

INTERNATIONAL DISPUTE SETTLEMENT

THIRD EDITION

This is a completely updated edition of a definitive overview of the peaceful settlement of international disputes. The book will appeal to lawyers and political scientists with an interest in international law and also to students in this area.

The third edition includes references to recent International Court cases and to the latest arbitration awards. The ending of the Cold War also necessitated considerable rewriting and amendment. The chapter on the United Nations has been updated to take account of new activities of the Security Council. This third edition includes a completely new chapter on the settlement of international trade disputes with particular reference to the World Trade Organisation. Documents in the Appendix have been reviewed and added to in the new edition.

Review of second edition

‘. . . the book will appeal to every lawyer and political scientist who has a general interest in . . . international law . . . and to teachers and students.’

American Journal of International Law

J. G. Merrills is Professor of Public International Law at the University of Sheffield in the UK.

INTERNATIONAL
DISPUTE
SETTLEMENT

J. G. MERRILLS

THIRD EDITION



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PREFACE

SINCE THE second edition of this book was published in 1991 much has happened of direct relevance to its field of inquiry. With the ending of the Cold War, and momentous changes in Eastern Europe, including the break up of Yugoslavia and the Soviet Union, the United Nations and the regional organisations of Europe have been presented not only with new opportunities but also with major challenges. After much travail the World Trade Organisation has been created and has begun to function, as has the complex system for addressing disputes set up by the 1982 Law of the Sea Convention, which has at last come into force. The International Court of Justice is busier than at any time in its history and, in the aftermath of the Gulf War, the Security Council has made unprecedented use of its powers under the Charter. There have, as might be expected, also been significant developments at the regional level in almost every part of the world, although it has to be said that with regard to some long-standing disputes and situations which were unresolved seven years ago, progress, if any, has been very slow.

The aim of this new edition is to examine the techniques and institutions available to states for the peaceful settlement of disputes, taking full account of recent developments. Chapters 1 to 4 examine the so-called 'diplomatic' means of settlement: negotiation, where matters are entirely in the hands of the parties, then mediation, inquiry and conciliation, in each of which outside assistance is utilised. Chapters 5, 6 and 7 deal with legal means, namely arbitration and judicial settlement through the International Court, where the object is to provide a legally binding decision. To underline the interaction of legal and diplomatic means and to show how they are used in specific contexts, Chapter 8 reviews the arrangements for dispute settlement in the Law of the Sea Convention and Chapter 9 considers the unusual provisions of the World Trade Organisation's recent Dispute Settlement Understanding. The final part considers the role of political

institutions, the United Nations (Chapter 10) and regional organisations (Chapter 11), whilst the last chapter reviews the current situation and offers some thoughts for the future.

Those familiar with the previous edition will find that Chapter 9 is entirely new and reflects my conviction that trade issues are now simply too important to be left out of a work concerned with current methods of handling international disputes, even one such as this which does not pretend to address the procedures available for dealing with specific types of disputes in any detail. Other changes, of course, reflect the need to take account of the latest practice. This includes several new treaties and agreements, and a good deal of new case-law, including the recent jurisprudence of the ICJ. There is also new political material relating to the activities of regional organisations and the UN.

In discussing the various techniques and institutions my object has remained to explain what they are, how they work and when they are used. As before, I have sought to include enough references to the relevant literature to enable the reader to follow up any points of particular interest. With a similar objective I have retained and updated the Appendix setting out extracts from some of the documents mentioned in the text.

For permission to quote the material in the Appendix I am again grateful to the editors of the *International Law Reports*. My thanks are also due to Fiona Smith for information on the WTO and to Alan Boyle for advice on environmental law, to Shirley Peacock and Sue Turner at the University of Sheffield for preparing the manuscript, to Finola O'Sullivan and Diane Ilott at Cambridge University Press, and to my wife Dariel, whose encouragement, as always, was invaluable.

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ABBREVIATIONS

AFDI	Annuaire français de Droit International
AJIL	American Journal of International Law
<i>Annuaire</i>	Annuaire de l'Institut de Droit International
Archiv des Völk.	Archiv des Völkerrechts
Aust. Year Book Int. L.	Australian Year Book of International Law
BYBIL	British Year Book of International Law
Calif. Western Int. LJ	California Western International Law Journal
Camb. LJ	Cambridge Law Journal
Can. Bar Rev.	Canadian Bar Review
Can. Yearbook Int. L.	Canadian Yearbook of International Law
CML Rev.	Common Market Law Review
Colum. JL & Soc. Prob.	Columbia Journal of Law and Social Problems
Colum. J. Transnat. L.	Columbia Journal of Transnational Law
Denver J. Int. L. & Pol.	Denver Journal of International Law and Policy
Ga. J. Int. & Comp. L.	Georgia Journal of International and Comparative Law
Grotius Soc. Trans.	Grotius Society Transactions
Harv. Int. LJ	Harvard International Law Journal
ICLQ	International and Comparative Law Quarterly
IHRR	International Human Rights Reports
ILM	International Legal Materials
ILQ	International Law Quarterly
ILR	International Law Reports
Ind. J. Int. L.	Indian Journal of International Law
Int. Org.	International Organisation
Int. Rel.	International Relations
IRAN-US CTR	Iran-United States Claims Tribunal Reports
Israel L. Rev.	Israel Law Review

J. World Trade	Journal of World Trade
Mich. L. Rev.	Michigan Law Review
NTIR	Nederlands tijdschrift voor internationaal recht
NYUJ Int. L. & Politics	New York University Journal of International Law and Politics
Ocean Devel. & Int. L.	Ocean Development and International Law
Proc. Am. Soc. Int. L.	Proceedings of the American Society of International Law
Rev. Egypt. Droit Int.	Revue Egyptienne de Droit International
RGDIP	Revue Générale de Droit International Public
RIAA	Reports of International Arbitral Awards
San Diego L. Rev.	San Diego Law Review
Syr. J. Int. L. & Com.	Syracuse Journal of International Law and Commerce
U. Chi. L. Rev.	University of Chicago Law Review
UKTS	United Kingdom Treaty Series
UNTS	United Nations Treaty Series
U. Toronto Fac. L. Rev.	University of Toronto Faculty Law Review
U. Toronto L.J.	University of Toronto Law Journal
Va. JIL	Virginia Journal of International Law
Yearbook of WA	Yearbook of World Affairs

NEGOTIATION

A DISPUTE may be defined as a specific disagreement concerning a matter of fact, law or policy in which a claim or assertion of one party is met with refusal, counter-claim or denial by another. In the broadest sense, an international dispute can be said to exist whenever such a disagreement involves governments, institutions, juristic persons (corporations) or private individuals in different parts of the world. However, the disputes with which the present work is primarily concerned are those in which the parties are two or more of the nearly 200 or so sovereign states into which the world is currently divided.

Disputes are an inevitable part of international relations, just as disputes between individuals are inevitable in domestic relations. Like individuals, states often want the same thing in a situation where there is not enough of it to go round. Moreover, just as people can disagree about the way to use a river, a piece of land or a sum of money, states frequently want to do different things, but their claims are incompatible. Admittedly, one side may change its position, extra resources may be found, or on looking further into the issue it may turn out that everyone can be satisfied after all. But no one imagines that these possibilities can eliminate all domestic disputes and they certainly cannot be relied on internationally. Disputes, whether between states, neighbours, or brothers and sisters, must therefore be accepted as a regular part of human relations and the problem is what to do about them.

