Disputes

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Peaceful settlement of. Australian attitudes.

Following is an article by the Legal Adviser to the Department of Foreign Affairs, Mr E Lauterpacht QC:[77]

> The efficacy of any particular mode of dispute settlement must depend upon the character of the dispute. Means appropriate to the settlement of legal disputes will not resolve political disputes; though, in the reverse situation, if the political will is present, the possibility of the settlement of legal disputes by political means is not to be excluded.
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> Dispute settlement is all too often thought of in terms of judicial activities of the International Court of Justice (ICJ). However, these represent only one relatively little used method of settling one of the two main categories of international dispute.
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> The first of these—to which judicial settlement is relevant—consists of those disputes which involve disagreements on the content of the law or on the existence of a fact. If these disagreements can be resolved, the dispute can normally be settled. Illustrations of this are provided by two recent arbitrations. One, between Chile and Argentina, related to the boundary in the Beagle Channel and sovereignty over certain islands lying at the Atlantic end of that Channel. The other, between Britain and France, involved the drawing of a boundary line between the areas of continental shelf belonging to the two parties in the English Channel and in the western approaches between the Cornwall peninsula and Brittany. In both cases it may be assumed that the parties will accept the awards and that the problem will as a result be solved. Such disputes may, for convenience, be called 'legal' disputes.
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> The other kind of dispute, though it may have in it elements of disagreement about law or fact and might in theory be capable of resolution if these elements were settled, goes deeper. It involves clashes of interest which transcend the other issues. The problems of the Middle East, and of Israel's relations with its neighbours, are a major illustration of an essentially political conflict, upon which determinations of law or fact could have very little impact. The same is true of the situation in Cyprus. Disputes of this nature may be called 'political' disputes. In effect, at least one of the parties is saying that it is discontented with the legal position and requires a change in it.
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> *Political disputes*
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> What do we mean by settlement by 'political' means or by 'legal' means? The basic element in the 'political' settlement of disputes is

77. Aust FA Rec, December 1977, 612.

negotiation, whether bilateral or multilateral. The international community has worked out a variety of methods of aiding disputants to reach a negotiated conclusion. Traditionally, these are listed as good offices, mediation and conciliation. Before international society was institutionalised in either universal form, such as the United Nations, or regional forms, such as the Organisation of African Unity and the Organisation of American States, the traditional methods involved the participation of a third state which lent its assistance to the disputants by seeking to bring them together at a negotiating table where they either negotiated alone (good offices), or in varying degrees, in the presence or with the assistance of a third party (conciliation or mediation). Although the role of individual states in these processes is by no means excluded today (for example, the role of Saudi Arabia in the dispute between Algeria and Morocco), it has largely been replaced by institutional activity. Thus, the activity of the UN Security Council—when not directed to the termination of a breach of the peace or an act of aggression—can be seen as a form of mediation between the parties in which the Security Council collectively, with its President playing an active role, fulfils the role of mediator. Moreover, the role of conciliation or mediation is sometimes played by the Secretary-General of the UN himself, or by an individual specially appointed for this purpose by the Secretary-General at the request of the Security Council. There are many modes of third party involvement—and all of them are directed towards promoting a settlement upon which the parties agree.

Legal disputes

'Legal' modes of settlement, on the other hand, are marked by the fact that a binding settlement is determined by the third party on the basis of law. They fall into two main classes: judicial settlement and arbitration. The former involves the use of a standing tribunal, with an institutional existence of its own, independent of the reference to it of any particular case. The ICJ is the principal example of such a tribunal. It has its seat at The Hague, where it is the judicial arm of the United Nations, endowed with the competence to decide any kind of international legal case which is referred to it by states. However, there are other established international courts, though they are normally more specialised and are open to a narrower group of states. For example, the Court of Justice of the European Communities has jurisdiction only in cases arising in connection with the treaties establishing the European Economic Community, the European Coal and Steel Community and Euratom; while the European Court of Human Rights operates as a tribunal of last recourse only between those members of the Council of Europe which are parties to the European Convention on Human Rights and in respect of questions arising under that Convention.

The other main category of instrument for the settlement of 'legal'

disputes is arbitration. While identical with judicial settlement in leading to a binding decision through the application of law, arbitration involves the establishment of a special tribunal, normally for each specific case. Once the case is over, the function of the tribunal is at an end. Reference has already been made to the recent awards in the arbitrations between Argentina and Chile as well as Britain and France. Some arbitrations are also conducted under the aegis of a standing system, for example, the Permanent Court of Arbitration or the World Bank Centre for the Settlement of Investment Disputes.

