with opportunities for diplomatic contact in a structured setting. Although such contact serves many purposes, it is something which may be particularly useful when there are disputes between member States because it can provide them with an opportunity to discuss their differences when tension may have disrupted normal communication. Such contact, moreover, is by no means restricted to the speech-making and formal proceedings of the organization, but also includes behind the scenes activity where the real work is often done. Indeed, informal contact of this kind may well be more valuable for parties with a dispute since it enables other States to use their influence without having to take a public position.

Negotiations, whether formal or informal, are the basic method of dealing with disputes, but, as noted earlier, may benefit from the presence of an outsider to encourage the dialogue and keep it going, or to make an independent contribution. Regional organizations provide opportunities for both good offices and mediation, as may be seen, for example, in the OAU which has frequently provided these services in disputes between African States (Maluwa, 1989) and the European Union which attempted mediation during the break-up of Yugoslavia. Some of these efforts, including the last, were unsuccessful, but then mediation, it will be recalled, is about facilitating negotiations, not imposing solutions.

More formal than mediation are the other diplomatic methods—inquiry and conciliation—and these too can be used by regional organizations. Inquiry, as we have seen, is essentially a fact-finding exercise, whereas conciliation involves presenting the parties with specific recommendations. Both processes need an individual or a commission to do the necessary fact-finding or conciliation and the two can sometimes be combined. In 1929, for example, the Conference of American States established a

⁵¹ On the role of regional organizations in general see Fawcett and Hurrell, 1995 and in relation to disputes specifically Merrills, 1998, pp 259–285; 2001, pp 195–207.

body called the Chaco Commission to investigate a dispute between Bolivia and Paraguay and to make proposals for a settlement. This involved both inquiry and conciliation and the Commission produced recommendations which the parties accepted, so demonstrating the value of this type of initiative (Bar-Yaacov, 1974, pp 199–211). So far we have really been considering ways in which disputes can be handled *through* regional organizations, rather than ways in which they can be handled *by* them. Negotiation and the other diplomatic methods are all processes which States can, and often do, employ on their own initiative without involving a regional organization at all. This does not make such organizations irrelevant because they may provide the spur to make things happen. It does, however, prompt the question whether there is action in relation to disputes which only organizations can take. Is there, in other words, a contribution from regional organizations that is uniquely their own?

The answer is yes, as may be seen from the following examples. First, a collective declaration of policy, such as the OAU's 1964 declaration on respecting African boundaries,⁵² can both reduce the likelihood of disputes and provide a basis for dealing with them when they arise. Secondly, though the powers of regional organizations are subject to international law and not unlimited, in some circumstances they are entitled to impose sanctions on a recalcitrant member.⁵³ And thirdly, regional organizations can play a role in international peace-keeping,⁵⁴ or in support of action by the Security Council under Chapter VII of the Charter. Such measures show how collective action may be used to pursue goals not open to States acting separately and the variety of ways in which regional organizations may be involved in international dispute settlement.

B. THE UNITED NATIONS

Article 1 of the UN Charter sets out the purposes of the United Nations which are: to maintain international peace and security; to develop friendly relations among nations; to achieve international cooperation in solving problems of an economic, social, cultural, or humanitarian character and in promoting human rights; and to be a centre for harmonizing the actions of States in attaining these ends. These are inter-related purposes, but the maintenance of international peace and security occupies a primary place, the UN having a responsibility to bring about cessation of conflict whenever it occurs and to assist the parties to international disputes to settle their

⁵² See on the declaration Zartman, 1991. Another example is the adoption in 1991 of a common policy on recognition towards the States of Eastern Europe by the members of the European Union on which see Warbrick, 1992.

⁵³ For an example see Macdonald, 1963–64, pp 367–372.

⁵⁴ For a general survey see McCoubrey and Morris, 2000. An interesting illustration of such activity is provided by the operations carried out by the Confederation of Independent States (CIS) in several parts of the former Soviet Union, which are described by Webber, 1996.

disputes by peaceful means. Clearly, then, dealing with disputes is a central function of the Organization according to the Charter.⁵⁵

How is this to be done? The Charter assigns a key role to the Security Council and gives it the relevant powers in Chapter VI, which is wholly concerned with the peaceful settlement of disputes. Although the Council may make recommendations with a view to the settlement of any dispute, if all the parties so request, and under Article 34 can investigate any dispute or threatening 'situation', its general competence is limited to disputes 'the continuation of which is likely to endanger the maintenance of international peace and security'. It is therefore clear that although Article 2(3) imposes a quite general obligation on member States to settle disputes by peaceful means, only the more serious disputes, or those which may become serious, are regarded as the Council's concern.

