MECHANISMS OF DISPUTE RESOLUTION IN INTERNATIONAL LAW

Among states, different political, legal, economic, military and other misunderstandings and differences appear, but only some of them may, under specified conditions, turn into conflicts.

An international dispute arises among states whenever in their relations to one another certain opposing claims, interests and rights have crystallized with respect to certain concrete issues.

In its broad meaning, the term “dispute” refers to complaints, litigations, disagreements or conflicts between two subjects of international law. The definition of a dispute has been the subject of some consideration by the International Court, but the reference by the Permanent Court in the Mavrommatis Palestine Concessions (Jurisdiction) case to ‘a disagreement over a point of law or fact, a conflict of legal views or of interests between two persons’ constitutes an authoritative indication. A distinction is sometimes made between legal and political disputes, or justiciable and non-justiciable disputes. Although maintained in some international treaties, it is to some extent unsound, in view of the fact that any dispute will involve some political considerations and many overtly political disagreements may be resolved by judicial means.

International disputes may be legal or a political disputes:

a) legal disputes are the disputes where opposing legal claims arise among states, dealing with interpretation of a treaty, a matter of international law, the existence or not of an alleged violation of an international obligation, as well as with the establishment of the nature or extent of the damages due in case of violation of international obligations

b) political disputes are the disputes where the parties' conflicting claims cannot be legally formulated.

In the world of national interests the chief methods of international conflict management were the traditional diplomatic, military, and economic means of influence, up to and including the threat or use of force. The United Nations Charter in 1945 gave birth to a radical new international framework under which states must never resort to armed force to settle disputes except in limited circumstances. Contemporary international law, which forbids the use of force or the threat of force in relations between states, requires that all international disputes be resolved only by peaceful means, on the basis of an accord between the disputing states. Article 2(4) of the UN Charter prohibits the threat or use of force by states other than in individual or collective self-defence (Article 51). Article 2(3) provides that all members ‘shall settle their international disputes by peaceful means in such a manner that
international peace and security, and justice, are not endangered’. This principle is also maintained by the Pact of the Arab League (art. V), the Charter of the Organization of African Unity (art. 3), and the Declaration on the Principles of International Law Concerning Friendly Relations Among States in Accordance With the Charter of the UN (1970).

Article 33(1) of the UN Charter further obliges parties to a dispute to seek resolution first by ‘negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice’. Article 33(2) gives the Security Council the power to call upon parties to settle disputes by such means as those listed in Article 33(1) when it deems necessary. The Security Council also has the power under Chapter VII to take measures to maintain or restore international peace and security, which includes the creation of international criminal tribunals.

Peaceful settlement of international disputes largely depends on the good faith of the states in dispute and their will to resort conciliation and mutual compromise. In the absence of such will, antagonisms that underlie the dispute remain irreconcilable.

International law does not predetermine the precise peaceful means of resolving a specific dispute but allows the states to choose these means themselves. Article 33 of the UN Charter lists the following peaceful means for resolving international disputes: negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, and recourse to regional agencies or arrangements. Peaceful means of resolving international disputes also include various conciliatory procedures, including good offices and the creation of investigation and conciliation commissions. In contrast to direct negotiations, conciliatory procedures usually feature the participation of third states or international bodies, with the consent of the disputing states.

Basically the techniques of conflict management fall into two categories: diplomatic procedures and adjudication. The former involves an attempt to resolve differences either by the contending parties themselves or with the aid of other entities by the use of the discussion and factfinding methods. Adjudication procedures involve the determination by a disinterested third party of the legal and factual issues involved, either by arbitration or by the decision of judicial organs.

**Negotiation** involves discussions between the disputing parties seeking to understand the different positions they hold in order to resolve the dispute. There is generally no third party involvement, and the negotiations are purely consensual and informal. Therefore, for negotiations to be successful they require a measure of goodwill, flexibility and mutual understanding between the parties. Even if a negotiation fails to resolve a dispute, it will often assist the parties in clarifying the nature of the disagreement and the issues in dispute and in obtaining a clearer idea of
their own and each other’s positions, what they are willing to compromise on and what it might take to resolve the dispute.