A basic requirement is a commitment from those who are likely to become involved, that is to say from everyone, that disputes will only be pursued by peaceful means. Within states this principle was established at an early stage and laws and institutions were set up to prohibit self-help and to enable disputes to be settled without disruption of the social order. On the international plane, where initially the matter was regarded as less important, equivalent arrangements have

been slower to develop. The emergence of international law, which in its modern form can be dated from the seventeenth century, was accompanied by neither the creation of a world government, nor a renunciation of the use of force by states. In 1945, however, with the consequences of the unbridled pursuit of national objectives still fresh in the memory, the founder members of the United Nations agreed in Article 2(3) of the Charter to 'settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered'. What these peaceful means are and how they are used by states are the subject of this book.

A General Assembly Resolution of 1970, after quoting Article 2(3), proclaims:

States shall accordingly seek early and just settlement of their international disputes by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements or other peaceful means of their choice.¹

In this provision, which is modelled on Article 33(1) of the Charter, the various methods of peaceful settlement are not set out in any order of priority, but the first mentioned, negotiation, is the principal means of handling all international disputes.² In fact in practice, negotiation is employed more frequently than all the other methods put together. Often, indeed, negotiation is the only means employed, not just because it is always the first to be tried and is often successful, but also because states may believe its advantages to be so great as to rule out the use of other methods, even in situations where the chances of a negotiated settlement are slight. On the occasions when another method is used, negotiation is not displaced, but directed towards instrumental issues, the terms of reference for an inquiry or conciliation commission, for example, or the arrangements for implementing an arbitral decision.

Thus in one form or another negotiation has a vital part in international disputes. But negotiation is more than a possible means

¹ *General Assembly Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations*, G. A. Res. 2625 (XXV), 24 October 1970. The resolution was adopted by the General Assembly without a vote.

² For discussion of the meaning and significance of negotiation see C. M. H. Waldock (ed.), *International Disputes: The Legal Aspects*, London, 1972, Chapter 2A (H. Darwin); F. S. Northedge and M. D. Donelan, *International Disputes: The Political Aspects*, London, 1971, Chapter 12; P. J. I. M. De Waart, *The Element of Negotiation in the Pacific Settlement of Disputes between States*, The Hague, 1973; and United Nations, *Handbook on the Peaceful Settlement of Disputes between States*, New York, 1992, Chapter 2A. On the techniques and practice of international negotiation see F. C. Iklé, *How Nations Negotiate*, New York, 1964; A. Lall, *Modern International Negotiation*, New York, 1966; and R. Fisher, *Basic Negotiating Strategy*, London, 1971.

of settling differences, it is also a technique for preventing them from arising. Since prevention is always better than cure, this form of negotiation, known as ‘consultation’, is a convenient place to begin.

Consultation

When a government anticipates that a decision or a proposed course of action may harm another state, discussions with the affected party can provide a way of heading off a dispute by creating an opportunity for adjustment and accommodation. Quite minor modifications to its plans, of no importance to the state taking the decision, may be all that is required to avoid trouble, yet may only be apparent if the other side is given a chance to point them out. The particular value of consultation is that it supplies this useful information at the most appropriate time – before anything has been done. For it is far easier to make the necessary modifications at the decision-making stage, rather than later, when exactly the same action may seem like capitulation to foreign pressure, or be seized on by critics as a sacrifice of domestic interests.

A good example of the value of consultation is provided by the practice of the United States and Canada in antitrust proceedings. Writing of the procedure employed in such cases, a commentator has noted that:

While it is true that antitrust officials of one state might flatly refuse to alter a course of action in any way, it has often been the case that officials have been persuaded to modify their plans somewhat. After consultation, it may be agreed to shape an indictment in a less offensive manner, to change the ground rules of an investigation so as to require only ‘voluntary’ testimony from witnesses, or that officials of the government initiating an investigation or action will keep their antitrust counterparts informed of progress in the case and allow them to voice their concerns.³

This policy of cooperation, developed through a series of bilateral understandings, is now incorporated in an agreement providing for coordination with regard to both the competition laws and the deceptive marketing practices laws of the two states.⁴

³ See B. R. Campbell, ‘The Canada–United States antitrust notification and consultation procedure’, (1978) 56 Can. Bar Rev. p. 459 at p. 468. On arrangements with Australia see S. D. Ramsey, ‘The United States–Australian Antitrust Cooperation Agreement: A step in the right direction’, (1983–4) 24 Va. JIL p. 127.

⁴ See Canada–United States: *Agreement regarding the Application of their Competition and Deceptive Marketing Practices Laws*, 1995. Text in (1996) 35 ILM p. 309. On the role of consultations in the dispute settlement arrangements of the World Trade Organisation see Chapter 9.

Consultation should be distinguished from two related ways of taking foreign susceptibilities into account: notification and the obtaining of prior consent. Suppose state A decides to notify state B of imminent action likely to affect B's interests, or, as will sometimes be the case, is obliged to do so as a legal duty. Such advanced warning gives B time to consider its response, which may be to make representations to A, and in any case avoids the abrasive impact of what might otherwise be regarded as an attempt to present B with a *fait accompli*. In these ways notification can make a modest contribution to dispute avoidance, though naturally B is likely to regard notification alone as a poor substitute for the chance to negotiate and influence the decision that consultation can provide.

Obtaining the consent of the other state, which again may sometimes be a legal obligation, lies at the opposite pole. Here the affected state enjoys a veto over the proposed action. This is clearly an extremely important power and its exceptional nature was properly emphasised by the tribunal in the *Lake Lanoux* case:

To admit that jurisdiction in a certain field can no longer be exercised except on the condition of, or by way of, an agreement between two States, is to place an essential restriction on the sovereignty of a State, and such restriction could only be admitted if there were clear and convincing evidence. Without doubt, international practice does reveal some special cases in which this hypothesis has become reality; thus, sometimes two States exercise conjointly jurisdiction over certain territories (joint ownership, *co-imperium*, or *condominium*); likewise, in certain international arrangements, the representatives of States exercise conjointly a certain jurisdiction in the name of those States or in the name of organizations. But these cases are exceptional, and international judicial decisions are slow to recognize their existence, especially when they impair the territorial sovereignty of a State, as would be the case in the present matter.⁵

In this case Spain argued that under both customary international law and treaties between the two states, France was under an obligation to obtain Spain's consent to the execution of works for the utilisation of certain waters in the Pyrenees for a hydroelectric scheme. The argument was rejected, but the tribunal went on to hold that France was under a duty to consult with Spain over projects that were likely to affect Spanish interests. Speaking of the nature of such obligatory consultations the tribunal observed that:

⁵ *Lake Lanoux Arbitration (France v. Spain)* (1957) 24 ILR p. 101 at p. 127. For discussion of the significance of the case see J. G. Laylin and R. L. Bianchi, 'The role of adjudication in international river disputes: The Lake Lanoux case', (1959) 53 AJIL p. 30.

one speaks, although often inaccurately, of the 'obligation of negotiating an agreement'. In reality, the engagements thus undertaken by States take very diverse forms and have a scope which varies according to the manner in which they are defined and according to the procedures intended for their execution; but the reality of the obligations thus undertaken is incontestable and sanctions can be applied in the event, for example, of an unjustified breaking off of the discussions, abnormal delays, disregard of the agreed procedures, systematic refusals to take into consideration adverse proposals or interests, and, more generally, in cases of violation of the rules of good faith.⁶

An example of how the various ways of coordinating activities may be constructively combined is provided by the 'Interim Reciprocal Information and Consultation System', established in 1990 to regulate the movement of British and Argentine forces in the South Western Atlantic.⁷ The system involved the creation of a direct communication link with the aim of reducing the possibility of incidents and limiting their consequences if they occur. These facilities for consultation are supported by a provision under which at least twenty-five days' written notice will be given about air and naval movements, and exercises of more than a certain size. This is a straightforward arrangement for notification, but two component features of the system are worth noticing. In the first place the notification provision is very specific as to the areas in which the obligation exists and the units to which it applies, and thereby minimises the possibilities for misunderstanding. Secondly, in relation to the most sensitive areas, those immediately off the parties' respective coasts, the notifying state must be informed immediately of any movement which 'might cause political or military difficulty' and 'mutual agreement will be necessary to proceed'. Here therefore there is not only a right and a corresponding duty in respect of notification, but in some circumstances at least a need to obtain consent.

