

SOME REFLECTIONS ON PEACEFUL MEANS

FOR THE SETTLEMENT OF INTER-STATE DISPUTES

BY

RUTH LAPIDOTH*

**Georgetown University Law Center
600 New Jersey Avenue, N.W.
Washington DC 20001-2075**

Abstract

Under international law States have an obligation to settle their disputes by peaceful means. However, unless they have agreed otherwise, there is no obligation to resort to a specific mechanism. They may choose between diplomatic and judicial means. The diplomatic mechanisms include the giving of information and consultation as means to prevent disputes, and negotiations, good offices, mediation, inquiry and conciliation to settle disputes. What characterizes all the diplomatic means is the lack of binding effect to any conclusions, and the possibility to take into consideration all the relevant circumstances.

Courts and arbitral tribunals, on the other hand, have in principle to solve the dispute only on the basis of law (though parties to an arbitration can agree on more flexible rules), and their conclusions are binding on the parties. These mechanisms are more adversarial than the diplomatic ones.

The 1978 draft Convention on the Law of the Non-Navigational Uses of International Watercourses includes a reference to all the above mentioned mechanisms but States have to commit themselves only to the giving of information and consultation, to negotiations and to submission to a 'fact finding' commission if the dispute has not been solved by other means.

When choosing among the various mechanisms, it is advisable to take into consideration the nature of the dispute, and the relations between the parties.

Table of contents:

Some Reflections on Peaceful Means for the Settlement of Inter-State Disputes

I: Introduction

II: A General Overview

III: Diplomatic Means:

1. Exchange of Information and Communication

2. Consultation

3. Negotiations

4. Good Offices

5. Mediation

6. Inquiry

7. Conciliation

IV: Judicial Means:

1. Arbitration

2. The International Court of Justice

V: Conclusions

Some Reflections on Peaceful Means for the Settlement of Inter-State Disputes

by

Ruth Lapidot*

I: INTRODUCTION

Ubi societas ibi jus (where there is a community there is law) says the Roman proverb. To this one can add: where there are people there are conflicts. One of the main purposes of law and of administration is to solve or at least to manage these conflicts as far as possible.

In the international arena the need for the peaceful settlement of disputes has grown in the last century for a variety of reasons. First, the prohibition of the use of force has, at least formally, eliminated war as a means to solve conflicts. The concomitant obligation to settle international disputes by non-violent means has been enshrined in the United Nations Charter (in Article 2(3)).

In addition, the ever growing and intensifying interdependence of States has increased the need for cooperation and coordination, for example in matters of trade, protection of the environment, or the fight against crime and disease. But close cooperation may easily lead to disputes.

Last but not least, new uses of the resources of the earth have increased the danger of conflicting interests. This observation applies *inter alia* to matters related to water resources. In the past, when watercourses served mainly or perhaps exclusively for navigation, the danger of conflict was minimal since the use of the river by one ship did not seriously hamper another vessel from sailing in its wake. But nowadays, with the new and expanded uses of water, for example for the generation of hydro-electricity, for irrigation and for industrial uses, and in particular with the ever growing danger of pollution and the tendency to undertake considerable development projects, disputes among neighbours who share an aquifer or a drainage system are almost unavoidable.

Hence the importance of looking carefully at the available techniques for solving or managing conflicts. There are certain well known mechanisms which will be studied later in detail. It is, however, amazing to see how many specialized bodies and procedures have sprung up in this field. Many international organizations have adopted rules and conventions on the establishment of mechanisms for the settlement of disputes, for example, the Organization of American States, the Organization of African Unity, the European Union, the International Labour Organization, the World Trade Organization, and the Organization for Security and Cooperation in Europe. In addition, various treaties and conventions include specific rules and mechanisms for the settlement of disputes about the application or interpretation of their provisions, for instance, the 1969 Vienna Convention on the Law of Treaties, the 1982 United Nations Convention on the Law of the Sea, and the 1997 draft Convention on the Law of Non-Navigational Uses of International Watercourses. The last mentioned text is the draft of 'a framework convention' intended to 'ensure the utilization, development, conservation, management and protection of international watercourses and the promotion of the optimal and sustainable utilization thereof for present and future generations'.¹

Recently a new expression has found its way into the parlance of dispute resolution: preventive diplomacy. According to Margaretha af Ugglas, the expression means:

'the use of diplomacy

- to prevent disputes from arising between parties
- to prevent disputes from developing into conflicts
- to eliminate conflicts when they occur and
- to contain and limit the spread of those conflicts not amenable to swift elimination'.²

*Bessie and Michael Greenblatt Professor of International Law at the Hebrew University of Jerusalem: Visiting Professor of Law at Georgetown University. This paper was researched and written while the author was Senior Visiting Fellow at St. Antony's College, Oxford.

¹ United Nations Doc. A/51/869, 11 April 1997, Report of the Sixth Committee of the General Assembly convening as the Working Group of the Whole.

² Margaretha af Ugglas, 'Conditions for Successful Preventive Diplomacy', in Staffan Carlsson, ed., *The Challenge of Preventive Diplomacy: The Experience of the CSCE* (Stockholm, 1994), p. 12.

It thus seems that preventive diplomacy includes the various functions and purposes of dispute settlement in a broad sense.

Conflict resolution is studied and analyzed by international lawyers as well as by experts in international relations, but the outlook is somewhat different although complementary. The latter distinguish between views of conflict as essentially subjective (or unrealistic) or essentially objective (or realistic); between 'cooperative' and competitive' processes of conflict resolution; 'resolution' and 'settlement' of conflicts; 'collaborative/network [versus] competitive/hierarchical approaches'; 'contextual' and 'substantive' interventions; deeper-level 'resolution' strategies and 'management' strategies of containment; 'resolution' based on mutual problem-sharing by the parties and 'settlement' which constitutes a mere compromise on the specific issues of the conflict.

In this paper, however, we will leave aside these theoretical notions and will concentrate on the bread and butter techniques for the resolution of disputes. These general rules and practices will enable us to discuss and analyze the methods adopted by the 1997 draft Convention on the Law of the Non-Navigational Uses of International Watercourses.

II: A GENERAL OVERVIEW

A distinction is usually made between diplomatic means for the settlement of disputes, on the one hand, and judicial settlement, on the other hand. Diplomatic means include exchange of information, consultation, negotiations, good offices, mediation, commissions of inquiry, and conciliation, while judicial settlement is achieved by arbitration or settlement by an international court. The difference between the above two groups concerns two matters: in the case of diplomatic procedures all the relevant considerations are taken into account, and the final resolution is not binding on the parties. On the other hand, in the case of adjudication by an arbitral award or a judgment of a court, in principle only legal aspects are relevant, and the ensuing resolution is binding.

When the U.N. organs - mainly the General Assembly and the Security Council - deal with a dispute, they usually act in accordance with the principles concerning diplomatic means, namely, they take into consideration all the relevant circumstances, and most resolutions that may be adopted are merely in the nature of a recommendation. However, the Security Council may also adopt binding decisions, in particular when acting under Chapter VII of the U.N. Charter, namely, in cases of a threat to the peace, breach of the peace or act of aggression.

The title of the forum established in order to settle a dispute does not always conform to its real nature. Thus, the conciliation commissions set up under the Peace Treaties concluded after World War II between the Allied Powers and Bulgaria, Finland, Hungary, Italy, and Romania carried the name of conciliation commissions while in fact they were arbitral tribunals since their resolutions were binding.³ On the other hand, the Badinter commission established in 1991 by the European Community in the framework of its efforts to settle the Yugoslav crisis, though named Arbitration Commission, had only advisory functions.⁴ In order to determine the real nature of a forum, one has to carefully read all the relevant documents, including the *compromis* (the agreement to arbitrate).