Many treaties provide for negotiation as a precondition to binding international dispute resolution. Examples include Article 84 of the Vienna Convention on the Representation of States in their Relations with International Organizations (1975) and Article 41 of the Convention on the Succession of States in Respect of Treaties (1978).

However, neither in the UN Charter nor otherwise in international law is there any general rule that requires the exhaustion of diplomatic negotiations as a precondition for a matter to be referred to a court or tribunal.

Nevertheless, the court or tribunal may direct parties at the preliminary stages of the proceedings to negotiate in good faith and to indicate certain factors to be taken into account in that negotiation process. Ultimately, there is no obligation on states to reach agreement, only that ‘serious efforts towards that end will be made’. This requires parties to ‘negotiate, bargain and in good faith attempt to reach a result acceptable to both parties’.

Examples of a breach of good faith have included unusual delays, continued refusal to consider proposals and breaking off discussions without justification. Negotiations may continue while there are other resolution processes under way, formal or informal, and a resolution may be reached at any time.

The employment of the procedures of good offices and mediation involves the use of a third party, whether an individual or individuals, a state or group of states or an international organisation, to encourage the contending parties to come to a settlement. Unlike the techniques of arbitration and adjudication, the process aims at persuading the parties to a dispute to reach satisfactory terms for its termination by themselves.

Technically, good offices are involved where a third party attempts to influence the opposing sides to enter into negotiations, whereas mediation implies the active participation in the negotiating process of the third party itself. In fact, the dividing line between the two approaches is often difficult to maintain as they tend to merge into one another, depending upon the circumstances. One example of the good offices method is the function performed by the USSR in assisting in the peaceful settlement of the India–Pakistan dispute in 1965.

Where differences of opinion on factual matters underlie a dispute between parties, the logical solution is often to institute a commission of inquiry to be conducted by reputable observers to ascertain precisely the facts in contention. Provisions for such inquiries were first elaborated in the 1899 Hague Conference as a possible alternative to the use of arbitration. However, the technique is limited in that it can only have relevance in the case of international disputes, involving neither the honour nor the vital interests of the parties, where the conflict centres around a
genuine disagreement as to particular facts which can be resolved by recourse to an impartial and conscientious investigation.

The process of conciliation involves a third-party investigation of the basis of the dispute and the submission of a report embodying suggestions for a settlement. As such it involves elements of both inquiry and mediation, and in fact the process of conciliation emerged from treaties providing for permanent inquiry commissions. Conciliation reports are only proposals and as such do not constitute binding decisions.

Conciliation processes do have a role to play. They are extremely flexible and by clarifying the facts and discussing proposals may stimulate negotiations between the parties. The rules dealing with conciliation were elaborated in the 1928 General Act on the Pacific Settlement of International Disputes (revised in 1949).

Disputes between states can also be resolved with the aid of international courts and arbitration bodies. International disputes today are resolved more and more often through international organizations, which resort to procedures provided for in their charters. In the UN, the peaceful resolution of disputes is handled primarily by the Security Council; the General Assembly and the International Court of Justice are sometimes called upon to resolve disputes.

Arbitration, a form of alternative dispute resolution (ADR), is a legal technique for the resolution of disputes outside the courts, where the parties to a dispute refer it to one or more persons (the “arbitrators”, “arbiters” or “arbitral tribunal”), by whose decision (the “award”) they agree to be bound. It is a settlement technique in which a third party reviews the case and imposes a decision that is legally binding for both sides. Other forms of ADR include mediation (a form of settlement negotiation facilitated by a neutral third party) and non-binding resolution by experts. Arbitration is often used for the resolution of commercial disputes, particularly in the context of international commercial transactions. The use of arbitration is also frequently employed in consumer and employment matters, where arbitration may be mandated by the terms of employment or commercial contracts.

International arbitration is a leading method for resolving disputes arising from international commercial agreements and other international relationships. As with arbitration generally, international arbitration is a creature of contract, i.e., the parties' decision to submit disputes to binding resolution by one or more arbitrators selected by or on behalf of the parties and applying adjudicatory procedures, usually by including a provision for the arbitration of future disputes in their contract. The practice of international arbitration has developed so as to allow parties from different legal and cultural backgrounds to resolve their disputes, generally without the formalities of their respective legal systems.