The advantages of consultation in bilateral relations are equally evident in matters which are of concern to a larger number of states. In a multilateral setting consultation usually calls for an institutional

⁶ 24 ILR p. 101 at p. 128. See further C. B. Bourne, 'Procedure in the development of international drainage basins: The duty to consult and negotiate', (1972) 10 Can. Yearbook Int. L. p. 212, and F. L. Kirgis, *Prior Consultation in International Law*, Charlottesville, 1983, Chapter 2.

⁷ Text in (1990) 29 ILM p. 1296 and see document A in the appendix below. For discussion see M. Evans, 'The restoration of diplomatic relations between Argentina and the United Kingdom', (1991) 40 ICLQ p. 473 at pp. 478–80. For later developments see R. R. Churchill, 'Falkland Islands: Maritime jurisdiction and co-operative arrangements with Argentina', (1997) 46 ICLQ p. 463.

structure of some kind. These can vary widely and do not have to be elaborate in order to be useful. The Antarctic Treaty system, for instance, now operates on the basis of annual meetings but has no permanent organs. It nevertheless shows the value of what has been called 'anticipatory co-operation'⁸ in addressing environmental and other issues in a special regional context. When closer regulation is needed more complex institutional arrangements may be appropriate. Thus the International Monetary Fund at one time required a member which had decided to change the par value of its currency to obtain the concurrence of the IMF before doing so. It is interesting to note that the term 'concurrence' was chosen 'to convey the idea of a presumption that was to be observed in favour of the member's proposal'.⁹ Even so, the arrangement meant that extremely sensitive decisions were subject to international scrutiny. As a result, until the par value system was abandoned in 1978, the provision gave rise to considerable difficulties in practice.

Consultation between states is usually an ad hoc process and except where reciprocity provides an incentive, as in the cases considered, has proved difficult to institutionalise. Obligatory consultation is bound to make decisions slower and, depending on how the obligation is defined, may well constrain a government's options. In the *Lake Lanoux* case the tribunal noted that it is a 'delicate matter' to decide whether such an obligation has been complied with, and held that on the facts, France had done all that was required. If consultation is to be compulsory, however, the circumstances in which the obligation arises, as well as its content, need careful definition, or allegation of failure to carry out the agreed procedure may itself become a disputed issue.

Whether voluntary or compulsory, consultation is often easier to implement for executive than for legislative decision making, since the former is usually less rigidly structured and more centralised. But legislative action can also cause international disputes, and so procedures designed to achieve the same effect as consultation can have an equally useful part to play. Where states enjoy close relations it may be possible to establish machinery for negotiating the coordination of legislative and administrative measures on matters of common interest. There are clear advantages in having uniform provisions on such matters as environmental protection, where states share a common frontier, or commerce, if trade is extensive. The difficulties of achieving

⁸ See C. C. Joyner, 'The evolving Antarctic legal regime', (1989) 83 AJIL p. 605 at p. 617. For an analogous recent development see the *Joint Communiqué and Declaration on the Establishment of the Arctic Council*, 1996, by the eight Arctic states. Text in (1996) 35 ILM p. 1382.

⁹ See J. Gold, 'Prior consultation in international law', (1983-4) 24 Va. JIL p. 729 at p. 737.

such harmonisation are considerable, as the experience of the European Community has demonstrated, though if uniformity cannot be achieved, compatibility of domestic provisions is a less ambitious alternative. In either case the rewards in terms of dispute avoidance make the effort well worthwhile.

Another approach is to give the foreign state, or interested parties, an opportunity to participate in the domestic legislative process. Whether this is possible depends on the legislative machinery being sufficiently accessible to make it practicable and the parties' relations being good enough for such participation, which can easily be construed as foreign interference, to be acceptable. When these conditions are fulfilled the example of North America, where United States gas importers have appeared before Canada's National Energy Board and Canadian officials have testified before Congressional Committees, shows what can be achieved.¹⁰

Consultation, then, is a valuable way of avoiding international disputes. It is therefore not surprising to find that in an increasingly interdependent world the practice is growing. The record, however, is still very uneven. Although, as we shall see in Chapter 9, consultation is increasingly important in international trade, on other issues which are likely to be major sources of disputes in the next century, such as access to resources and the protection of the environment, progress in developing procedures for consultation has been slower than would be desirable. Similarly, while there is already consultation on a number of matters between Canada and the United States and in Western Europe, in other parts of the world the practice is scarcely known. Finally, when such procedures have been developed, there is, as we have noted, an important distinction between consultation as a matter of obligation and voluntary consultation which states prefer.

The author of a comprehensive review of consultation was compelled by the evidence of state practice to conclude that:

Despite the growth of prior consultation norms, it is unlikely that there will be any all-encompassing prior consultation duty in the foreseeable future. Thus, to the extent that formal procedural structures for prior consultation may be desirable, they should be tailored to recurring, relatively well defined, troublesome situations.¹¹

The difficulty of persuading states to accept consultation procedures

¹⁰ See *Settlement of International Disputes between Canada and the USA* (Report of the American and Canadian Bar Associations' Joint Working Group, 1979) for a description of this and other aspects of United States-Canadian cooperation.

¹¹ Kirgis, *Prior Consultation*, p. 375.

and the ways in which they operate when established are reminders of the fact that states are not entities, like individuals, but complex groupings of institutions and interests. If this is constantly borne in mind, the salient features of negotiation and the means of settlement discussed in later chapters will be much easier to understand.

Forms of negotiation

Negotiations between states are usually conducted through ‘normal diplomatic channels’, that is by the respective foreign offices, or by diplomatic representatives, who in the case of complex negotiations may lead delegations including representatives of several interested departments of the governments concerned. As an alternative, if the subject matter is appropriate, negotiations may be carried out by what are termed the ‘competent authorities’ of each party, that is by representatives of the particular ministry or department responsible for the matter in question – between trade departments in the case of a commercial agreement, for example, or between defence ministries in negotiations concerning weapons procurement. Where the competent authorities are subordinate bodies, they may be authorised to take negotiations as far as possible and to refer disagreements to a higher governmental level. One of the treaty provisions discussed in the *Lake Lanoux* dispute, for example, provided that:

The highest administrative authorities of the bordering Departments and Provinces will act in concert in the exercise of their right to make regulations for the general interest and to interpret or modify their regulations whenever the respective interests are at stake, and in case they cannot reach agreement, the dispute shall be submitted to the two Governments.¹²

In the case of a recurrent problem or a situation requiring continuous supervision, states may decide to institutionalise negotiation by creating what is termed a mixed or joint commission. Thus neighbouring states commonly employ mixed commissions to deal with boundary delimitation, or other matters of common concern. The Soviet Union, for instance, concluded treaties with a number of adjoining states, providing for frontier disputes and incidents to be referred to mixed commissions with power to decide minor disputes and to investigate other cases, before referring them for settlement through diplomatic channels.¹³

¹² See the *Additional Act* to the three *Treaties of Bayonne* (1866) Art. 16 in (1957) 24 ILR p. 104.

¹³ For details see N. Bar-Yaacov, *The Handling of International Disputes by Means of Inquiry*, Oxford, 1974, pp. 117–19.