Although in principle every dispute can be settled by diplomatic means as well as by judicial means, generally political disputes are settled by the former and legal ones by the latter. However, it is not easy to distinguish between these two categories of disputes. According to the classical distinction, legal disputes are those where parties disagree over the application and interpretation of existing legal rules, while in the case of a political dispute at least one of the parties wishes the *lex lata* to be modified. For instance, if a boundary has been established by the parties, a legal dispute may involve disagreement about the exact emplacement of that border, while a political dispute would occur if one of the parties or both requested that boundary to be changed for any reason (e.g. geography, demography or strategic considerations).

³ E.g. Article 83 of the Treaty of Peace with Italy, 49 United Nations Treaty Series (1950), pp. 167-168.

⁴ Arbitration Commission established by the European Community to deal with questions arising from the dissolution of Yugoslavia, 31 International Legal Materials (1992), pp. 1488-1490.

A number of agreements on the peaceful settlement of international disputes foresee different mechanisms for different kinds of conflicts. Moreover, some of them provide that if a certain mechanism has failed, the parties should have recourse to another one. Thus, under the multilateral General Act for the Pacific Settlement of International Disputes of 1928 (revised in 1949),⁵ all disputes have to be submitted to conciliation, unless the States concerned have accepted the jurisdiction of the International Court of Justice for legal disputes. If conciliation is not successful, the dispute should be submitted to arbitration.

In the Egypt-Israel and the Jordan-Israel peace treaties of 1979 and 1994 respectively, the parties have undertaken to resolve disputes about the application and interpretation of those treaties by negotiations. Any dispute which cannot be settled by negotiations shall be resolved by conciliation or submitted to arbitration.⁶ On the other hand, in the agreements between Israel and the Palestinians, the recourse to conciliation and arbitration is optional.⁷

Under the draft Convention on the Law of the Non-Navigational Uses of International Watercourses (1997) (henceforth: 1997 Convention on Watercourses) conflicts are to be prevented by the exchange of information, communication and consultation. If, nevertheless, a conflict occurs, it should be solved by negotiations upon the request of one of the parties. If negotiations fail, the parties 'may jointly seek the good offices of, or request mediation or conciliation by, a third party, or make use, as appropriate, of any joint watercourse institutions that may have been established by them or agree to submit the dispute to arbitration or to the International Court of Justice'. All these mechanisms, except for negotiations, require the consent of both parties. If the dispute is not solved by one of these methods, there is an obligation, upon one party's request, to submit it to a Fact-finding Commission. The parties have to consider the latter's report 'in good faith', but it is not

⁵ 71 United Nations Treaty Series, p. 101, and UN General Assembly Resolution 268A (III) of 28 April 1949.

⁶ Treaty of Peace between Egypt and Israel (1979), 1138 United Nations Treaty Series, no. 17855, p. 72, Article VII; Treaty of Peace between Jordan and Israel (1994), 34 International Legal Materials (1995), p. 43, Article 29.

⁷ Declaration of Principles on Interim Self Government Arrangements (1993), 32 International Legal Materials (1993), pp. 1525-44, Article XV; Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip (1995), Article XXI.

binding. States may also agree in advance to submit disputes to the International Court of Justice or to binding arbitration (Article 33). These various stages will later be examined in greater detail.

With these general notions in mind, we can now proceed to the study of the main techniques for dispute resolution, starting with the diplomatic ones and then moving to judicial mechanisms. Among diplomatic processes, a distinction can be made between measures to prevent disputes, and measures intended to solve them.

III: DIPLOMATIC MEANS

1. Exchange of Information and Communication

Sometimes the timely exchange of information or communication can help reduce a conflict of interests which could lead to a dispute. This is true in particular with regard to activities that may have transboundary effects, for instance in matters related to the prevention of pollution and the use of international watercourses. The exchange of information can be voluntary, but in many cases it has been established as an obligation. Thus the 1997 Convention on Watercourses imposes an obligation to exchange information on planned measures (Articles 11-19). Moreover, in emergency situations (defined as ‘a situation that causes, or poses an imminent threat of causing, serious harm to watercourse States... and that results suddenly from natural causes... or from human conduct...’), a watercourse State has an obligation to immediately notify other potentially affected States and organizations of the emergency (Article 28).

The idea is that early knowledge of an emergency can help the potentially affected States to prevent or reduce the damage. The extra harm caused by the holding back of information has been amply demonstrated by the Chernobyl nuclear disaster.

Sometimes the exchange of information is not left exclusively in the hands of the parties.

Thus the Organization for Security and Cooperation in Europe has established several organisms and processes for monitoring and early warning, e.g. the High Commissioner on National Minorities.

2. 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’.⁸ Consultation can be either voluntary or obligatory. It is obligatory if the parties have committed themselves in advance to consult each other, and in certain cases even without such prior commitment, for instance in matters related to the use of certain resources. Thus, when one riparian of a river wishes to undertake a development project on the river system (which in this context also includes relevant lakes and tributaries) in a manner which may harm the interests of another riparian, it has an obligation to consult the other riparian/s.

This principle was established by the award in the 1957 *Lake Lanoux* arbitration (France v. Spain).⁹ France wished to undertake a development project on Lake Lanoux in the Pyrenees. Spain claimed that this project would damage the waters she received from a river that has its source in this Lake. France intended to reduce the harm caused to Spain by building a canal that would bring water from another source to the Spanish river. The Tribunal based its opinion both on a treaty between the parties and on general international customary law. It came to the conclusion that France was under a duty to consult with Spain over the project since it was likely to affect Spanish interests, but Spain’s consent to the project was not required, so that she did not have the right to veto the French project. As the Tribunal mentioned, where there exists an obligation to consult, it is

⁸ J.G. Merrills, *International Dispute Settlement*, second edition (Cambridge, 1991), p. 3.

⁹ *Lake Lanoux Arbitration* (France v. Spain) (1957), 24 *International Law Reports*, p. 101.

often difficult to decide whether that obligation has been complied with, but in the *Lake Lanoux* case the Tribunal was satisfied that France had indeed done her duty.

The commitment to consultation is also very conspicuous in the 1997 Convention on Watercourses. '[W]atercourse States concerned shall, when the need arises, enter into consultations in a spirit of cooperation' with regard to the allocation of the water (Article 6 (2)). If the utilization of the watercourse by one State causes significant harm to another State, the first State has to take all appropriate measures, in consultation with the affected State, to eliminate or mitigate the harm (Article 7 (2)). Moreover, '[w]atercourse States shall exchange information and consult each other and, if necessary, negotiate on the possible effects of planned measures on the condition of an international watercourse' (Article 11). The consultation should take place after one State has provided the other/s with a notification about measures it intends to undertake, and the other State/s has communicated its reservations (Articles 11-19). The use of the term 'shall' conveys the idea, that this consultation is obligatory.

Consultation can take place on an *ad hoc* basis, but in some situations, in particular in the field of international rivers, States often establish joint commissions where the consultations can take place. The 1997 Convention on Watercourses provides that 'watercourse States may consider the establishment of joint mechanisms or commissions' to enhance their cooperation (Article 8), but it is not obligatory. Under the 1994 Treaty of Peace between Israel and Jordan, a Joint Water Committee has been established (Annex II, Article VII).