International arbitration has enjoyed growing popularity with business and other users over the past 50 years. There are a number of reasons that parties elect to
have their international disputes resolved through arbitration. These include the desire to avoid the uncertainties and local practices associated with litigation in national courts, the desire to obtain a quicker, more efficient decision, the relative enforceability of arbitration agreements and arbitral awards (as contrasted with forum selection clauses and national court judgments), the commercial expertise of arbitrators, the parties' freedom to select and design the arbitral procedures, confidentiality and other benefits.

International arbitration is a significant variant of the practice in many countries of arbitration, from which it is derived and shares many features. It is not just the fact that international arbitration arises in the context of international contracts that makes it different. In the international dispute resolution community, it is widely accepted to be a different animal entirely, involving different practices and rules, and being represented by a different community of arbitrators and legal practitioners.

The ability to resolve disputes in a neutral forum and the enforceability of binding decisions are often cited as the main advantages of international arbitration over the resolution of disputes in domestic courts. And there is solid legal support for this view. The principal instrument governing the enforcement of commercial international arbitration agreements and awards is the United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the "New York Convention"). The New York Convention was drafted under the auspices of the United Nations and has been ratified by more than 150 countries, including most major countries involved in significant international trade and economic transactions. The New York Convention requires that the states that have ratified it to recognize and enforce international arbitration agreements and foreign arbitral awards issued in other contracting states, subject to certain limited exceptions. These provisions of the New York Convention, together with the large number of contracting states, has created an international legal regime that significantly favors the enforcement of international arbitration agreements and awards.

Parties to international contracts can decide to site their disputes in a third, neutral country, knowing that the eventual award can be easily enforced in any country that is a signatory to the New York Convention, which has been ratified by a significant majority of commercial nations (with notable exceptions like Iraq, which, not having ratified the New York Convention, cannot be assumed to give effect to arbitration decisions rendered in other countries). An international award therefore has substantially greater executory (legal) force than a domestic court decision.

Under the New York Convention, if a party to arbitration commences legal proceedings in breach of an arbitration agreement against another contracting party, the court is obligated to stay the proceedings. Chapter 2 of the Federal Arbitration
Act sets forth the statutory basis for an American court to issue a stay in connection with contracts falling within the ambit of the New York Convention.

The resolution of disputes under international commercial contracts is widely conducted under the auspices of several major international institutions and rule making bodies. The most significant are the International Chamber of Commerce (ICC), the International Centre for Dispute Resolution (ICDR), the international branch of the American Arbitration Association, the London Court of International Arbitration (LCIA), the Hong Kong International Arbitration Centre, and the Singapore International Arbitration Centre (SIAC). Specialist ADR bodies also exist, such as the World Intellectual Property Organisation (WIPO), which has an arbitration and mediation center and a panel of international neutrals specialising in intellectual property and technology related disputes.

In a more recent development, the Swiss Chambers of Commerce of Industry of Basel, Berne, Geneva, Lausanne, Lugano, Neuchâtel and Zurich have adopted a new set of Swiss Rules of Commercial Mediation that are designed to integrate fully with the Swiss Rules of International Arbitration that were previously adopted by these chambers to harmonize international arbitration and mediation proceedings across Switzerland.

As has been seen, there is a considerable variety of means, mechanisms and institutions established to resolve disputes in the field of international law. However, a special place is accorded to the creation of judicial bodies. Such courts and tribunals may be purely inter-state or permit individuals to appear as applicants or respondents. They may be permanent or temporary, being established to resolve one particular dispute.

Like arbitration, judicial settlement is a binding method of dispute settlement, but by means of an established and permanent body. There are a number of international and regional courts deciding disputes between subjects of international law, in accordance with the rules and principles of international law.

