1

Negotiation

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

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

A basic requirement is a commitment from those who are likely to become involved, that is to say from everyone, that disputes will only be pursued by peaceful means. Within states this principle was established at an early stage and laws and institutions were set up to prohibit self-help and to enable disputes to be settled without disruption of the social order. On the international plane, where initially the matter was regarded as less important, equivalent arrangements have been slower to develop. The emergence of international law, which in its modern form can be dated from the seventeenth century, was accompanied by neither the creation

of a world government, nor a renunciation of the use of force by states. In 1945, however, with the consequences of the unbridled pursuit of national objectives still fresh in the memory, the founder members of the United Nations agreed in Article 2(3) of the Charter to 'settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered'. What these peaceful means are and how they are used by states are the subject of this book.

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

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

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

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

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

[2] For discussion of the meaning and significance of negotiation see C. M. H. Waldock (ed.), *International Disputes: The Legal Aspects*, London, 1972, Chapter 2A (H. Darwin); F. S. Northedge and M. D. Donelan, *International Disputes: The Political Aspects*, London, 1971, Chapter 12; P. J. I. M. De Waart, *The Element of Negotiation in the Pacific Settlement of Disputes between States*, The Hague, 1973; United Nations, *Handbook on the Peaceful Settlement of Disputes between States*, New York, 1992, Chapter 2A; B. Starkey, M. A. Boyer and J. Wilkenfield, *Negotiating a Complex World*, Lanham, 1999; I. W. Zartman and J. Z. Rubin (eds.), *Power and Negotiation*, Ann Arbor, 2000; and V. A. Kremenyuk (ed.), *International Negotiation* (2nd edn), San Francisco, 2002.

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

Consultation

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

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

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

This policy of co-operation, developed through a series of bilateral understandings, has been incorporated in an agreement providing for coordination with regard to both the competition laws and the deceptive marketing practices laws of the two states.[4]

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

[4] See Canada–United States, Agreement regarding the Application of their Competition and Deceptive Marketing Practices Laws, 1995. Text in (1996) 35 ILM p. 309. On the role of

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

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

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

In that case Spain argued that under both customary international law and treaties between the two states, France was under an obligation to obtain Spain's consent to the execution of works for the utilisation of certain waters in the Pyrenees for a hydroelectric scheme. The argument was

consultations in the dispute settlement arrangements of the World Trade Organization see Chapter 9.

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

rejected, but the tribunal went on to hold that France was under a duty to consult with Spain over projects that were likely to affect Spanish interests. Speaking of the nature of such obligatory consultations the tribunal observed that:

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

An example of how the various ways of co-ordinating activities may be constructively combined is provided by the 'Interim Reciprocal Information and Consultation System', established in 1990 to regulate the movement of British and Argentine forces in the South Western Atlantic.[7] The system involved the creation of a direct communication link with the aim of reducing the possibility of incidents and limiting their consequences if they occur. These facilities for consultation are supported by a provision under which at least twenty-five days' written notice is required about air and naval movements, and exercises of more than a certain size. This is a straightforward arrangement for notification, but two component features of the system are worth noticing. In the first place the notification provision is very specific as to the areas in which the obligation exists and the units to which it applies, and thereby minimises the possibilities for misunderstanding. Secondly, in relation to the most sensitive areas, those immediately off the parties' respective coasts, the notifying state must be informed immediately of any movement which 'might cause political or

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

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

military difficulty' and 'mutual agreement will be necessary to proceed'. Here therefore there is not only a right and a corresponding duty in respect of notification, but in some circumstances at least a need to obtain consent.

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

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

[8] See C. C. Joyner, 'The evolving Antarctic legal regime', (1989) 83 AJIL p. 605 at p. 617. The decision to establish a Permanent Secretariat was taken in 2001: see K. Scott, 'Institutional developments within the Antarctic Treaty System', (2003) 52 ICLQ p. 473. For an analogous recent development see E. T. Bloom, 'Establishment of the Arctic Council', (1999) 93 AJIL p. 712.

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

Whether voluntary or compulsory, consultation is often easier to implement for executive than for legislative decision making, since the former is usually less rigidly structured and more centralised. But legislative action can also cause international disputes, and so procedures designed to achieve the same effect as consultation can have an equally useful part to play. Where states enjoy close relations it may be possible to establish machinery for negotiating the coordination of legislative and administrative measures on matters of common interest. There are clear advantages in having uniform provisions on such matters as environmental protection, where states share a common frontier, or commerce, if trade is extensive. The difficulties of achieving such harmonisation are considerable, as the experience of the European Union has demonstrated, though if uniformity cannot be achieved, compatibility of domestic provisions is a less ambitious alternative. In either case the rewards in terms of dispute avoidance make the effort well worthwhile.

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

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

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

distinction between consultation as a matter of obligation and voluntary consultation which states prefer.

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

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

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

Forms of negotiation

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

> The highest administrative authorities of the bordering Departments and Provinces will act in concert in the exercise of their right to make regulations for the general interest and to interpret or modify their regulations

[11] Kirgis, *Prior Consultation*, p. 375. See also I. W. Zartman (ed.), *Preventive Negotiation*, Lanham, 2001.

> whenever the respective interests are at stake, and in case they cannot reach agreement, the dispute shall be submitted to the two Governments.[12]

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

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

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

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

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

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

have had the function of supervising execution of the water diversion scheme and monitoring its day-to-day operation.

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

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

The public aspect of negotiations which is exemplified in summit diplomacy is also prominent in the activity of international organisations. In the United Nations General Assembly and similar bodies states can, if they choose, conduct diplomatic exchanges in the full glare of international attention. This is undoubtedly a useful way of letting off steam and, more constructively, of engaging the attention of outside states which may have something to contribute to the solution of a dispute. It has the

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