Another area in which prior consultation is often mandatory is the protection of the environment.

Consultation, whether voluntary or obligatory, should not be confounded with the obtaining of prior consent. The difference has been illustrated in the above-mentioned *Lake Lanoux* case.

3. Negotiations

The most natural and commonly used way to settle a dispute is by negotiations. Moreover, even when ultimately the parties may have to resort to another means to settle their dispute, they will usually first try to solve it by direct negotiations. Negotiations may be optional or obligatory. Thus, as mentioned, under the 1997 Convention on Watercourses, upon the request of one party there is an obligation to negotiate, unless the parties have agreed on another means of dispute resolution (Article 33 (1) and (2), and 11-19). The duty to negotiate may even have its basis in customary international law, for instance, the obligation to negotiate on the delimitation of the continental shelf between States with opposite or adjacent coasts. Although this rule has its origin in conventional law (e.g. Article 83 of the 1982 U.N. Convention on the Law of the Sea), it is also recognized as part of the general customary law.

The negotiations can take place at different levels, for instance, between experts or administrative agencies, between ministries of foreign affairs, between diplomats or at a summit conference. Each level has its advantages and disadvantages. Sometimes negotiations take place within a permanent joint commission or in the corridors of an international organization. The latter venue has the advantage of making unofficial contacts easier.

Negotiations can be successful only if all the participants wish to reach an agreement and are ready to compromise. Sometimes the splitting of the object of the dispute can be helpful. According to a famous example, two persons quarrelled about an orange. During their negotiations it surfaced that one person needed the juice while the other wished to use the skin. Thus a compromise was easily reached. Similarly, where States disagree about the location of a boundary, a negotiated solution can perhaps be found on a functional basis, establishing a different regime for the inhabitants, the status of the territory and rights in adjoining seas (e.g. the Torres Strait Treaty of 1978 between Australia and Papua New Guinea).

Another means would be to agree not to agree on a sensitive preliminary question, but reach agreement on practical matters. Thus, the 1959 Antarctic Treaty 'froze' all claims to territorial

sovereignty in the Antarctica region but regulated the various activities in the area. A similar solution has been adopted by the United Kingdom and Argentina with regard to the Falkland/Malvinas islands. This kind of solution is sometimes called 'without prejudice' arrangements.

Another method sometimes used in negotiations consists of the linking of two disputes so that a negotiated settlement can balance gains in one area against losses in the other one. Such 'package deals' were often used in the negotiations for the 1982 United Nations Convention on the Law of the Sea.

For negotiations to succeed, they should take place away from the media. Publicity at the stage of negotiations may make it impossible for a party to make concessions.

When the exhaustion of negotiations is a prerequisite for the resort to another means of dispute settlement, it is not easy to establish when and whether the possibilities for a negotiated settlement have been exhausted. The 1997 Convention on Watercourses has established an objective criterion related to time: '[I]f after six months from the time of the request for negotiations... the Parties concerned have not been able to settle their dispute through negotiation or any other means... the dispute shall be submitted, at the request of any of the parties to the dispute, to impartial fact-finding...' (Article 33 (3)). I assume the same applies if a party refuses to negotiate, despite its obligation.

A refusal to negotiate may result from very bad relations between the parties (for instance, the relations between the U.S. and Iran in 1979-80, at the time of the hostages crisis) or from the lack of recognition (e.g. the non-recognition of Israel by the Arab States in the past).

4. Good Offices

So far our survey has dealt with procedures in which only the concerned parties are involved. With good offices we start to deal with diplomatic means wherein a third entity who is not a party to the dispute intervenes.

The term 'good offices' is used in two different but closely related meanings. First, it designates the action of a third party who merely encourages the disputing States to resume negotiations or helps them to get together. Second, the term is sometimes used as referring to any non-structured form of assistance given by a third party. With this meaning, the term would include both the first mentioned kind of good offices and mediation.

Good offices are also mentioned in the 1997 Convention on Watercourses: 'If the parties concerned cannot reach agreement by negotiation requested by one of them, they may jointly seek the good offices of, or request mediation or conciliation by, a third party...' (Article 33 (2)). The terms 'may jointly' show that there is no obligation to submit to these means, and that the consent of both parties is needed.

5. Mediation

A mediator participates actively in the negotiations between the parties, he helps each of them to understand the strong and weak points of its own case while clarifying the attitude of the other party, he serves as a go-between, he can improve the atmosphere, and he advances his own proposals for a solution. He can also transmit discreetly the proposals of one party to the other one/s. His participation in the process makes it politically easier for the parties to make the necessary concessions in order to reach a compromise. From my own experience I have learned, that sometimes, when the parties reach a deadlock, a smart mediator will interrupt the negotiations and he will continue to deal with each party separately, until the obstacle is overcome.

All the parties to the dispute have to agree to the mediation, unless there exists a prior commitment to mediation. A prospective mediator can also offer his services on his own initiative,

but the parties are free to accept or reject it. Usually disputing parties agree to mediation if they genuinely look for a compromise, or if they are tired of a stalemated war, or perhaps even if they wish to appear to be peace-loving and reasonable.

Mediation can be performed by functionaries of an international organization (e.g. the Secretary-General of the United Nations), by representatives of a State or of an NGO (e.g. the Red Cross) or by a distinguished personality (e.g. the Pope). The parties' consent is needed for the designation of the person of the mediator. The representative of a powerful State or organization has more chance of success due to the State's ability to influence the parties' behaviour (the stick and the carrot).

Sometimes the mediator himself is interested to bring the dispute to an end. Thus, it may be assumed that when the Pope proposed to mediate in the Beagle Channel dispute between Argentina and Chili, he probably wished to prevent the outbreak of war between two Catholic States.

In some situations, neutrality of the mediator is important. However, in most cases, 'the fact that a state has interests of its own and may have close relations with one party to a dispute will not normally be an objection so long as it is on speaking terms with the other party. Indeed, a special relationship with one side may actually be an advantage',¹⁰ for 'closeness that implies a possibility to 'deliver' its friend may stimulate the other party's cooperativeness'.¹¹

Sometimes it is difficult to find a State or a person who would agree to mediate since mediation is a very difficult time consuming mission which requires much patience and a strong constitution. Moreover, not all mediations succeed to end the dispute.

The success of mediation often depends on timing. Thus, one may perhaps say, that Richard C. Holbrooke succeeded to end the war in Bosnia-Herzegovina because he entered the scene after long and protracted earlier attempts to solve the dispute had failed, and the parties were tired of the war.

¹⁰ J.G. Merrills, *supra* note 8, pp. 33-34.

¹¹ S. Touval and I.W. Zartman, eds., *International Mediation in Theory and Practice* (Boulder, 1985), p. 257.

Like negotiations, mediation needs strict confidentiality in order to succeed.

Among successful recent mediations we will mention the success of the Pope's representative Cardinal Antonio Samoré who mediated between Chili and Argentina and helped the two States to solve their dispute about sovereignty over three islands in the Beagle Channel which had been the subject of a 1977 arbitral award, but almost led to war in 1978. His mediation induced the conclusion in 1984 of a Treaty of Peace and Friendship between the two countries.¹² This case is particularly interesting because mediation came in the wake of arbitration, whereas usually mediation precedes the submission to arbitration. Other successful cases include *inter alia*, Richard Holbrooke's mediation of the Bosnia-Herzegovina conflict, which led to the conclusion of the 1995 Dayton accords,¹³ Algeria's mediation between Iran and the U.S. with regard to the diplomatic hostages crisis, which led to the 1981 Declaration of Algeria,¹⁴ and the mediation of the International Bank for Reconstruction and Development for the settlement in 1960 of the dispute between India and Pakistan about the waters of the Indus.¹⁵

The 1997 Convention on Watercourses also mentions mediation as a possible means to settle disputes, in Article 33 (2) quoted earlier.