Mixed commissions usually consist of an equal number of representatives of both parties and may be given either a broad brief of indefinite duration, or the task of dealing with a specific problem. An outstanding example of a commission of the first type is provided by the Canadian–United States International Joint Commission, which since its creation in 1909, has dealt with a large number of issues including industrial development, air pollution and a variety of questions concerning boundary waters.¹⁴

An illustration of the different functions that may be assigned to ad hoc commissions is to be found in the *Lake Lanoux* dispute. After being considered by the International Commission for the Pyrenees, a mixed commission established as long ago as 1875, the matter was referred to a Franco-Spanish Commission of Engineers, set up in 1949 to examine the technical aspects of the dispute. When the Commission of Engineers was unable to agree, France and Spain created a special mixed commission with the task of formulating proposals for the utilisation of Lake Lanoux and submitting them to the two governments for consideration. It was only when this commission was also unable to agree that the parties decided to refer the case to arbitration, though not before France had put forward (unsuccessfully) the idea of a fourth mixed commission, which would have had the function of supervising execution of the water diversion scheme and monitoring its day-to-day operation.

If negotiation through established machinery proves unproductive, ‘summit discussions’ between heads of state or foreign ministers may be used in an attempt to break the deadlock. Though the value of such conspicuous means of negotiation should not be exaggerated, summit diplomacy may facilitate agreement by enabling official bureaucracies to be by-passed to some extent, while providing an incentive to agree in the form of enhanced prestige for the leaders concerned. It should be noted, however, that summit diplomacy is usually the culmination of a great deal of conventional negotiation and in some cases at least reflects nothing more than a desire to make political capital out of an agreement that is already assured.

A disadvantage of summit meetings is that, unlike conventional negotiations, they take place amid a glare of publicity and so generate expectations which may be hard to fulfil. The idea that a meeting

¹⁴ For an excellent survey of the work of the International Joint Commission see M. Cohen, ‘The regime of boundary waters – The Canadian–United States experience’, (1975) 146 *Hague Recueil des Cours* p. 219 (with bibliography). For a review of another commission see L. C. Wilson, ‘The settlement of boundary disputes: Mexico, the United States and the International Boundary Commission’, (1980) 29 ICLQ p. 38.

between world leaders has failed unless it produces a new agreement of some kind is scarcely realistic yet is epitomised by the mixture of hope and dread with which meetings between the leaders of the United States and the Soviet Union used to be surrounded. In an attempt to change this unhealthy atmosphere, in November 1989 President Bush described his forthcoming meeting with Mr Gorbachov as an 'interim informal meeting' and emphasised that there would be no specific agenda.¹⁵ It is doubtful if such attempts to damp down expectations can ever be wholly successful and even less likely that politicians would wish the media to treat their exploits on the international stage with indifference. However, as the solution of international problems is primarily a matter of working patiently with regular contact at all levels, there is much to be said for attempting to remove the unique aura of summit meetings and encouraging them to be seen instead as a regular channel of communication.

The public aspect of negotiations which is exemplified in summit diplomacy is also prominent in the activity of international organisations. In the United Nations General Assembly and similar bodies states can, if they choose, conduct diplomatic exchanges in the full glare of international attention. This is undoubtedly a useful way of letting off steam and, more constructively, of engaging the attention of outside states which may have something to contribute to the solution of a dispute. It has the disadvantage, however, that so visible a performance may encourage the striking of attitudes which are at once both unrealistic and difficult to abandon. It is therefore probable that for states with a serious interest in negotiating a settlement, the many opportunities for informal contact which international organisations provide are more useful than the dramatic confrontations of public debate.

Whether discussion of a dispute in an international organisation can be regarded as equivalent to traditional diplomatic negotiation is an issue which may also have legal implications. In the *South West Africa* cases (1962),¹⁶ one of South Africa's preliminary objections was that any dispute between itself and the applicants, Ethiopia and Liberia, fell outside the terms of the International Court's jurisdiction (which rested on Article 7 of the Mandate), because it had not been shown that the dispute was one which could not be settled by negotiation. The Court rejected the objection on the ground that extensive discussions in the United Nations on the question of South West Africa, in

¹⁵ See L. Freedman, 'Just two men in a boat', *The Independent*, 3 November 1989, p. 19.

¹⁶ *South West Africa, Preliminary Objections*, Judgment [1962] ICJ Rep. p. 319.

which South Africa and the applicants had been involved, constituted negotiations in respect of the dispute and the fact that those discussions had ended in deadlock indicated that the dispute could not be settled by negotiation.

In their joint dissenting opinion, Judges Spender and Fitzmaurice disagreed. In their view, what had occurred in the United Nations did not amount to negotiation within Article 7. Those discussions, they argued, failed to satisfy the requirements of Article 7 because such discussions had not been directed to the alleged dispute between the applicants and South Africa, merely to points of disagreement between the Assembly and South Africa. Even if this had not been so, proceedings within an international organisation could never be regarded as a substitute for direct negotiations between the parties because:

a 'negotiation' confined to the floor of an international Assembly, consisting of allegations of Members, resolutions of the Assembly and actions taken by the Assembly pursuant thereto, denial of allegations, refusal to comply with resolutions or to respond to action taken thereunder, cannot be enough to justify the Court in holding that the dispute 'cannot' be settled by negotiation, when no direct diplomatic interchanges have ever taken place between the parties, and therefore no attempt at settlement has been made at the statal and diplomatic level.¹⁷

The *Northern Cameroons* case¹⁸ raised a very similar issue. Article 19 of the Trusteeship Agreement for the Cameroons, like Article 7 of the Mandate, covered only disputes incapable of settlement by negotiation. The International Court, which decided the case on other grounds, did not discuss this aspect of Article 19. Fitzmaurice, however, examining the requirement in the light of his opinion in the *South West Africa* cases, observed that 'negotiation' did not mean 'a couple of States arguing with each other across the floor of an international assembly, or circulating statements of their complaints or contentions to its member States. That is disputation, not negotiation'¹⁹ and repeated his view that direct negotiations were essential. Finding that the only 'negotiations' in the present case had taken the form of proceedings in the General Assembly, Fitzmaurice upheld a British objection that the requirements of Article 19 had not been satisfied.

The issue here is clearly one that is likely to recur. International organisations, as already noted, provide an attractive forum for the airing of certain types of international disputes. How far it is appro-

¹⁷ *Ibid.*, p. 562.

¹⁸ *Northern Cameroons*, Judgment, [1963] ICJ Rep. p. 15.

¹⁹ *Ibid.*, p. 123.

priate to regard such exchanges as an alternative to conventional negotiation is a question which judicial institutions will have to resolve as part of the larger process of settling their relationship with their political counterparts.

Substantive aspects of negotiation

For a negotiated settlement to be possible, the parties must believe that the benefits of an agreement outweigh the losses. If their interests are diametrically opposed, an arrangement which would require one side to yield all or most of its position is therefore unlikely to be acceptable. This appears to have been the situation in the *Lake Lanoux* dispute, where the various attempts at a negotiated settlement encountered an insuperable obstacle in the irreconcilability of Spain's demand for a veto over works affecting border waters with France's insistence on its complete freedom of action.

There are a number of ways in which such an impasse may be avoided. If negotiations on the substantive aspects of a dispute are deadlocked, it may be possible for the parties to agree on a procedural solution. This is not an exception to the principle that gains must outweigh losses but an illustration of it, as the *Lake Lanoux* case demonstrates. For there the parties' eventual agreement to refer the dispute to arbitration provided both states with the benefits of a definitive settlement to a question which had been under discussion for almost forty years, and the removal of a serious irritant in Franco-Spanish affairs.

Another approach is to consider whether the issue at the heart of a dispute can be split in such a way as to enable each side to obtain satisfaction. A solution of this kind was devised in 1978 to the problem of maritime delimitation between Australia and Papua New Guinea in the Torres Strait.²⁰ Having identified the different strands of the dispute, the parties succeeded in negotiating an agreement which deals separately with the interests of the inhabitants of islands in the Strait, the status of the islands, seabed jurisdiction, fisheries jurisdiction, conservation and navigation rights. The virtue of this highly functional approach to the problem is underlined by the fact that earlier attempts to negotiate a single maritime boundary for the area had all ended in failure.