Jurisdiction of the ICJ

In contrast with domestic legal systems, where subjection to the jurisdiction of courts is obligatory, consent is the key to the exercise of jurisdiction in the international community—whether by courts or arbitral tribunals. Consent may be given in various ways. In the case of the ICJ it is not sufficient to be a party to its Statute. A further indication of acceptance of its jurisdiction must be identified. This can be either a declaration made under the Optional Clause (a form of unilateral contracting-in to the Court's compulsory jurisdiction) or an undertaking in a treaty to settle disputes arising under the treaty (or perhaps under other treaties) by recourse to the Court. The possibility of making declarations under the Optional Clause is one of the features which distinguishes the institutional character of the ICJ from the essentially ad hoc nature of arbitration—which usually takes place on the basis of a special agreement between the parties.

The choice between recourse to the ICJ and arbitration depends upon a variety of factors. For example, if a prospective plaintiff sees that a state against which it wishes to start proceedings is bound by the jurisdiction of the ICJ but is not a party to any relevant arbitration agreement, or is not willing to make one specially, it will naturally start proceedings in the Court. But when there is no operative provision between the parties requiring recourse to either the ICJ or arbitration and the states concerned have to decide which is the best system on which to agree for the settlement of the dispute, one runs into more fundamental problems. Thus, a number of states, particularly new states, have expressed a hesitation to accept the jurisdiction of the ICJ because they regard the manner in which it applies international law as unresponsive to their needs. At the same time, there are some developed states, with a long tradition of recourse to judicial settlement, which are equally reluctant to go to the ICJ, but for the opposite reason—that they consider that the manner in which the Court applies the law is insufficiently traditional and predictable. These differing approaches are interestingly reflected in the discussions at the Law of the Sea Conference (now approaching its seventh session) on the disputes settlement provisions of the emerging convention. The inability to agree on which is to be the preferred method has led to a novel proposal: each party may choose which of three

methods of settlement it prefers: a special new Law of the Sea Tribunal, the ICJ or arbitration. If a party makes no choice before becoming involved in a case, it is deemed to have chosen arbitration. Where the parties to a case have both chosen the same procedure the case will be settled by that procedure; where they have chosen different procedures it may go only to arbitration. There appears to be at the Conference a widespread inclination to accept a measure of compulsory dispute settlement—but the precise degree to which the parties are prepared to agree to judicial scrutiny of certain discretionary areas of their conduct still remains to be settled.

Australia's attitude

Australia has, for nearly half a century, been a leader in acknowledging the advantages and propriety of obligatory and effective legal methods of dispute settlement. Having originally accepted the compulsory jurisdiction of the Permanent Court of International Justice (the predecessor of the ICJ) in 1930, Australia in 1975 enlarged that acceptance by deleting the few reservations which it had previously maintained. In the Law of the Sea Conference the name of Australia's Ambassador to the United Nations, Mr Ralph Harry, has been closely associated with the evolution of the disputes settlement provisions.

Disputes

Peaceful settlement of. International Court of Justice. Access to.

Following is the text of a note concerning jurisdiction of the International Court:[78]

The number of recent public references to the International Court of Justice (ICJ) suggests that the limitations on the jurisdiction of the Court may not be fully understood outside international legal circles. The Court is the principal judicial organ of the UN. Every member of that organisation is a party to the Statute of the Court. However, that by itself does not give the Court jurisdiction over every member. The Statute itself determines who may bring cases before the Court and under what conditions.

The only entities which may bring cases before the Court are States. Article 34 of the Statute expressly provides: 'Only States may be parties to disputes before the Court'. This provision thus excludes the possibility of actions by entities which though they may be called 'States' within their national constitutional systems are not in fact independent States carrying on their own foreign affairs. Thus, the states constituting the Commonwealth of Australia cannot proceed individually or directly before the ICJ.

Nor may individuals do so. Where an individual has suffered injury in a foreign State as a result of conduct which violates the standards prescribed by international law, only the State of which that individual is a national can, to use the technical expression, 'espouse his

78. *Backgrounder*, 16 July 1976.

claim'. But the right of the national State of an injured individual—or even of any State to present a claim on its own behalf because of some infringement of its sovereignty—still depends upon establishing that the Court possesses jurisdiction under its Statute.