6. Inquiry

This term too, like good offices, is used in two distinct but related meanings. Most international disputes include *inter alia* disagreement over facts, and a disinterested third party that tries to solve the dispute, whether it is a conciliation commission, or an arbitral tribunal, a court of law or a United Nations organ, has to resolve the issue of fact by an inquiry. On the other hand, the more technical meaning of 'inquiry' relates to a specific institutional arrangement intended to clarify

¹² 24 International Legal Materials (1985), p. 10.

¹³ 35 International Legal Materials (1996), pp. 89-183.

¹⁴ 20 International Legal Materials (1981), p. 230.

¹⁵ A.H. Garretson, C.J. Olmstead and R.D. Hayton, eds., *The Law of International Drainage Basins* (New York, 1967), chapter 9.

only a specific point of fact. The relevant mechanism - Commission of Inquiry - was introduced by the 1899 and 1907 Hague Conventions for the Pacific Settlement of International Disputes.¹⁶

The 1907 Hague Convention has laid down the procedure for the establishment of a commission of inquiry and for its functioning. The mechanism has been very successful in the few cases in which it was applied. It is based on the assumption that if the factual disagreement is solved by an authoritative impartial third party, the solution to the dispute is self evident. To illustrate this statement, we will briefly summarize one of the cases settled by inquiry.

In 1917, during World War I, a German submarine sank a Norwegian ship, the *Tiger*, off the coast of Spain which was neutral in that war. The justification was that the Norwegian vessel although neutral was carrying contraband (i.e. war material). Under the laws of war, it is permitted to sink a neutral ship on the high seas if it carries contraband to the enemy but this may not be done in the territorial sea of a neutral State. The crucial question was the vessel's location: Spain claimed that the attack had taken place in her waters (and hence was illegal), while Germany maintained that it had taken place on the high seas (and hence was lawful). The Commission had difficulties in ascertaining where the attack had actually taken place, but in the end concluded that it had happened in Spanish waters.¹⁷ The obvious conclusion was that the act was unlawful; however, the Commission did not have to deal with the question of legality but only with the factual question.

Although successful, the specific procedure established by the Hague Conventions has been followed only in very few cases (about five), but other fact-finding mechanisms have been used on an *ad-hoc* basis by various international organizations, like the League of Nations, the United Nations, the International Labour Organization and the International Civil Aviation Organization. Thus, for instance, in 1983 the I.C.A.O. instructed the Secretary-General to investigate the KE007 incident - the shooting down of a South Korean plane over Soviet territory.

¹⁶ Articles 9-14 of the 1899 Convention, and Articles 9-35 of the 1907 Convention; Clive Parry, *205 Consolidated Treaty Series* (1907), p. 234; N. Bar-Yaacov, *The Handling of International Disputes by Means of Inquiry*, (Oxford, 1974).

¹⁷ N. Bar-Yaacov, *supra* note 16, pp. 156-71.

Fact-finding has also been included in the 1982 U.N. Convention on the Law of the Sea, namely, within the context of 'special arbitration', which is one of the means of dispute settlement that members can opt for.¹⁸

The 1997 Convention on Watercourses envisages compulsory submission to an impartial fact-finding commission of all disputes not solved by any other means. However, a perusal of the relevant provisions (Article 33 (4) - (9)) indicates, that the procedure foreseen by the convention in fact implies more than fact-finding, and therefore we will discuss it within the framework of conciliation.

To conclude, it appears that inquiry or fact-finding can be a successful means for the settlement of disputes where the disagreement relates to facts, and each of the parties is willing to accept that perhaps its version of the events may have been erroneous. Like all diplomatic means for the settlement of disputes, inquiry usually leads to a non-binding finding, but of course the parties may also agree in advance that the findings should be binding.

7. Conciliation

This mechanism, developed since the 1920s, involves the attempt by a formal, institutionalized impartial commission to investigate the dispute and to suggest possible ways to settle it. Usually the commission asks the parties to indicate their response to its proposals within a certain time. If the proposals are accepted, the commission drafts a *procès-verbal*, namely, a kind of an agreement, which reports the fact that conciliation has taken place and sets out the terms of the settlement.¹⁹

Like all other diplomatic means for the settlement of disputes, the commission's proposals are not binding, although there may have been an obligation to submit to conciliation. Such an obligation has been established for certain disputes by the 1982 U.N. Convention on the Law of the

¹⁸ Annex VIII, Article 5.

¹⁹ On conciliation, see J.-P. Cot, *International Conciliation*, (London, 1972); J.G. Merrills, *supra* note 8, pp. 59-79.

Sea, and by the 1969 Convention on the Law of Treaties. A Commission of Conciliation differs from a commission of inquiry in that its investigation is not limited to questions of fact, and in its having authority to submit proposals for a solution. Moreover, conciliators sometimes act also like mediators in trying to convince the parties to agree to a certain solution.

In numerous conventions, both bilateral and multilateral, States have agreed in a general way to settle disputes by conciliation, either as the sole mechanism or in conjunction with other ones. Moreover, in 1922 the Assembly of the League of Nations expressly recommended that States conclude agreements on conciliation and in 1990 the U.N. adopted Draft Rules on conciliation. Among the most well-known treaties that include a reference to conciliation are four of the 1925 bilateral Locarno Treaties concluded by Germany with Belgium, France, Czechoslovakia and Poland; the 1928 General Act for the Pacific Settlement of International Disputes; the 1929 Inter-American General Convention of Conciliation; the 1963 Charter of the Organization of African Unity, and many others. In a number of cases the procedure foreseen is considerably influenced by the 1925 treaty between France and Switzerland, establishing a Permanent Conciliation Commission.²⁰

A Conciliation commission can be set up on a permanent basis or can be established *ad hoc*. The mode of operation varies from case to case, and it depends on the contents of the instrument that has established the commission, on the attitude of the parties and on the perception of the members of the commission about their function. Sometimes the process is more formal and may include pleadings by the parties, in other instances it is more of a cooperative nature.

As with all diplomatic means, the confidentiality of the proceedings is a *sine qua non*.

Although conciliation has been foreseen in a great number of conventions, there are only relatively few cases where it has actually been applied. As an example of a successful conciliation, we will briefly summarize the activity of the conciliation commission set up in 1980 by Iceland and Norway to make recommendations with regard to their dispute about the continental shelf between

²⁰ M. Habicht, *Post-War Treaties for the Pacific Settlement of International Disputes* (Cambridge, MA, 1931).

Iceland and the island of Jan Mayen. The parties directed the commission to take into consideration Iceland's strong economic interests in the relevant areas, as well as the relevant geographical and geological factors. The commission, after careful investigation, including a seminar of experts held at Columbia University, proposed a joint development agreement covering almost all the relevant areas.²¹

Another example, this one of a failed conciliation, was involved in the boundary dispute between Egypt and Israel including the Taba area. Egypt had insisted on submitting the dispute to arbitration while Israel preferred conciliation. Hence it was agreed to resort to arbitration but within this process, at the end of the written pleadings, an attempt was to be made by a three-member chamber of the tribunal to find an agreed solution.²² Although usually referred to as conciliation, the procedure followed was practically more similar to mediation. This was a rather peculiar process - a conciliation attempt built into an arbitration, while usually diplomatic means for the settlement of disputes precede the submission to a judicial one.