²⁰ See H. Burmester, 'The Torres Strait Treaty: Ocean boundary delimitation by agreement', (1982) 76 AJIL p. 321; also D. Renton, 'The Torres Strait Treaty after 15 years: Some observations from a Papua New Guinea perspective', in J. Crawford and D. R. Rothwell (eds.), *The Law of the Sea in the Asian Pacific Region*, Dordrecht, 1995, p. 171.

If splitting the dispute is not possible, a procedural agreement may be used to compensate one side for yielding on the substantive issue. In 1961 the United Kingdom and Iceland ended a dispute over the latter's fishing limits with an agreement which provided for the recognition of Iceland's claims in return for phasing out arrangements to protect British interests and an undertaking that future disputes could be referred to the International Court. The agreement provided that Iceland:

will continue to work for the implementation of the Althing Resolution of May 5, 1959, regarding the extension of fisheries jurisdiction around Iceland, but shall give the United Kingdom Government six months' notice of such extension and, in the case of a dispute in relation to such extension, the matter shall, at the request of either party, be referred to the International Court of Justice.²¹

Two points are worth noticing about this provision. First, whilst it is phrased in terms which permit recourse to the Court by either party, it is clear from the *travaux préparatoires* that it was included at Britain's request. Secondly, the reference to the Althing Resolution shows how a compromise can be agreed without prejudicing what one side regards as an important point of policy or principle.

Agreements like the one just quoted in which the parties are able to bring their negotiations to a successful conclusion, while agreeing to differ on what may appear to be a major obstacle to agreement, are not uncommon. Like other diplomatic techniques, such 'without prejudice' clauses are as useful in multilateral as in bilateral negotiations, where the need to avoid sensitive issues may be even greater. A particularly good example may be seen in the Antarctic Treaty of 1959,²² which succeeded in creating the basis for international administration of the area, while providing in Article 4 that:

1. Nothing contained in the present treaty shall be interpreted as:
 - (a) a renunciation by any Contracting Party of previously asserted rights of or claims to territorial sovereignty in Antarctica;
 - (b) a renunciation or diminution by any Contracting Party of any basis of claim to territorial sovereignty in Antarctica which it may have whether as a result of its activities or those of its nationals in Antarctica, or otherwise;
 - (c) prejudicing the position of any Contracting Party as regards its

²¹ See [1973] ICJ Rep. p. 8.

²² *Antarctic Treaty*, 1959. Text in (1960) 54 AJIL p. 477. For discussion of this and other aspects of the treaty see J. Hanessian, 'The Antarctic Treaty 1959', (1960) 9 ICLQ p. 436.

recognition or non-recognition of any other State's right of or claim or basis of claim to territorial sovereignty in Antarctica

2. No acts or activities taking place while the present treaty is in force shall constitute a basis for asserting, supporting or denying a claim to territorial sovereignty in Antarctica or create any rights of sovereignty in Antarctica. No new claim, or enlargement of an existing claim, to territorial sovereignty in Antarctica shall be asserted while the present treaty is in force.

A comparable bilateral example is the informal agreement between the United Kingdom and Argentina in 1989 to the effect that discussions between them would take place relating to various aspects of the Falkland Islands issue, but that the question of sovereignty would not be raised.²³ As in the case of Antarctica, the effect of this was that each side reserved its position on the sovereignty question, in order that negotiations could proceed on other matters.

It is easy to appreciate why such arrangements are popular with negotiators and to recognise their value in not so much bridging, as creating a detour around, incompatible positions. It seems improbable that in 1959 the question of Antarctica could have been dealt with in an acceptable way without the ingenious formula of Article 4. Similarly, it is only necessary to recall that in 1984 a previous attempt to discuss the Falkland Islands broke down when Argentina insisted on raising the issue of sovereignty, to appreciate the importance of a 'without prejudice' arrangement in that context. Such arrangements are not a panacea however. The issues on which states agree to differ are unlikely to disappear and to the extent that they are really important, far from being forgotten, will remain as a source of future problems. Within ten years of the 1961 Agreement Iceland was extending its fishing limits again and it is scarcely necessary to point out that at present neither the status of Antarctica, nor the future of the Falkland Islands can be regarded as completely settled. 'Without prejudice' arrangements should therefore be thought of less as a means of settling disputes by negotiation than as a way of managing them. By allowing attention to be focused on those matters which can be negotiated, they allow progress to be made until such time as other more intractable issues can be addressed.

It often happens that the nature of a dispute and the parties'

²³ The parties agreed to place the sovereignty issue under a so-called 'umbrella', while other differences were discussed. See Evans, 'The restoration of diplomatic relations', pp. 476-7. For the text of the informal agreement see (1990) 29 ILM p. 1291. The same formula was recently employed in the two states' *Joint Declaration on Co-operation over Offshore Activities in the South West Atlantic*, 1995; text in (1996) 35 ILM p. 301.

interests are such that in an agreement one side is bound to gain at the other's expense. A possible way of providing compensation in such a situation is to give the less-favoured party control of details such as the time and place of the negotiations. The latter in particular can assume considerable symbolic importance and thus constitutes an element which may be used to good effect. A more radical solution is to link two disputes together so that a negotiated settlement can balance gains and losses overall and be capable of acceptance by both sides. Such 'package deals' are particularly common in multilateral negotiations such as the Third United Nations Conference on the Law of the Sea, where the large number of states involved and the broad agenda made the trading of issues a conspicuous feature of the proceedings.²⁴

The fact that today the public dimension of diplomacy has much greater importance than in the past is another factor with a bearing on the substance of international negotiations. For if negotiation is a matter of exchanging proposals and counter-proposals in an attempt to arrive at an agreement from which both sides can derive a measure of satisfaction, the parties' awareness of an audience consisting of the general public in one or both of the states concerned, and the international community as a whole, can seriously affect the outcome. The element of give and take which is usually an essential part of a successful negotiation is likely to be inhibited if every step is being monitored by interested pressure groups at home, while the suspicion that the other side may simply be interested in eliciting a favourable audience reaction may lead serious proposals to be dismissed as mere propaganda. The difficulty of negotiating arrangements for arms limitation and disarmament in the era of the Cold War illustrates both points.

It follows that in sensitive negotiations, precautions may be necessary to ensure that the demands of the media do nothing to jeopardise agreement. In 1982 when the British military commander was negotiating the surrender of the Argentine forces in Port Stanley at the end of the conflict over the Falkland Islands, he insisted that the official photographer wait in an adjoining room until agreement had been secured. He explained afterwards that he had taken this step to avoid anything that might interfere with the final stages of the negotiations. While these were in progress the British government imposed a news black-out on Port Stanley for the same reason.²⁵

²⁴ See H. Caminos and M. R. Molitor, 'Progressive development of international law and the package deal', (1985) 79 AJIL p. 871.

²⁵ For an account of the negotiations see L. Freedman and V. Gamba-Stonehouse, *Signals of War. The Falklands Conflict of 1982*, London, 1990, Chapter 23.

Besides inhibiting possible agreement, the real or supposed need to keep the public informed as to the state of negotiations can itself be a cause of avoidable controversy. In the *Aegean Sea Continental Shelf* case the International Court was called upon to examine the legal significance of a joint communiqué issued to the press by the Prime Ministers of Greece and Turkey, following a meeting between them in May 1975. The key passage in the Communiqué was the paragraph which stated that:

In the course of their meeting the two Prime Ministers had an opportunity to give consideration to the problems which led to the existing situation as regards relations between their countries. They decided that those problems should be resolved peacefully by means of negotiations and as regards the continental shelf of the Aegean Sea by the International Court at the Hague.²⁶

Greece argued that this constituted an agreement to refer the dispute over the continental shelf to the Court and that it permitted unilateral recourse in the event of a refusal by either side to conclude any subsequent agreement that might be needed to implement the obligation. Turkey denied that the Communiqué had any legal force and argued that in any event it could not be said to contemplate recourse to the Court prior to the negotiation of a special agreement.