Article 52(1) of Chapter VIII of the UN Charter provides that nothing in the Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the purposes and principles of the UN. Article 52(2) stipulates that members of the UN entering into such arrangements or agencies are to make every effort to settle local disputes peacefully through such regional arrangements or by such regional agencies before referring them to the Security Council, and that the Security Council encourages the development of the peaceful settlement of local disputes through such regional arrangements. That having been said, article 52(4) stresses that the application of articles 34 and 35 of the UN Charter relating to the roles of the Security Council and General Assembly remains
The supremacy of the Security Council is reinforced by article 53(1) which provides that while the Council may, where appropriate, utilise such regional arrangements or agencies for enforcement action under its authority, ‘no enforcement action shall be taken under regional arrangements or by regional agencies without the authorisation of the Security Council’.

In practice and in relation to the adoption of active measures, the UN is likely to defer to appropriate regional mechanisms while realistic chances exist for a regional settlement.

Various regional organisations have created machinery for the settlement of disputes.

The Organisation of African Unity was established in 1963. Article XIX of its Charter referred to the principle of ‘the peaceful settlement of disputes by negotiation, mediation, conciliation or arbitration’ and to assist in achieving this a Commission of Mediation, Conciliation and Arbitration was established by the Protocol of 21 July 1964. The jurisdiction of the Commission was not, however, compulsory and it was not utilised. African states were historically unwilling to resort to judicial or arbitral methods of dispute settlement and in general preferred informal third-party involvement through the medium of the OAU. In the Algeria–Morocco boundary dispute, for example, the OAU established an ad hoc commission consisting of the representatives of seven African states to seek to achieve a settlement of issues arising out of the 1963 clashes. Similarly in the Somali–Ethiopian conflict, a commission was set up by the OAU in an attempt to mediate. Despite mixed success, it became fairly established practice that in a dispute involving African states, initial recourse will be made to OAU mechanisms, primarily ad hoc commissions or committees.

There are in addition a number of subregional organisations in Africa which are playing an increasing role in conflict resolution. First and foremost is the Economic Community of West African States (ECOWAS) created in 1975. The constituent instrument was revised in 1993 and article 58 of the revised treaty refers to the responsibility of ECOWAS to prevent and settle regional conflicts, with the ECOWAS Cease-fire Monitoring Group (ECOMOG) as the adopted regional intervention force.

Article 23 of the Charter of the Organisation of American States, signed at Bogota in 1948 and as amended by the Protocol of Cartagena de Indias, 1985, provides that international disputes between member states must be submitted to the Organisation for peaceful settlement, although this is not to be interpreted as an impairment of the rights and obligations of member states under articles 34 and 35 of the UN Charter. The 1948 American Treaty of Pacific Settlement (the Pact of Bogot’a, to be distinguished from the Charter) sets out the procedures in detail,
ranging from good offices, mediation and conciliation to arbitration and judicial settlement by the International Court of Justice.

The Arab League, established in 1945, aims at increasing co-operation between the Arab states. Its facilities for peaceful settlement of disputes amongst its members are not, however, very well developed, and in practice consist primarily of informal conciliation attempts. One notable exception was the creation in 1961 of an Inter-Arab Force to keep the peace between Iraq and Kuwait.

The European Convention for the Peaceful Settlement of Disputes adopted by the Council of Europe in 1957 provides that legal disputes (as defined in article 36(2) of the Statute of the International Court of Justice) are to be sent to the International Court, although conciliation may be tried before this step is taken. Other disputes are to go to arbitration, unless the parties have agreed to accept conciliation.

Within the NATO alliance, there exist good offices facilities, and inquiry, mediation, conciliation and arbitration procedures may be instituted. In fact, the Organisation proved of some use, for instance in the longstanding ‘cold war’ between Britain and Iceland, two NATO partners. The Organisation on Security and Co-operation in Europe (OSCE) has gradually been establishing dispute resolution mechanisms. Under the key documents of this organisation, the participating states are to endeavour in good faith to reach a rapid and equitable solution of their disputes by using a variety of means.

The various specialised agencies which encourage international cooperation in functional spheres have their own procedures for settling disputes between their members relating to the interpretation of their constitutional instruments. Such procedures vary from organisation to organisation, although the general pattern involves recourse to one of the main organs of the institution upon the failure of negotiations. If this fails to result in a settlement, the matter may be referred to the International Court of Justice or to arbitration unless otherwise agreed.