Last but not least, we have to examine the procedure for the settlement of disputes foreseen by the 1997 Convention on Watercourses. As mentioned above (in the general overview chapter), in the first place there is an obligation to negotiate upon the request of one of the parties. If no agreement is reached by negotiations, the parties may jointly seek the good offices, mediation or conciliation by a third party. These procedures are optional and require the consent of both parties. The text does not give us any details about this optional conciliation, for instance, the composition of the commission, hence they have to be agreed upon by the parties.

The next step would be obligatory submission of the dispute to a fact-finding commission upon the request of one party. In view of the rules laid down by the text, this body is actually a

²¹ The Commission's Report was published in 20 *International Legal Materials* (1981), p. 797; the treaty which incorporated most of the recommendations of the Commission was published in 21 *International Legal Materials* (1982), p. 1222. See also E.L. Richardson, 'Jan Mayen in Perspective', 82 *American Journal of International Law*, (1988), p. 443.

²² *Arbitration Compromis* of 11 September 1986, 26 *International Legal Materials*, (1987), p. 1, Article IX. The award was published in 27 *International Legal Materials* (1988), p. 1421.

combination of an inquiry and a conciliation commission. It is to be composed of one member appointed by each of the parties to the dispute, and a third person chosen by the two members nominated by the parties. The third member may not have the nationality of either party, and he will serve as chairman. In order to prevent frustration of the process by the failure to agree on a chairman, the text provides that if within three months of the request for the establishment of the commission the chairman has not been chosen, the Secretary-General of the United Nations will appoint him. Moreover, the text even foresees the possibility that a party may refuse to appoint its own member - a situation that has happened in the past when a party wished to avoid an arbitration to which it was committed.²³ In that case, under the Watercourses Convention, the Secretary-General of the U.N. will appoint a person who does not have the nationality of any of the parties to the dispute nor of any riparian State of the watercourse concerned, and this person will constitute 'a single-member Commission'.

The Commission, however constituted, shall determine its own procedure. The parties have to provide the Commission with information that it may require, and to permit it to visit their respective territories in order to inspect relevant structures and equipment as well as natural features.

The Commission shall adopt its report by a majority vote and submit it to the parties. The report should set forth 'its findings and the reasons therefor and such recommendations as it deems appropriate for an equitable solution of the dispute' (Article 33 (8)). The reference to 'findings' reminds us of commissions of inquiry, while the 'recommendations' point in the direction of conciliation. The 'recommendations' should lead to an 'equitable solution', which does not necessarily have to be in accordance with the legal situation.

The parties do not have to adopt the report and implement it, but they have to consider it 'in good faith'.

The text permits the parties to prefer other means of dispute settlement, if all agree thereto.

²³ *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, Advisory Opinion, First Phase (1950) International Court of Justice, Reports, 1950, p. 65; Second Phase, *Ibid.*, p. 221.

This survey of diplomatic means for the settlement of disputes has shown the variety of available avenues. However, the distinctions are not clear-cut and rigid. Hence, a mechanism may be set up which does not fall neatly into one of the classical categories, but is a combination of several. Moreover, within each category there are different shades and modalities. The characteristics which usually distinguish all diplomatic means is the lack of a duty to resort to them except in case there exists a prior commitment, the non-binding effect of the report or conclusions, and the possibility to take into consideration all the relevant circumstances.

IV: JUDICIAL MEANS

As mentioned earlier, both arbitration and proceedings in a court of law lead to a decision that is binding upon the parties. However, unless there exists a prior commitment, submission of a dispute to either procedure is voluntary. What are the main differences between the two procedures?

While the composition of a court, its procedure, and the law to be applied by it are determined by its Statute which applies to all cases brought before the court, in the case of arbitration these factors are determined in the *compromis* (the arbitration agreement) by the parties to the dispute. Moreover, although both procedures are in principle intended to solve disputes on the basis of law, as we shall see later, arbitrators are sometimes authorized by the parties to take into consideration other elements as well. These differences have led at least one expert to characterize arbitration as a quasi-judicial process.²⁴

Yet another distinction exists in internal law, but it certainly does not apply in international law: within a State, courts of law have compulsory jurisdiction while arbitration requires the consent of the parties. In international law, on the other hand, the jurisdiction of both courts of law and of arbitrators depends on the consent of the parties. There may, of course, exist specialized courts

²⁴ Kenneth R. Simmonds, 'Public International Arbitration - Roundtable', 22 *Texas International Law Journal*, (1987), p. 149, p. 155.

upon which the States have expressly conferred compulsory jurisdiction in certain areas, for instance the Court of Justice of the European Community.

1. Arbitration

‘International arbitration has for its object the settlement of disputes between States by judges of their own choice and on the basis of respect for law. Recourse to arbitration implies an engagement to submit in good faith to the award’.²⁵

Although arbitration is one of the oldest institutions of international relations, the rules pertaining to it have not been authoritatively codified, probably because by definition it is the parties themselves that have to establish the rules that should apply to the settlement of their dispute. However various institutions have drafted model rules to which the parties may refer. Among the most famous model rules are those adopted in 1958 by the U.N. General Assembly;²⁶ those included in the above mentioned 1899 and 1907 Hague Conventions for the Pacific Settlement of International Disputes; and those adopted in 1976 by the United Nations Commission on International Trade Law - UNCITRAL.²⁷

States that wish to establish in their *compromis* the rules concerning arbitration can either draft those rules themselves or may incorporate in their agreement a reference to any of the sets of model rules. Thus, the Iran-U.S. Claims Tribunal has been governed by the arbitration rules of UNCITRAL.

The *compromis* is of great importance since it should include provisions on the main matters relevant to the arbitration, in particular: the undertaking to arbitrate, the question submitted to

²⁵ Articles 15 and 37 respectively of the 1899 and 1907 Hague Conventions for the Pacific Settlement of International Disputes, supra note 16. On arbitration, see e.g. J.G. Wetter, *The International Arbitral Process Public and Private*, 5 volumes (New York, 1979); J.L. Simpson and H. Fox, *International Arbitration: Law and Practice* (London, 1959).

²⁶ Yearbook of the International Law Commission, 1958, vol. II, p. 83.

²⁷ 15 International Legal Materials, (1976), p. 701.

arbitration, the rules to be applied, the composition of the tribunal and its powers, as well as procedural matters. Later we will come back to some of these items.

It is not uncommon for a party which is dissatisfied with an arbitral award to try to challenge it.²⁸ According to the 1958 U.N. Model Rules, the validity of an award may be challenged on the following grounds:

- a) That the tribunal has exceeded its powers;
- b) That there was corruption on the part of a member of the tribunal;
- c) That there has been a failure to state the reasons for the award or a serious departure from a fundamental rule of procedure;
- d) That the undertaking to arbitrate or the *compromis* is a nullity'.²⁹

In the practice of arbitration one can find that two additional arguments have sometimes been used to undermine the validity of awards: fraud and error. Fraud would include, for instance, the non-disclosure of documents. Errors of fact based on evidence discovered after the end of the arbitration can sometimes be corrected by a procedure of revision. Errors in the application or interpretation of the law can be relied upon only if they constitute 'essential' or 'manifest' errors.