In its decision in 1978 the Court held that both the terms of the disputed instrument and the circumstances of its conclusion were relevant to its interpretation. The background of the Brussels Communiqué was, the Court found, a situation in which in previous diplomatic exchanges and at an earlier meeting of Foreign Ministers in Rome, the parties had discussed the possibility of a joint submission to adjudication. The Court found no evidence in the terms of the Communiqué to suggest that at the Brussels meeting this situation had changed and that the possibility of a unilateral reference had been in the parties' contemplation. Indeed, a reference in the Communiqué to a subsequent meeting of the parties' experts confirmed that only a joint reference of the matter had been envisaged. Further support for this construction was found in the parties' subsequent practice. From the first Turkey had insisted that a special agreement must be negotiated and even Greece had not sought to argue that the Communiqué alone provided a basis for the Court's jurisdiction until the

²⁶ [1978] ICJ Rep. pp. 39, 40. For a comprehensive review of this decision see D. H. N. Johnson, 'The International Court of Justice declines jurisdiction again', (1976-7) 7 Aust. Year Book Int. L. p. 309.

initiation of the present proceedings. Thus the Court's conclusion was that the Communiqué provided no basis for its jurisdiction.

In the *Maritime Delimitation and Territorial Questions* case²⁷ between Qatar and Bahrain, which raised a rather similar issue, the Court reached the opposite conclusion. The first question in that case was whether the minutes of a meeting of the Cooperation Council of Arab States, held in 1990, constituted an agreement between the two states capable of providing the ICJ with a basis of jurisdiction. The Court decided that they were an agreement, rather than a 'simple record of negotiations' as Bahrain maintained, and having established this point, then had to determine the content of the agreement. This called for decisions as to both the subject matter of the dispute and how it should be submitted which presented considerable difficulties. When states discuss submission of a dispute to the Court they therefore need to be clear about the nature and scope of their commitments if subsequent argument on these matters is to be avoided.

Negotiation and adjudication

Although negotiation is usually involved at some stage in every international dispute and in that sense is related to all of the other methods of settling disputes we shall be considering, its relation to one of them, adjudication, is particularly significant. Negotiation is a process which allows the parties to retain the maximum amount of control over their dispute; adjudication, in contrast, takes the dispute entirely out of their hands, at least as regards the court's decision. It is therefore not surprising that defining the point of transition from one to the other, and establishing the relation between them, have been matters to which states and international courts alike have had to give a good deal of attention.

One situation in which the connection is important is when states choose to make the exhaustion of attempts to settle a dispute by negotiation a condition of an adjudicator's jurisdiction. The questions which may arise here are, first, what is to be regarded as negotiation for jurisdictional purposes? And then, how is it to be established that the possibilities of a negotiated settlement have been exhausted? We have already seen that the *South West Africa* cases posed the first question with reference to diplomatic exchanges in the United Nations and the issue can also arise in other contexts. In the *Border and*

²⁷ *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility*, Judgments of 1 July 1994 and 15 February 1995, [1994] ICJ Rep. p. 112 and [1995] ICJ Rep. p. 6. For comment see M. D. Evans, Note (1995) 44 ICLQ p. 691.

Transborder Armed Actions case,²⁸ for instance, where the question was whether negotiations in a dispute between Honduras and Nicaragua were still in progress, the International Court decided that the multi-lateral diplomacy of the Contadora process constituted mediation rather than negotiation, and accordingly rejected an argument from Honduras to the effect that the Court's jurisdiction had not yet been established.

Showing that the possibilities of a negotiation have been exhausted might seem to require a demonstration that negotiations of some kind have taken place. Usually this will be so, but if one party to a dispute makes it clear that it is unwilling to negotiate, the absence of negotiations will not be regarded as an obstacle to an international court's exercising jurisdiction. Thus in the *Diplomatic Staff in Tehran* case,²⁹ one of the instruments relied on by the United States gave the International Court jurisdiction over any dispute 'not satisfactorily adjusted by diplomacy', but when the Court found that Iran had refused to discuss the hostages issue with the United States, it had no hesitation in ruling that its jurisdiction was established. Subsequently the Court used identical reasoning in the quite different circumstances of the *United Nations Headquarters Agreement* case.³⁰ The issue there was not whether the Court itself had jurisdiction, but whether a dispute between the United States and the United Nations was subject to compulsory arbitration. This depended on whether the dispute in question, which was over the closing of the office of the Palestine Liberation Organisation's Observer Mission in New York, was 'not settled by negotiation or other agreed mode of settlement'. The Court found that the Secretary-General had exhausted such possibilities as were open to him and, ruling that litigation of the dispute in the United States could not be regarded as an 'agreed mode of settlement', decided that the case was ready for arbitration.

The outcome of these cases demonstrates that when the parties to a dispute specify that negotiations are to have priority as a means of settlement, it will not be open to either of them to delay legal proceedings by the simple expedient of refusing to negotiate. Whilst it is easy to appreciate that any other view would deprive the parties' reference to adjudication of its intended force, a more difficult situation

²⁸ *Border and Transborder Armed Actions, Jurisdiction and Admissibility*, Judgment, [1988] ICJ Rep. p. 69. The Court's decision on this point and the significance of the Contadora process are further discussed in Chapter 11.

²⁹ *United States Diplomatic and Consular Staff in Tehran*, Judgment, [1980] ICJ Rep. p. 3.

³⁰ *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, Advisory Opinion, [1988] ICJ Rep. p. 12.

arises when negotiations take place but fail to yield a solution. Here the party which wishes to avoid litigation is likely to argue that further efforts at negotiation should be made, while its opponent will seek to persuade the court or tribunal that nothing more is needed to enable it to exercise jurisdiction. To spare the adjudicator the delicate task of deciding whether there is still a chance to reach a negotiated settlement, it is good policy to establish a time-limit for use of the preferred procedure. Thus the 1965 Convention on Transit Trade of Land-Locked Countries provides that:

Any dispute which may arise with respect to the interpretation or application of the provisions of this Convention which is not settled by negotiation or by other peaceful means of settlement within a period of nine months shall, at the request of either party, be settled by arbitration.³¹

Even if the parties are not required to explore the possibility of a negotiated settlement as a condition of international jurisdiction, diplomatic exchanges will usually be necessary to focus a disagreement to the point where it can be treated as an international dispute. In relation to adjudication this is particularly important because, as we shall see later, adjudication is a rather specialised way of resolving conflicts, and cannot be regarded as appropriate for every sort of disagreement. One reflection of their specialised function is that courts, unlike international political institutions, cannot be asked to deal with situations in which there is tension, but no specific questions to be resolved. It follows that one of the functions of negotiation is to bring such situations into focus so that any issues which might be put to a legal tribunal can be identified. Thus, quite apart from its jurisdictional significance, negotiation will often be needed to make the points of disagreement sufficiently concrete for reference to a court or tribunal to be a possibility.

Although this screening or concretising function is another significant facet of the relation between negotiation and adjudication, it would be wrong to see the link between the two processes as a necessary one, or to believe that negotiation is indispensable. To prove that a dispute exists it is necessary to show that 'the claim of one party is positively opposed by the other'.³² Usually this will be done by using the parties' diplomatic exchanges to demonstrate that official representations have defined the points in issue and that efforts to resolve the matter by negotiation have failed. However, there is no rule of law to

³¹ Article 16(1), 597 UNTS p. 3 (1967).