The fundamental principle controlling the Court's jurisdiction is that it may be exercised only with the consent of the defendant State. This consent may be given in various ways. One is by express agreement. This normally takes the form of an appropriate provision in a treaty. The treaty may be one which deals primarily with some substantive matter and in addition contains a 'disputes settlement clause' under which the parties are entitled to refer disputes to the Court for settlement. Or the treaty may be one specifically dealing with the settlement of disputes over a wide range of substantive issues. For example, when Australia commenced proceedings against France in the *Nuclear Tests* case, the basis of jurisdiction invoked by Australia was the General Act for the Pacific Settlement of Disputes of 1928. This was a multilateral treaty establishing a comprehensive system of disputes settlement between the parties to it.

Another important way in which the Court may obtain jurisdiction is by means of unilateral declarations made by States in pursuance of the so-called 'Optional Clause' of the Court's Statute. Although the exact terms of the declarations may differ and the scope of the jurisdiction thereby accepted may accordingly vary, the basic concept of the Optional Clause is that any State making a declaration under it thereby gives its consent to the commencement of proceedings against it by any other State making a comparable declaration. The concept of reciprocity of declarations is essential to the operation of the system. Some 45 States have made such declarations. Australia made her original declaration in 1930 and replaced it in 1975 with a comprehensive and virtually unconditional acceptance of the Court's jurisdiction.

In addition, it is always possible for States to agree after a dispute has actually arisen that it should be settled by the Court. And on occasion States have even commenced proceedings against others in the hope that the latter will then accept the jurisdiction of the Court.

The Court applies only international law. It is expressly not allowed to decide cases by reference to general considerations of fairness or equity—unless the parties both specially consent. However, there are a number of areas of international law in which States are now required to act in an equitable manner. In such cases, the Court applies equity because the law requires it to do so.

Judgments of the Court are binding on the parties. But the Court has no doctrine of binding precedent and is not obliged to apply its own previous decisions—though in practice it does so. Generally speaking, parties comply with the decisions of the Court. For those who fail to do so there exists the possibility that they may be taken to the

Security Council which has the power to make such recommendations or take such decisions as the circumstances may require. In fact, the Security Council has never been asked to exercise this power.

What has been said above relates only to the Court's contentious jurisdiction, that is to say disputes between States. However, there is another important branch of the Court's jurisdiction, namely, its power to give Advisory Opinions. These may be sought only by international organisations and the questions must relate to legal issues arising out of their activities. It is not possible for States to ask for Advisory Opinions. The most frequent source of request for opinions has been the General Assembly of the United Nations, which has sought guidance from the Court on such questions as UN membership, UN finances, the obligations of South Africa in relation to the mandate for South-West Africa and the status of Western Sahara.

In theory, the Advisory Opinion procedure may not be used as a device to get round a refusal by a State to accept the contentious jurisdiction of the Court. But in practice the Court will not refuse to deal with a request for an Advisory Opinion even though it raises a question actually in dispute between States, if an answer is required to enable the UN General Assembly properly to perform its functions.

The Advisory Opinions given by the Court are, as the expression implies, merely 'advisory'. However, the decisions are reached by the same process as are judgments in contentious cases, and therefore they carry the same authority even though they do not possess the same formal binding quality.

The Court consists of 15 judges. They are not elected as representatives of States though they are, of course, nationals of States. At the present time the judges are from the following countries:

Argentina
Dahomey
Federal Republic of Germany
India
Japan
Nigeria
Poland
Senegal
Spain
Syria
Uruguay
United Kingdom
United States of America
U.S.S.R.

The Court decides cases by majority and, in the case of an equal division of votes, the President has the casting vote. The decision of

the Court is incorporated in a judgment which represents the collective view of the Court, but individual judges may file separate opinions if they agree with the conclusion but differ as to their reasoning, or dissenting opinions if they do not agree with the conclusion of the Court.

The ICJ is not the only international tribunal, but it is the only one with general jurisdiction operating within the UN system. Outside this system, there are special regional tribunals to deal with specific issues, such as those arising within the EEC. It is probable that the current Law of the Sea negotiations will contain settlement of disputes provisions which establish a special Law of the Sea Tribunal. It is also open to States to submit cases to arbitration—a process which involves the establishment of a special tribunal in the particular case.