The exact formulation of the question to be submitted may influence the outcome of the proceedings, and therefore the parties may have a difficulty in reaching an agreement on that formulation. In rare cases, where no agreement on the wording of the question was reached, each of the parties formulated its own version, as happened in the *Beagle Channel* arbitration of 1977.³⁰

It is the parties themselves who agree in the *compromis* on the substantive rules to be applied by the arbitrators. The cases include many variations. Sometimes the parties actually formulate the rules to be applied, as happened in the famous 1872 *Alabama* arbitration between Great Britain and the United States.³¹ In this case the parties included in the *compromis* three rules on neutrality in maritime war. In most cases there is a simple and general reference to the rules of international law,

²⁸ Thus Argentina rejected the award in the 1977 *Beagle Channel* case, 17 *International Legal Materials*, (1978), p. 738.

²⁹ *Supra* note 26.

³⁰ For the award, see 17 *International Legal Materials*, (1978), p. 634.

³¹ J.B. Moore, *History and Digest of the International Arbitrations to which the United States has been a Party*, vol. 1, (1898), p. 550.

like the *compromis* in the *Beagle Channel* case between Chili and Argentina (1977). In other documents there is a reference to specific documents which should be applied, for instance with regard to the *Boundary Dispute (Taba)* between Egypt and Israel (1988).³² Sometimes the *compromis* also refers to 'rules applicable between the parties'³³ or to the internal legal system of one or both of them.³⁴ Other texts refer the arbitrators to equity, usually but not always in conjunction with law.³⁵ In very rare cases the tribunal is called upon to set up a new legal regime for the parties.³⁶ When the *compromis* does not lay down what rules should be applied, there is a presumption that the intention was to apply the rules of international law.

The parties have also to agree on the composition of the tribunal. Either they designate the arbitrators by name or they establish a procedure for the appointment. The parties can agree on any uneven number of members. Usually the tribunal will include an arbitrator appointed by each of the parties respectively, and a 'neutral' one or several ones appointed by common agreement. The *compromis* may provide that if no agreement is reached, a third party, like the President of the International Court of Justice, would be authorized to make the appointment. Rules have also to be established on the filling of vacancies.

Basically, the formulation of the question to be submitted to arbitration and the rules to be applied determine the jurisdiction of the tribunal. But sometimes the *compromis* includes additional rules defining or limiting the competence of the tribunal by laying down what remedies the panel may grant. One such limitation is the 'exclusive disjunction' (i.e. 'either - or') permitting the panel to reach only one of certain decisions. For instance, in the *Boundary Dispute (Taba)* arbitration between Egypt and Israel, the panel was authorized to decide either upon the location advanced by

³² Supra note 22.

³³ E.g. the 1975 Agreement between France and the United Kingdom to submit to arbitration the delimitation of their continental shelf in the Channel, 18 International Legal Materials (1979), p. 397.

³⁴ E.g. *The Trail Smelter* arbitration (1941) between Canada and the U.S., 3 Reports of International Arbitral Awards, (1949), p. 1907, Article 4.

³⁵ E.g. the 1995 Dayton /Paris accords, with regard to the boundary in the crucial Brcko area, 35 International Legal Materials (1996), p. 89, p. 113. For the award, see 36 International Legal Materials, (1997), p. 396.

³⁶ E.g. the U.K. - U.S. Arbitration concerning *Jurisdictional Rights in the Behring's Sea* (*Compromis* of 1892), J.B. Moore, supra note 31, p. 801

Egypt for the boundary pillars or one of those claimed by Israel, and it was precluded from deciding on any other location.³⁷ If the arbitrators ignore such a directive, the resulting award may be declared a nullity as happened in the 1911 *Chamizal* case between the U.S. and Mexico.³⁸

As to matters of jurisdiction, the *compromis* should also establish whether the tribunal is authorized to decide on provisional measures, and whether it may propose compromises to the parties.

Procedural matter not dealt with in the *compromis* will usually be settled by the tribunal itself, sometimes after consulting the parties.

The *compromis* should include some directives about the award, for example, what majority is needed? Do all the arbitrators have to sign the majority award or only those that have voted for it? Are individual or dissenting opinions permitted?

With this general overview of arbitration in mind, we can now examine the relevant rules in the 1997 Convention on Watercourses. When becoming a party to the Convention or later, a State may declare that it accepts as compulsory, in its relations with other States accepting a similar obligation, to submit its disputes to the International Court of Justice or to arbitration. Unless the parties to the dispute agree otherwise, the following rules, laid down in the Annex to the Convention, will apply to this arbitration. A party may unilaterally (namely, without the consent of the other party) submit a dispute to arbitration. 'If the parties do not agree on the subject matter of the dispute, the arbitral tribunal shall determine the subject matter' (Article 2). The 'subject matter' is probably equivalent to the question submitted to arbitration.

The tribunal shall consist of three members. Each of the parties shall appoint one member, and the chairman shall be designated by common agreement. He may not be a national or a habitual resident of any of the parties or the riparians. Vacancies shall be filled in the same manner. If either

³⁷ Supra note 22, Annex, Article 5.

³⁸ M.M. Whiteman, 3 *Digest of International Law*, pp. 680-699 (1964)

. a national member or the chairman are not appointed within a certain time, the President of the International Court of Justice shall designate him at the request of a party.

The rules to be applied are defined as follows ‘...[T]he provisions of this convention and international law’ (Article 5). Although the text does not expressly mention equity, the tribunal probably may refer to it since the Convention itself to a large extent provides for ‘equitable and reasonable utilization and participation’ (Articles 5-6).

Unless the parties to the dispute otherwise agree, the arbitral tribunal shall determine its own rules of procedure (Article 6). It may also, at the request of one of the parties, recommend essential interim measures of protection (Article 7). The term ‘recommend’ implies, that these measures are optional. The parties have to facilitate the work of the tribunal (Article 8). Both the parties and the arbitrators are under an obligation to protect the confidentiality of any information they receive in confidence during the proceedings (Article 8). Usually the expenses of the tribunal shall be borne by the parties in equal shares (Article 9).

Other parties that have an interest of a legal nature in the subject matter may intervene in the proceedings with the consent of the tribunal (Article 10). This provision is quite remarkable, since it is usually not possible for a third party to intervene in an arbitration.

When dealing with a case, the tribunal may also hear counterclaims that arise directly out of the subject matter of the dispute (Article 11). If a party does not participate in the proceedings, the tribunal may nevertheless go ahead with the case (Article 13).

The tribunal should render its award within five months, but it may extend that period to another five months. The award should include the reasons on which it is based, and members may add separate or dissenting opinions. There lies no appeal against the award unless the parties have agreed in advance to an appellate procedure. Either party may apply to the tribunal if a controversy arises with regard to the interpretation or manner of implementation of the award (Article 14).

2. Settlement by the International Court of Justice

There are a number of specialized international courts in various fields; some of them are limited to a certain group of States. There exist at least two courts in the sphere of human rights: a European one and an Inter-American one. The European Community has its own court which deals mainly with economic matters. Under the 1982 U.N. Convention on the Law of the Sea, an international tribunal for the law of the sea as well as a sea-bed dispute chamber have been foreseen. In the area of criminal law, so far only *ad hoc* tribunals have been established such as the international military tribunals set up in Nuremberg and Tokyo after World War II, and the more recent tribunals for crimes committed in the former territory of Yugoslavia and in Rwanda respectively. The establishment of a permanent court to deal with severe crimes against international law perpetrated by individuals has been discussed in the United Nations, and will be the subject of a conference in 1998.

However, we will limit our examination to the International Court of Justice in The Hague, which has general civil jurisdiction over States subject to their consent.