³² S. Rosenne, *The Law and Practice of the International Court* (2nd rev. edn), Dordrecht, 1985, p. 293.

the effect that a dispute exists only if it is reflected in a formal exchange of representations. If the subject of a disagreement is perfectly clear, then the International Court has indicated that it will be prepared to hold that a dispute exists, even if there has been no official contact. This was the situation in the *Diplomatic Staff in Tehran* case, where the actions of Iran had caused a break in relations but the Court had no hesitation in finding that there was a dispute with the United States, arising out of the interpretation or application of the relevant international conventions.

The above principle was reaffirmed in 1985 when the Court dealt with an application from Tunisia for revision and interpretation of its earlier decision in the *Tunisia–Libya Continental Shelf* case.³³ Rejecting an argument by Libya that the request was premature, the Court recalled that as long ago as 1927 its predecessor had said:

In so far as concerns the word ‘dispute’, the Court observes that, according to the tenor of Article 60 of the Statute, the manifestation of the existence of the dispute in a specific manner, as for instance by diplomatic negotiations, is not required. It would no doubt be desirable that a State should not proceed to take as serious a step as summoning another State to appear before the Court without having previously, within reasonable limits, endeavoured to make it quite clear that a difference of views is in question which has not been capable of being otherwise overcome. But in view of the wording of the article, the Court considers that it cannot require that the dispute should have manifested itself in a formal way; according to the Court’s view, it should be sufficient if the two Governments have in fact shown themselves as holding opposite views in regard to the meaning or scope of a judgment of the Court.³⁴

In these cases the Court was discussing the concept of a dispute in a special context, but it is clear that both the policy and the principle set out here are of general application. It may be unwise to initiate litigation before trying to settle a matter diplomatically; however, provided a clear difference of opinion on a legal issue is manifest, negotiation is not a prerequisite of adjudication.

Referring a case to a court or tribunal is merely one way of attempting to settle international differences and, as several of the cases we have been considering demonstrate, even when judicial settlement has been agreed on by the parties in advance, there is no guarantee that it will appeal to them equally when a dispute arises. A

³³ *Application for Revision and Interpretation of the Judgment of 4 February 1982 in the Case concerning the Continental Shelf (Tunisia v. Libyan Arab Jamahiriya)*, Judgment, [1985] ICJ Rep. p. 192.

³⁴ *Ibid.*, p. 218. The reference is to the *Chorzów Factory* case, PCIJ Series A, No. 13.

further question to be considered therefore is whether, as a matter of principle, the competence of an international court is affected if negotiation is also under way. To avoid misunderstanding it should be emphasised that the issue here is not whether it is open to the parties to agree to give negotiation formal priority. For, as we have seen, this can easily be arranged by including an appropriate provision in the instrument establishing jurisdiction. Rather, the question is whether the relation between negotiation and adjudication is such that it is inappropriate or impermissible for the two methods of settlement to be pursued simultaneously; whether in short the judge must be ready to defer to the negotiator.

This issue was one of the preliminary matters considered in the *Aegean Sea Continental Shelf* case.³⁵ Certain observations by the Turkish government were interpreted by the International Court as perhaps suggesting that it ought not to proceed while Greece and Turkey continued to negotiate, and that the existence of active negotiations was a legal impediment to the exercise of its jurisdiction. All this the Court emphatically rejected. It drew attention to the fact that negotiation and judicial settlement are enumerated together in Article 33 of the Charter and pointed out that on several occasions both methods have been pursued simultaneously. Moreover, in some cases judicial proceedings have been discontinued when negotiations resulted in a settlement. In the light of this, said the Court, 'the fact that negotiations are being actively pursued during the present proceedings, is not, legally, any obstacle to the exercise by the Court of its judicial function'.³⁶

Thus while negotiation is a basic means of attempting to settle disputes, any priority or privileged status which it is to enjoy depends on the parties, and not on considerations of principle bearing on justiciability. This is a sensible approach because it avoids placing unnecessary constraints on the actions of states and recognises that as international disputes are complex, the chances of a peaceful settlement are enhanced by allowing different procedures to be employed simultaneously. Though relevant to the relation between negotiation and adjudication, this point is no less pertinent in other contexts. For as we shall see in later chapters, the approach adopted in the *Aegean Sea* case has been followed in cases where the relation between adjudication and other political procedures was in issue.

The final aspect of negotiation which needs to be mentioned

³⁵ *Aegean Sea Continental Shelf*, Judgment, [1978] ICJ Rep. p. 3.

³⁶ *Ibid.*, p. 12. Since the Court made this observation several cases have been settled in the course of litigation. See, for example, the settlement of the Iran–United States *Aerial Incident* case in 1996, noted in (1996) 90 AJIL p. 278.

concerns what may be termed the substantive relation between negotiation and adjudication. If the parties to an international dispute attempt to deal with it by diplomacy, they may say and do things in the course of negotiation which could prejudice their case if the dispute is subsequently referred to adjudication. Although the dangers here should not be exaggerated and a state's actions can sometimes have the effect of improving its case, if such a prejudicial link exists (or is thought to exist) it may make a state reluctant to refer a dispute to adjudication. The answer to this type of problem is to insulate the judicial proceedings from the previous negotiations concerning the substance of the dispute. An example of how this can be done is provided by the Special Agreement under which the United States and Canada agreed to refer the *Gulf of Maine* case³⁷ to a chamber of the International Court. Article 5(1) of the Agreement stated:

Neither party shall introduce into evidence or argument, or publicly disclose in any manner, the nature or content of proposals directed to a maritime boundaries settlement, or responses thereto, in the course of negotiations or discussions between the parties undertaken since 1969.³⁸

This type of provision is rather rare, which perhaps suggests that excluding the evidence of diplomatic exchanges is only likely to be important when negotiations have been prolonged, or when criteria of reasonableness or acceptability are expected to play a significant part at the judicial stage. In the first situation, however, the value of being able to move from profitless negotiation to a definitive settlement is particularly marked; moreover, the tendency to use equitable criteria for certain kinds of decision means, as we shall see, that in some areas of international law, the line between adjudication, based on rules, and conciliation, emphasising accommodation, has become somewhat blurred. If, therefore, negotiation is not to be a barrier to adjudication, prohibitions on referring to diplomatic material at the stage when a dispute is being litigated may be increasingly necessary.

Limitations of negotiation

Negotiation is plainly impossible if the parties to a dispute refuse to have any dealings with each other. Serious disputes sometimes lead the

³⁷ *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, Judgment, [1984] ICJ Rep. p. 246. This case is discussed in Chapters 6 and 7.

³⁸ Text in (1981) 20 ILM p. 1378. A further reference to negotiations is to be found in Article 7(1) which provided that: 'Following the decision of the Chamber, either party may request negotiations directed toward reaching agreement on extension of the maritime boundary as far seaward as the Parties may consider desirable.'

states concerned to sever diplomatic relations, a step that is especially common when force has been used. Prominent examples include the severance of relations between the United States and Iran, following the seizure of the embassy in Tehran in 1979, and the breaking of diplomatic relations between Britain and Argentina after the invasion of the Falkland Islands in 1982. Of course, the termination of official relations need not entail the elimination of all contact between the states concerned. It does, however, preclude the use of the various standard arrangements for diplomatic contact, described earlier, and thus places a substantial obstacle in the path of negotiation.

Similar consequences flow from the use of non-recognition to deny standing to the other party to a dispute, or as a general mark of disapproval. Here the problem is that official channels are never established. The consequences of this are demonstrated by the Arab–Israeli situation, where until quite recently the refusal of the Arab states to recognise Israel and Israel’s refusal to acknowledge the PLO prevented direct negotiations. It is again possible for the absence of official communication to be mitigated by alternative means, as the extensive discussions between United States and Chinese representatives in the years before American recognition of the Peking government demonstrate. But where non-recognition is essentially a reflection of the substantive issues in dispute, as in the case of the Arab states and Israel, there is little reason for such links to be established.