There are a number of procedures and mechanisms which seek to resolve disputes in particular areas, usually economic and involving mixed disputes, that is between states and non-state entities. These processes are becoming of considerable significance and many of them are having a meaningful impact upon general international law.

The dispute settlement procedures established under the General Agreement on Tariffs and Trade commenced with bilateral consultations under article XXII.

A number of regional dispute mechanisms concerning economic questions have been established. The most developed is the European Union, which has a fully functioning judicial system with the Court of Justice in Luxembourg with wide-ranging jurisdiction. Other relevant, but modest regional economic mechanisms include Mercosur (Argentina, Brazil, Paraguay and Uruguay), Comesa and ECOWAS.
The International Centre for Settlement of Investment Disputes was established under the auspices of the World Bank by the Convention on the Settlement of Investment Disputes Between States and the Nationals of Other States, 1965 and administers ad hoc arbitrations. It constitutes a framework within which conciliation and arbitration takes place and provides an autonomous system free from municipal law in which states and non-state investors (from member states) may settle disputes. States parties to the Convention undertake to recognise awards made by arbitration tribunals acting under the auspices of the Centre as final and binding in their territories and to enforce them as if they were final judgments of national courts.

Another procedure of growing importance is the Court of Arbitration of the International Chamber of Commerce. A number of agreements provide for the settlement of disputes by arbitration under the Rules of the International Chamber of Commerce and several cases have been heard. Also to be noted is the set of rules adopted by the UN Commission on International Trade Law (UNCITRAL) in 1966.

Turning to the main international judicial bodies, the International Court of Justice, located at the Hague in the Netherlands, is the principal judicial organ of the United Nations. It was established in June 1945 by the Charter of the United Nations and began work in April 1946. Its main functions are to settle legal disputes submitted to it by states and to give advisory opinions on legal questions submitted to it by duly authorized international organs, agencies, and the UN General Assembly. Its Statute is an integral part of the United Nations Charter.

The Court's role is to settle, in accordance with international law, legal disputes submitted to it by States and to give advisory opinions on legal questions referred to it by authorized United Nations organs and specialized agencies.

The ICJ is composed of fifteen members: elected regardless of their nationality, from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognised competence in international law. The procedure for the appointment of judges is interesting in that it combines both legal and political elements, while seeking to exclude as far as possible the influence of national states over them.

The members of the Court are elected by the General Assembly and Security Council (voting separately) from a list of qualified persons drawn up by the national groups of the Permanent Court of Arbitration, or by specially appointed national groups in the case of UN members that are not represented in the PCA. The members of the Court are elected for nine years and may be re-elected. They enjoy diplomatic privileges and immunities when on official business, and a judge cannot be dismissed unless it is the unanimous opinion of the other members of the Court that he or she has ceased to fulfil the required conditions/
The Rules of the Court, which govern its procedure and operations, were adopted in 1946 and revised in 1972 and 1978. Articles 79 and 80 of the 1978 Rules were amended in 2000 and 2005. The internal judicial practice of the Court has been the source of discussion in recent years and some changes have taken place. The Court, for example, now adopts Practice Directions. The Court has the power to regulate its own procedure. Written pleadings are governed by articles 44 to 53 of the Rules of Court, which in fact allow the parties considerable latitude. While it is for the Court itself to determine the number, order and timing of filings of pleadings, this is done in consultation with the parties and the Court is ready to allow parties to extend time limits or determine whether, for example, there should be further rounds of pleadings.

The International Court is a judicial institution that decides cases on the basis of international law as it exists at the date of the decision. It cannot formally create law as it is not a legislative organ. The Court has emphasised that, ‘it states the existing law and does not legislate. This is so even if, in stating and applying the law, the Court necessarily has to specify its scope and sometimes note its general trend.