In the early twenties the Permanent Court of International Justice was established, but after World War II it was replaced by the International Court of Justice. The two courts are, however, very similar and there is continuity in their case law. The present-day Court is the judicial organ of the United Nations and its Statute is part of the U.N. Charter. However, although all members of the Organization are automatically parties to the Statute of the Court, they are under no obligation to accept its jurisdiction.

The Court has 15 judges, elected for nine years by the U.N. Security Council and the General Assembly. At the end of his term, a judge is eligible for re-election. The judges should represent the main legal systems of the world. Practically the Court always has a judge from the U.S., Russia,

.China, France and Britain respectively, namely, the permanent members of the Security Council. The judges should, of course, be 'of high moral character' and 'possess the qualifications required in their respective countries for appointment to the highest judicial offices', or be 'jurisconsults of recognized competence in international law' (Article 2 of the Statute). When 'engaged on the business of the Court', the judges enjoy diplomatic privileges and immunities (Article 19).

In principle '[t]he full Court shall sit except when it is expressly provided otherwise in the present Statute' (Article 25), but in recent years a number of cases have been dealt with by chambers of the Court, in accordance with Article 26. Moreover, the parties have had a say in the determination of the composition of the relevant chamber. Thus, the 1986 *Frontier Dispute* case between Burkina Faso and Mali³⁹ was decided by a chamber, as well as the 1984 *Gulf of Maine* case between Canada and the U.S.⁴⁰

Of great importance is the question under what circumstances does the Court have the power to adjudicate. In principle, the consent of the parties is needed. This consent is given in one of three ways:

1. The parties can decide, by a special agreement, to submit a specific dispute to the Court (Article 36 (1)). Similarly, if one party applies unilaterally to the Court and the second party participates in the proceedings or communicates to the Court that it accepts the latter's jurisdiction,⁴¹ this may constitute agreement to jurisdiction. However, the second mentioned procedure is rather rare. Usually States prefer to negotiate on the exact question to be submitted to the Court. Thus, for instance, the 1989 *ELSI* case between Italy and the U.S.⁴² was submitted to the Court by a special agreement.
2. Certain treaties include a compromissory clause under which disputes about the application or interpretation of the treaty or of certain parts of it should be submitted to the Court. Among the

³⁹ International Court of Justice (henceforth: I.C.J.), Reports 1986, p. 554..

⁴⁰ I.C.J. Reports 1982, p.3 (This is the Order that dealt with the composition of the chamber).

⁴¹ For instance, the 1948 *Corfu Channel* case, I.C.J. Reports 1947-48, p. 15 (This is the judgment that dealt with the preliminary objections).

⁴² I.C.J. Reports 1989, p. 15.

examples, we will mention the 1971 Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, and the 1969 Vienna Convention on the Law of Treaties.

3. A State may, by unilateral declaration, 'recognize as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court in all legal disputes...' (Article 36 (2)). This optional acceptance of the compulsory jurisdiction of the Court is based on strict reciprocity. The acceptance may be unconditional or subject to reservations. The principle of reciprocity is so far-reaching, that a State may rely on the reservations made by the other party to the dispute, even if the first State itself had not made such a reservation. This extreme reciprocity was solidified in the 1957 *Norwegian Loans* case between France and Norway.⁴³

Compromissory clauses in treaties and declarations on the acceptance of the compulsory jurisdiction made with regard to the earlier Permanent Court of International Justice apply also to the present day International Court (Articles 36 (5) and 37), if they were still in force when the new Court was established.

Even though a State may have committed itself to the jurisdiction of the Court, it may have second thoughts when a case is brought against it. It is therefore not surprising that in many cases the defendant State tries to challenge the jurisdiction of the Court. In principle, the Court itself has the power to decide whether it has jurisdiction or not (Article 36 (6)). However, this task is sometimes frustrated if a State has limited the acceptance of the jurisdiction by a reservation which in fact leaves the decision to the State itself. Thus, in 1946 the U.S. accepted the compulsory jurisdiction subject to two reservations, one of which excluded 'disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America as determined

⁴³ I.C.J. Reports 1957, p. 9.

- by the United States of America'.⁴⁴ Other States have also used this 'automatic' or 'peremptory' reservation. Its validity was recognized in the 1957 *Norwegian Loans* case.⁴⁵

The jurisdiction of the Court includes not only the power to decide the case itself, but also to indicate 'provisional measures which ought to be taken to preserve the respective rights' of the parties, if the Court 'considers that circumstances so require' (Article 41). In addition, it may permit a third State with 'an interest of a legal nature which may be affected by the decision in the case' to intervene (Article 62). However, the Court has only rarely acceded to such requests. Where the dispute is about the construction of a convention, other States that are parties to that convention do have a right to intervene without the need for special permission (Article 63).

So far we have dealt with the Court's power to adjudicate disputes between States. Actually, '[o]nly States may be parties in cases before the Court' (Article 34 (1) of the Statute). However, it may also give advisory opinions on legal matters, upon the request of the U.N. General Assembly, the Security Council as well as other organs of the U.N. or a specialized agency authorized thereto by the General Assembly (Article 96 of the United Nations Charter). The Court's jurisdiction to give advisory opinions is discretionary, but only rarely has the Court refused to give its opinion. In several instances the question has been raised whether the Court should give an advisory opinion although the question submitted to it in fact related to a dispute between States and the States involved had not accepted the jurisdiction of the Court.⁴⁶

The next matter to be discussed concerns the rules to be applied by the Court. Article 38 of the Statute enumerates the main sources of international law that are to be applied, and we will review them very briefly. Historically the most important source was custom - 'a general practice accepted as law'. A party that claims that a certain custom exists has to prove that in fact many States have acted in a similar way over a reasonably long period of time with the conviction that

⁴⁴ In 1985 the U.S. terminated its acceptance of the compulsory jurisdiction of the Court.

⁴⁵ *Supra* note 43

⁴⁶ See for instance the 1923 *Eastern Carelia* case, Permanent Court of International Justice, Series B, no. 5; the 1971 *Namibia* case, I.C.J. Reports 1971, p. 16; the 1975 *Western Sahara* case, I.C.J. Reports 1975, p. 12.

there was a legal obligation to behave accordingly (*'opinio juris sive necessitatis'*). Once established, the rule is binding for all members of the international community, including new States that come into being after the crystallization of the custom. Only a 'persistent objector' who objected to the custom during the process of its formation, will be exempted from it. It is not easy to prove the existence of a custom, but Article 38 permits the reliance on earlier judicial decisions (although precedents have no binding force except between the parties - Article 59) and on the writings of experts 'as subsidiary means for the determination of the rules of law'. Many rules of international law, *inter alia* some of those concerning international rivers, have their origin in customary law, as demonstrated by the *Lake Lanoux* case.⁴⁷

The second source are 'international conventions, whether general or particular, establishing rules expressly recognized by the contesting States'. International conventions are agreements between States or other subjects of international law which are governed by international law. Many different titles are used in this context - treaties, conventions, statutes, charters, agreements, memoranda of understanding, etc. In the 1978 Camp David documents signed by Egypt and Israel the word 'framework' was used. There is no difference among these terms with regard to the binding effect of the text. However, under U.S. constitutional law, the term treaty implies that its ratification requires the approval of a two thirds majority in the Senate.

Some conventions are concluded in a formal way, namely by a process of negotiations followed by signature and a later ratification, while others are 'in simplified form', meaning that they do not require ratification. The 1997 Convention on Watercourses does need ratification or a similar process such as acceptance, approval or accession. It will enter into force on the 90th day following the date of deposit of the 35th instrument of ratification or instrument to similar effect.