The particular role of the Security Council is further emphasized in Article 33(1) which provides that the parties to a dispute within its remit should 'first of all' seek a solution by negotiation or another peaceful means of their own choice, and Article 52(2), which provides that members of regional arrangements or agencies 'shall make every effort to achieve peaceful settlement of local disputes' through such arrangements or agencies before referring them to the Security Council. However, despite these priorities, the Council has the right under Article 36(1) to recommend appropriate procedures at any time. Moreover, its authority to consider these issues comes from the relevant provisions of the Charter. Thus, unlike a court of arbitration or conciliation commission, the Security Council does not require the consent of the States concerned in order to become involved.

A final point to make about Chapter VI is that the provisions in this part of the Charter, which are all concerned with encouraging States to use peaceful methods of settlement, need to be read alongside those of Chapter VII, which give the Security Council power to impose sanctions. The structure of the Charter can therefore be seen as designed first and foremost to help States with their problems, but in the last resort to back this up with coercive measures in disputes or situations which lead to a 'threat to the peace, breach of the peace or act of aggression'. How well this has worked in practice is another matter, but in theory at least the Charter equips the Security Council with enforcement powers to use when they are needed.

Because the Charter envisages the Security Council playing the main role in UN dispute management, there is nothing as elaborate as Chapter VI or Chapter VII conferring powers on the General Assembly or Secretary-General. However, these organs too are given a role. Thus the General Assembly has broad powers of discussion and recommendation under Articles 10 to 14. These are wide enough to cover, for example, the recommendation of 'measures for the peaceful adjustment of any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations' (Article 14), although this provision, like others

⁵⁵ From the vast literature on the United Nations the following relate specifically to the issues discussed in the text: Peck, 1996; White, 1997; Merrills, 1998, pp 220–258; 2001, pp 208–220.

relating to the General Assembly, is subject to Article 12, which preserves the primacy of the Security Council.

The role of the Secretariat is set out in Articles 98 and 99 of the Charter which, though brief, are very important. Article 98 speaks of the Secretary-General performing secretarial (ie, administrative) functions for the General Assembly, the Security Council, and the other principal organs and performing 'such other functions as are entrusted to him by these organs'. Under this provision, then, tasks relating to disputes and other matters may be delegated to the Secretariat. Article 99, on the other hand, refers to the Secretary-General bringing 'to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security'. Here therefore the Secretary-General is given a power of initiative which, as will be seen, has proved highly significant.

C. THE CHARTER SYSTEM IN PRACTICE

The United Nations is often criticized for failing to solve the world's problems and the validity of this criticism, at least in relation to disputes, is something we must consider. Before doing so, however, something should be said about what the UN has been able to achieve, beginning with the work of the political organs. As noted above, both the General Assembly and the Security Council are entitled to make recommendations and both organs have used this power extensively, to try to calm disputes, to urge the use of particular methods, or in some cases to recommend specific terms for a settlement. As these are merely recommendations, they can be, and often are, ignored. On the other hand, such UN involvement has the effect of bringing diplomatic pressure to bear and is sometimes helpful in providing States which may be locked on a collision course with a way out of their difficulty.

It was pointed out earlier that the existence of regional organizations stimulates negotiation by bringing States together in a setting where diplomatic contact is easy and can be encouraged by others. The United Nations functions in a similar way with the advantage that at the UN diplomacy is possible not just among States which are neighbours, but on a worldwide scale. Providing a setting for diplomatic contacts is useful in itself, but it is often possible to go further and use the Organization's own machinery to facilitate negotiations. One rather formal method is to appoint a committee of selected member States to assist negotiations, as was done for discussions on Indonesia's independence in 1947. Another is to use individuals as mediators or conciliators, which has been one of the Secretariat's most significant activities.

The contribution which fact-finding can make to the resolution of certain types of disputes has also already been mentioned. This too is a matter on which the UN may be able to help and there are many examples of the Security Council or the General Assembly creating subsidiary organs for this purpose.⁵⁶ As we have seen,

⁵⁶ For a review of early UN practice, examining the value and limitations of this form of activity see Plunkett, 1968-69.

this is something which the States concerned could do for themselves utilizing the inquiry procedure of the Hague Conventions, but this requires the parties to agree and by the time a dispute reaches the UN it is usually plain they are not going to do so. The Organization's contribution is therefore to fill this gap by promoting the necessary investigation, in an attempt to bring the parties closer together.