Negotiation will be ineffective if the parties’ positions are far apart and there are no common interests to bridge the gap. The variety of ways in which an agreement can be constructed so as to satisfy both sides has already been pointed out. But it must be frankly recognised that in many situations no arrangement, however ingenious, is capable of fulfilling this function. In a territorial dispute the party in possession may see no reason to negotiate at all. In any dispute if one party insists on its legal rights, while the other, recognising the weakness of its legal case, seeks a settlement on some other basis, there is little room for agreement on matters of substance, and even a procedural agreement, to refer the dispute to arbitration, for example, may be difficult to negotiate without seeming to prejudice one side or the other.

Disagreement on the agenda for discussion, which may mean that negotiations never get beyond the stage of ‘talks about talks’, is usually a reflection of a wide gulf between the parties on some such substantive matter. For example, the reluctance of the United Kingdom to place the issue of sovereignty on the agenda of its discussions with Spain on the subject of Gibraltar is a clear indication of unwillingness to yield on the crucial issue of legal title. Whilst it is true that relations between

states are not static and that concessions which are unthinkable today may be regarded with equanimity tomorrow, in many disputes, including some of the most serious, until the time is ripe, negotiation can have little to offer.

Even when it is obvious that negotiation has only a small chance of success, it is commonly assumed that the parties to a dispute are duty bound to try. Whether this assumption is correct, depends on whether negotiation is ever to be regarded as an inappropriate means of settlement. The answer must be yes. If machinery for dispute settlement has already been agreed between the parties, a state which demands negotiation and refuses to use the agreed procedure is in breach of its obligations and has no reason to complain if its demands are refused. This was the position in the 1972 'Cod War' when Iceland repudiated the provisions for judicial settlement in the treaty quoted earlier and the United Kingdom referred the dispute to the International Court.³⁹

A more general objection is that the idea that states should always be prepared to negotiate ignores the fact that the terms of any agreement will generally reflect not the merits of each party's case, but their relative power.⁴⁰ Thus a state with a completely unjustified claim may be able to secure a favourable negotiated settlement by bringing superior power to bear. A party which possesses this kind of advantage will naturally tend to demand negotiations and to portray any resistance as unreasonable. But since it is clear that to negotiate in such a situation is to guarantee that the solution will be unjust, the weaker party has excellent grounds for refusing the invitation.

Another drawback appears if we consider the possibility that the attempt to resolve a dispute by negotiation may be unsuccessful. For negotiations which are unsuccessful do not, as might be thought, invariably leave a dispute where it was to begin with. On the contrary, although they can sometimes improve matters by demonstrating that the parties are slowly moving closer together, they can also have the opposite effect. Indeed, because negotiations involve exploring the possibilities for resolving a dispute peacefully, lack of progress may encourage the use of force by seeming to eliminate all the alternatives. As a commentator on the Falklands dispute put it:

While negotiations can control a conflict for a certain time while alternatives are being considered, every time an alternative is considered and

³⁹ See *Fisheries Jurisdiction (United Kingdom v. Iceland) Jurisdiction of the Court*, Judgment, [1973] ICJ Rep. p. 3.

⁴⁰ See Northedge and Donelan, *Political Aspects*, p. 282.

discarded by mutual agreement, the dispute . . . has less and less room to evolve toward settlement. The successful control of a conflict – not necessarily its resolution – seems to lie in the ability to avoid running short of viable alternatives.⁴¹

Events in the twenty-year period preceding the war of 1982 appear to bear out this analysis. Initially the United Kingdom denied that there was any dispute with Argentina, then, when this was no longer feasible, delayed formalising negotiations for as long as possible. The wisdom of this strategy became apparent when negotiations eventually began, because as one alternative after another was discussed and rejected, the prospects of securing a settlement which both sides could accept soon receded to vanishing point. This does not mean that Argentina was justified either legally or morally in attempting to seize the islands by force, nor that the failure of the parties' negotiations should be thought of as making the war inevitable. It does, however, suggest that the ending of negotiations can sometimes be the signal for a dispute to enter a new and more dangerous phase and, as a corollary, that an awareness of these implications can make governments reluctant to become involved with them.

A state can of course bind itself to negotiate by treaty, or find itself in a situation where an obligation to negotiate arises under the general law. In 1969, for example, 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'.⁴² Similarly, in 1974 it found that the United Kingdom and Iceland were 'under mutual obligations to undertake negotiations in good faith for the equitable solution of their differences',⁴³ concerning their respective fishery rights in the waters of Iceland. In both cases what the Court was saying was that since the rights of more than one state were in issue, the matter in question was not open to unilateral regulation, but had to be negotiated.

In the above situations, like the cases of consultation considered earlier, the duty to negotiate exists even before there is a dispute. Often, however, negotiation is laid down as a requirement when a dispute arises and forms either the exclusive procedure, or, more commonly, a necessary preliminary to the use of other methods. An

⁴¹ R. de Hoyos, 'Islas Malvinas or Falkland Islands: The negotiation of a conflict, 1945–1982', in M. A. Morris and V. Millán (eds.), *Controlling Latin American Conflicts*, Boulder, 1983, p. 185 at pp. 192–3.

⁴² *North Sea Continental Shelf*, Judgment, [1969] ICJ Rep. p. 3.

⁴³ *Fisheries Jurisdiction (United Kingdom v. Iceland) Merits*, Judgment, [1974] ICJ Rep. p. 3.

illustration of this type of obligatory negotiation may be seen in Article 41 of the 1978 Vienna Convention on Succession of States in Respect of Treaties,⁴⁴ which provides:

If a dispute regarding the application or interpretation of the present Convention arises between two or more Parties to the Convention, they shall, upon the request of any of them, seek to resolve it by a process of consultation and negotiation.

It is clear then that in some situations there is a duty to negotiate. Moreover in others, as we shall see in Chapter 8, the parties to a dispute may have a lesser obligation such as to 'proceed expeditiously to an exchange of views'⁴⁵ regarding the means of settlement to be adopted. However, it is worth emphasising that just as there is no general duty to consult other states before taking action which may affect them, so there is no general duty to attempt to settle disputes by negotiation. The various means of settlement in Article 33 of the Charter are listed as alternatives, and so in the absence of a specific obligation to negotiate a state is entitled to suggest that another procedure should be used. In a dispute concerning sovereignty over territory, for example, a state which is confident of its legal title may well advocate judicial settlement, as the United Kingdom did in the case of Gibraltar. Naturally the offer is unlikely to be accepted if the other party's claim is political rather than legal. But that is hardly the point. Negotiation is simply one means of settlement and, in the absence of a legal duty to negotiate, states are entitled to use it or not as they see fit.

None of the above is intended to imply that negotiation is not an extremely important means of dealing with international disputes. In almost all cases diplomatic exchanges will be necessary before a disagreement becomes sufficiently specific to be called a dispute, and once a dispute has arisen negotiation will often provide the best prospect of a solution. We have seen, however, that although negotiation must be regarded as basic, it may also be impossible, ineffective or inappropriate. As a consequence, use of the methods described in the following chapters may be essential if any progress is to be made.

⁴⁴ See R. Lavalle, 'Dispute settlement under the Vienna Convention on Succession of States in Respect of Treaties', (1979) 73 *AJIL* p. 407.

⁴⁵ United Nations Convention on the Law of the Sea (1982) Article 283. For further examples see S. L. Kass, 'Obligatory negotiations in international organisations', (1965) 3 *Can. Yearbook Int. L.* p. 36.