Most treaties and conventions are bilateral and settle specific matters between the parties, e.g. commercial treaties. Some of the multilateral treaties, on the other hand, lay down general rules

⁴⁷ Supra note 9

of behaviour for the participating States, like the 1949 Red Cross Conventions and the 1997 Convention on Watercourses. Sometimes the rules embodied in such a multilateral convention are gradually also recognized as customary law, when States who are not parties to the convention nevertheless behave in accordance with its provisions. It is generally recognized that some of the 1907 Hague Conventions on the laws of war have acquired that status. The rules concerning the conclusion of treaties, their validity, interpretation, application and termination have been codified in the 1969 Vienna Convention on the Law of Treaties, which will also govern the 1997 Convention on Watercourses.

The third source of international law to be applied by the International Court are 'the general principles of law recognized by civilized nations'. This wording is somewhat ambiguous, but it is usually understood as referring to general principles of national law, in so far as they are suitable to relations among States. More briefly, one may say: general principles of comparative law. This source is of great importance in matters related to water, since the rules applicable among the units of a federal State (e.g. the states in the U.S. and the cantons in Switzerland) may well be a source of general principles of law in this area.

There are two additional sources applied by the International Court although not mentioned in Article 38 of the Statute: some principles of equity or justice, and certain resolutions of international organizations. As to equity, one has to distinguish between situations where the legal rule itself refers to equity, on the one hand, and cases where the Court applies equity of its own initiative, on the other hand. References to equity in legal rules are well known in the law of the sea, and in the rules on international watercourses. Thus, under the 1997 Convention, States parties to it commit themselves to 'utilize an international watercourse in an equitable and reasonable manner' (Article 5).

But to what extent may a judge refer to equity without such an authorization? It is generally recognized that the judge may always apply equity *infra legem* (within the law) - 'which constitutes a

method of interpretation of the law in force...'.⁴⁸ In other words, when the applicable rule of law is susceptible to various interpretations, the judge may choose the one which is more just in his opinion. Thus, in the 1986 Burkina Faso/Mali *Frontier Dispute* the Court divided a frontier pool among the parties as an equitable solution. Judge Hudson applied the principle that equality is equity in the 1937 case of *Diversion of Waters from the River Meuse*. In that case the Court refused to grant a remedy to the Netherlands against Belgium because 'one party which is engaged in a continuing non-performance of [its] obligations should not be permitted to take advantage of a similar non-performance of that obligation by the other party' (diversion of water from the Meuse in violation of a treaty of 1863).⁴⁹

As to certain resolutions of international organizations, they derive their relative effect from the instrument which has established the organization, namely a treaty. The Court often refers to these rules, for instance in the 1992 *Aerial Incident over Lockerbie* case (Libya v. the U.S.) which dealt with sanctions imposed on Libya because it refused to extradite the agents suspected of having been involved in the blowing up of a PanAm plane over Lockerbie in Scotland.⁵⁰

The parties may also agree to authorize the Court 'to decide a case *ex aequo et bono*', namely, in accordance with justice and irrespective of the law (Article 38 (2)). However, so far there has not been any case where such an agreement has been made. Probably States would prefer conciliation or arbitration if they wished a decision not based on law.

Provisions on the procedure in the Court are included in its Statute and its 1978 Rules of Procedure. Here only a few of those rules will be mentioned.

If the Court does not include a judge of the nationality of one or both parties to the dispute, the party or both of them respectively may choose a person (or persons) to sit as judge (or judges) in that particular case (Article 31). This institution is usually referred to as judge *ad hoc*.

⁴⁸ *Frontier Dispute* case, supra note 39, pp. 567-568..

⁴⁹ Permanent Court of International Justice, Series A/B, no. 70.

⁵⁰ I.C.J. Reports, 1992, p. 114 (Request for the indication of provisional measures); and Libya v. U.K., *ibid.*, p. 3.

The procedure at the Court consists of a written and an oral phase (Article 43). A provision which is of particular importance for disputes about water permits the Court, at any time, to entrust an individual or a group that it may select, 'with the task of carrying out an inquiry or giving an expert opinion' (Article 50). If one of the parties does not appear before the Court, the Court may, upon the request of the other party, continue the deliberations and decide the case, but the Court must verify that it does have jurisdiction and that the claim is well founded (Article 53). This happened for instance in the 1980 *Diplomatic Staff in Teheran* case,⁵¹ where Iran refused to appear before the Court, and in the 1986 *Nicaragua* case,⁵² where the U.S. refused to participate.

Cases are decided by a majority of the judges present (Article 55). Judges may add individual or dissenting opinions to the reasoning of the Court (Article 57). Judgments have to be implemented by the parties, but - as already hinted - they do not constitute generally binding precedents for other cases (Article 59). In the event of a dispute about the meaning or scope of the judgment, the Court shall construe it upon the request of a party (Article 60). There is possibility to ask for revision of a judgment if a fact is discovered which was unknown to the Court and to the party that requests the revision (Article 61).

As mentioned earlier, when becoming a party to the 1997 Convention on Watercourses or later, a State may declare that it accepts as compulsory, in relations with other States accepting a similar obligation, to submit its disputes to the International Court of Justice.

V: CONCLUSIONS

The main question is of course: how should one choose the suitable means of settlement? Before trying to answer that question, it is perhaps worthwhile to underline certain observations. International law imposes an obligation to settle disputes by peaceful means, but unless the parties

⁵¹ *United States Diplomatic and Consular Staff in Teheran*, I.C.J. Reports 1980, p.3.

⁵² *Military and Paramilitary Activities in and Against Nicaragua, Merits* (Nicaragua/United States), I.C.J. Reports 1986, p. 14.

have agreed otherwise, there is no obligation to resort to a specific mechanism. States can choose between diplomatic and judicial means. The first ones include a whole gamut of procedures, with the differences among them not always clear-cut. What characterizes all the diplomatic means is the lack of binding effect of the report which may be prepared at the end of the process, and the possibility to take into consideration all the relevant circumstances. Diplomatic means are by their nature friendlier and less adversarial than adjudication.

Although the submission to arbitration or a court of law is optional, once the tribunal has made its decision, that decision is binding and has to be implemented. Arbitration is more flexible and can better be adapted to the wishes of the States parties to the dispute, in particular with regard to the choice of the arbitrators and the rules to be applied. Proceedings at the International Court are certainly more rigid, international law has to be applied, and the procedure foreseen by the Statute and the Rules of Procedure has to be followed, but with the possibility to opt for adjudication by a chamber, the parties can exercise some influence on the designation of the judges that are to deal with the case.

History shows that most cases of dispute resolution involved negotiations, mediation or arbitration, but nowadays the list of cases on the agenda of the Hague Court is also quite impressive.

What are, then, the circumstances to be considered when deciding which procedure should be preferred? First we have to clarify whether we are dealing with an already existing conflict, or one that can still be avoided by preventive measures. Second, what is the nature of the dispute - is it a political or a legal one, namely, are the parties at odds over their existing rights or over changes to be introduced in those rights. Third, do the parties disagree on questions of fact, or of law, or of both? Fourth, is the dispute mainly of a technical nature? Fifth, the general relations between the parties have to be taken into consideration. Sixth, does the dispute involve vital interests of a State? Indeed, most States would be reluctant to submit such a dispute to binding third party adjudication.

The variety of mechanisms available to the parties ensures that wherever there is a will to solve a dispute peacefully, there is a way.