If the political organs cannot help directly, or do not wish to do so, they can refer a dispute to another body, a regional organization, for example, or another UN organ. So long as it is not merely a way of evading responsibility (as it can sometimes be), passing a dispute on in this way may be a desirable step. A case in point is legal disputes, which Article 36(3) says should 'as a general rule' be referred to the International Court. The General Assembly and the Security Council may also ask the Court for advisory opinions and this power is potentially very important in disputes like that in the *Western Sahara* case⁵⁷ which involve decolonization or other United Nations policies. It cannot be said, however, that the political organs use the Court as often as they might with the result that opportunities to engage it in their work have been somewhat neglected.

The political organs, and the Security Council in particular, though active in the ways described, have frequently been slow to act; however, the same cannot be said for the Secretary-General, whose work under Articles 98 and 99 has often formed the main, or even the only element in a United Nations response. As regards Article 98, one of the most important contributions has been to provide good offices and mediation when the authorizing organ perceives a need to help the parties with negotiations (Franck and Nolte, 1993; Skjelsbaek and Fermann, 1996). In such cases introduction of the Secretary-General as a neutral third party, supported by the Security Council or the General Assembly can be a constructive move. Among the many examples of such involvement are the Secretary-General Waldheim's creation of a fact-finding and conciliation commission, together with the provision of good offices, in the Diplomatic Hostages crisis of 1979, and the good offices of Secretary-General Boutros-Ghali, following the invasion of Kuwait in 1990.

The powers of initiative possessed by the Secretary-General under Article 99 have been interpreted broadly which has made this provision just as important in practice as Article 98. Consequently, a similar range of activities has been undertaken. It is important to appreciate, however, that even when exercising initiative under Article 99, the Secretary-General has always been careful to coordinate his work with that of the political organs, especially the Security Council (Perez de Cuellar, 1993). This underlines the point that the primary responsibility for making the UN system work lies with the member States. If they fail to play their part it is pointless expecting the Secretary-General to fill the gap and blaming him when things go

⁵⁷ *Western Sahara, Advisory Opinion*, ICJ Reports 1975, p 12. See also the *Namibia* case, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (270)*, *Advisory Opinion*, ICJ Reports 1971, p 16.

wrong. The Secretary-General has a key role, but cannot carry the whole burden of dispute management for the United Nations.

D. THE VALUE AND LIMITATIONS OF ORGANIZATIONS

Enough has been said to indicate that political organizations can make a useful contribution to the management and resolution of international disputes. However, various factors which can limit their activity must now be noted. To take regional organizations first, one very obvious limitation is that they are unlikely to be very effective in disputes which cross regional boundaries, ie, in disputes between States from different regions. Another, no less significant, is that regional organizations are often reluctant to become involved in disputes within States, for example, civil wars and other internal conflicts. A further limitation is that most regional organizations lack resources and so may simply be unable to undertake the more expensive kinds of institutional activities such as peace-keeping.

Turning to the United Nations, its involvement in disputes has tended to reflect the extent to which the major States have seen UN action as something which is in their interests. This means that in many disputes there has been little UN involvement, or its contribution has been only marginal. Where the UN has been involved, the record underlines the point made at the beginning about the need to manage international disputes when they cannot be settled. Not many disputes have been settled through the UN, compared with the large number which have been managed, in the sense of being dealt with in some way, through the Organization's processes. This is particularly clear in the case of peacekeeping operations, for example, which have almost always been concerned with stabilizing situations, so as to create conditions in which other processes can be used.

To see why all this is so is to begin to understand the nature and limitations of the UN system. The Organization is a reflection of the social and political relations of States. Although constructive steps have sometimes been taken, effective action is usually possible only insofar as States are prepared to relinquish control and seek assistance. When things become sufficiently serious, a UN presence or other initiative may be acceptable, but unless what is wanted is simply a face-saving arrangement, settling the basic problem is likely to be much more difficult. As a consequence, in very many cases prophylactic measures may be all that is politically possible, yet the fact that a festering dispute remains unresolved will be accounted another failure of the Organization.