The Court has underlined that the question as to the establishment of jurisdiction is a matter for the Court itself. Although a party seeking to assert a fact must prove it, the issue of jurisdiction is a question of law to be resolved by the Court in the light of the relevant facts. Further, jurisdiction must be determined at the time that the act instituting proceedings was filed, so that if the Court had jurisdiction at that date, it will continue to have jurisdiction irrespective of subsequent events. Subsequent events may lead to a finding that an application has become moot, but cannot deprive the Court of jurisdiction. It should also be noted that in dealing with issues of jurisdiction, the Court will not attach as much importance to matters of form as would be the case in domestic law. The Court possesses an inherent jurisdiction to take such action as may be required in order to ensure that the exercise of its jurisdiction over the merits, once established, is not frustrated, and to ensure the orderly settlement of all matters in dispute, to ensure the ‘inherent limitations on the exercise of the judicial function’ of the Court and to ‘maintain its judicial character’. The Court has also held that where jurisdiction exists over a dispute on a particular matter, no separate basis for jurisdiction is required in order to consider the question of remedies.

The Court has jurisdiction under article 36(1) of its Statute in all cases referred to it by parties, and regarding all matters specially provided for in the UN Charter or in treaties or conventions in force. As in the case of arbitration, parties may refer a particular dispute to the ICJ by means of a special agreement, or compromis, which will specify the terms of the dispute and the framework within which the Court is to operate. This method was used in the Minquiers and Ecrehos case, and in a number of others.
In its deliberations, the Court will apply the rules of international law as laid down in article 38 (treaties, custom, general principles of law). However, the Court may decide a case *ex aequo et bono*, i.e. on the basis of justice and equity untrammelled by technical legal rules where the parties agree.

Once given, the judgment of the Court under article 60 is final and without appeal. Although it has no binding force except between the parties and in respect of the particular case under article 59, such decisions are often very influential in the evolution of new rules of international law. The Court itself is not concerned with compliance and takes the view that ‘once the Court has found that a state has entered into a commitment concerning its future conduct it is not the Court’s function to contemplate that it will not comply with it’.

In addition to having the capacity to decide disputes between states, the ICJ may give advisory opinions. Article 65 of the Statute declares that ‘the Court may give an advisory opinion on any legal question at the request of whatever body may be authorised by or in accordance with the Charter of the United Nations to make such a request’, while article 96 of the Charter notes that as well as the General Assembly and Security Council, other organs of the UN and specialised agencies where so authorised by the Assembly may request such opinions on legal questions arising within the scope of their activities.

The decisions and advisory opinions of the ICJ (and PCIJ before it) have played a vital part in the evolution of international law. Further, the increasing number of applications in recent years have emphasised that the Court is now playing a more central role within the international legal system than thought possible two decades ago. Of course, many of the most serious of international conflicts may never come before the Court, due to a large extent to the unwillingness of states to place their vital interests in the hands of binding third-party decision-making, while the growth of other means of regional and global resolution of disputes cannot be ignored.

The proliferation of *judicial organs on the international and regional level* has been one characteristic of recent decades. It has reflected the increasing scope and utilisation of international law on the one hand and an increasing sense of the value of resolving disputes by impartial third-party mechanisms on the other. It is now possible to identify an accepted international practice of turning to such mechanisms as a reasonably effective way of settling differences in a manner that is reflective of the rule of law and the growth of international co-operation. The importance of this practice to the evolution of international law is self-evident, as the development of legal rules and the creation of legal institutions with accompanying compulsory adjudication go hand in hand.

The European Court of Justice, the European Court of Human Rights, the new African Court of Human Rights and the Inter-American Court of Human Rights have
been joined by the two Tribunals examining war crimes in Bosnia and Rwanda and by the new International Criminal Court. In addition, the International Tribunal for the Law of the Sea is in operation and a variety of other relevant mechanisms have arisen, ranging from the World Trade Organisation’s Dispute Settlement provisions creating an Appellate Body to administrative tribunals and economic courts. Again, the work of arbitration tribunals, whether established to hear one case or a series of similar cases, is of direct relevance.

All of these courts and tribunals and other organs relate in some way to international law and thus may contribute to its development and increasing scope. Together with a realisation of this increasing spread of institutions must come a developing sense of interest in and knowledge of the work of such courts and tribunals. The special position of the International Court as the principal judicial organ of the UN and as the pre-eminent inter-state forum has led some to suggest a referral or consultative role for it, enabling it to advise other courts and tribunals. While it is difficult to see this as a realistic or practical project, increasing co-operation between the International Court and other judicial bodies is taking place and all the relevant courts and tribunals are well aware of each other’s work.