In *An Agenda for Peace*,⁵⁸ his 1992 report to the Security Council, Secretary-General Boutros-Ghali examined the potential of the United Nations in the fields of preventive diplomacy, peace-keeping, peace-making and post-conflict peace-building. The report described what the Secretary-General saw as the contribution which regional organizations could make to resolving disputes, emphasizing, as might be

expected, that they must act in a manner consistent with the Charter and that the Security Council has primary responsibility for maintaining international peace and security. However, provided these constitutional limitations are respected, regional action could lighten the Security Council's burden and 'contribute to a deeper sense of participation, consensus and democratization in international affairs'.⁵⁹

As the Secretary-General indicated, cooperation between regional organizations and the UN is particularly useful in situations which call for peacekeeping forces or related action and recent events have demonstrated how institutions can perform complementary functions when the political atmosphere is favourable. In the complex situation in Central America in the 1980s, for example, the main diplomatic work was carried out through the regional Contadora process, but when security arrangements were needed, a UN force (ONUCA) was established by the Security Council (White, 1993, pp 226–227). Similarly, in the Liberian crisis of 1990 peacekeeping forces were supplied by the local sub-regional organization (ECOWAS) and subsequently supported both politically and on the ground by the UN (White, 1996, pp 217–219). It is scarcely necessary to add that cooperation between organizations presents many difficulties and is not a panacea. But if there is still far to go before we can speak of a global-regional peace-making system, what *An Agenda for Peace* calls 'this new era or opportunity',⁶⁰ makes it worth working for.

One final point. Institutions exist to help with disputes which States are incapable of dealing with themselves. It follows that these will tend to be the more difficult cases and it should be no surprise if even moderate success is often elusive. However, whether a dispute is referred to an organization or not, the primary responsibility remains with the governments concerned. Organizations are valuable and worth improving, but institution building is no more a substitute for responsible behaviour internationally, than it is in domestic affairs.

V. CONCLUSION

International law requires States to resolve their disputes peacefully and the primary means available for them to do so remains negotiation, sometimes assisted by good offices and mediation from third parties, and including today new forms of diplomacy associated with the ever-expanding role of international organizations. With the introduction of inquiry and conciliation we find third party assistance formalized in processes which provide the benefit of independent findings or recommendations, but with no prior commitment to accept the result. The non-binding character of these methods means they should be thought of more as ways of moving a dispute forward than of settling it, but their value and flexibility may be seen in international practice.

⁵⁸ SC Doc S/24111, 17 June 1992. Text in (1992) 31 ILM 953.

⁵⁹ Ibid, para 64.

⁶⁰ Ibid, para 63.

States which are prepared to relinquish control over their disputes can reap the additional advantages of judicial settlement or arbitration. Legal means, including the dispute settlement system of the WTO, and an increasing number of specialized courts, provide a way of obtaining binding decisions for individual cases, or whole classes of disputes. Moreover, access to such procedures need not, as hitherto, be confined to States, but is now sometimes available to international organizations, companies, or individuals. Important as they are, however, courts and tribunals are not suitable for all disputes and even when available, may not always be utilized, or be effective. Thus legal methods must be seen in their political context.

Organizations are also important. However, the United Nations is not a world government, but essentially a body through which pressure and influence can be exerted on States when their disputes come before the Organization. Of course, many disputes never reach the UN, while many of those that do remain unsettled. Regional organizations can sometimes help by providing a diplomatic forum, or involving regional neighbours in the capacity of mediators or conciliators. There is also now the possibility of combining regional action with action by the United Nations. In both fora though, institutional action will often be less important in practice than the parties' own initiatives. Organizations, then, bring new possibilities, but for much of the time are no more than a further arena in which the sovereign State can exercise its traditional power to settle, or not to settle, its international disputes.

No student of current affairs needs to be told that dispute settlement is a subject on which the gulf between rhetoric and reality is conspicuously wide. All too often governments express support for general propositions like those to be found in the UN Charter, the Declaration on Friendly Relations, and the Manila Declaration, only to follow quite different precepts in their international behaviour. But realism is not cynicism and any dispassionate observer must recognize that since the landmark 1899 Hague Convention enormous progress has been made in refining the methods available for resolving international disputes and in developing States' obligations. The challenge for the twenty-first century is to see that current arrangements, which unquestionably provide the means for dealing with disputes, continue to be used in international practice.

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