

# **Law and policy of international courts and tribunals**

**Section B: Non-adjudicatory dispute  
resolution processes**

**R. Mackenzie**

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# Chapter 3: Diplomatic means of dispute settlement

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## Introduction

This chapter addresses various processes for the resolution of international disputes. The processes surveyed in this chapter have in common that they do not, as a general rule, result in a legally binding outcome (although the parties to the dispute may themselves subsequently decide to embody the resolution of the dispute in a legally binding instrument).

**Article 33 of the UN Charter** sets out the main mechanisms for the peaceful settlement of international disputes. It provides:

‘The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.’

The means enumerated in Article 33 are generally characterised as diplomatic (or non-adjudicatory) and legal (or adjudicatory) means:

**Diplomatic** means include **negotiation, consultation, mediation, conciliation** and **inquiry**. Under these means, the parties to the dispute retain control of the outcome of the dispute in that they remain free to accept or reject any proposal for resolution.

In contrast to these mechanisms, **legal** (or adjudicatory) means of dispute settlement (arbitration and judicial settlement) result in third party decisions that are binding upon the parties to the dispute.

This chapter focuses on identifying the characteristics of the various diplomatic means of dispute settlement, and the principal distinctions between them. As will become apparent, the means of dispute settlement considered in this chapter are not always clear cut alternatives – the distinctions between them may be rather blurred and to a large extent the different processes represent a continuum of dispute settlement options.

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## Learning outcomes

By the end of this chapter and the relevant readings you should be able to:

- ☐ identify and explain the various diplomatic means available for the resolution of international disputes
- ☐ explain the principal features of and distinctions between the various means

- assess why states, or others involved in international disputes, might prefer particular means of dispute resolution
- discuss aspects of the relationship between adjudicatory and non-adjudicatory means of dispute resolution.

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### Essential reading

- *Merrills*, Chapters 1–4.
- Collier, J. and V. Lowe *The Settlement of Disputes in International Law*. (Oxford: Oxford University Press, 1999), Chapter 2.
- Anderson, D. 'Negotiation and Dispute Settlement' in Evans, M. (ed.) *Remedies in International Law: The Institutional Dilemma*. (Oxford: Hart Publishing, 1998).
- Franck, T.M. 'Administrative Impartiality as Fairness: the UN Secretary-General's Good Offices and other 'Third Party' Functions' in Franck, T.M. (ed.) *Fairness in International Law and Institutions*. (Oxford: Clarendon Press, 1995).
- *US Diplomatic and Consular Staff in Tehran* (United States v Iran) 1980 ICJ Rep., **paras 1–31**, and **39–45**, available at <http://www.icj-cij.org>.
- *Case Concerning Gabčíkovo-Nagymaros project*, (Hungary/Slovakia) 1997 ICJ Rep, **para. 125 ff**, available at <http://www.icj-cij.org>.
- *Case Concerning Land and Maritime Boundary between Cameroon and Nigeria*, 1998 ICJ Rep. **para. 56**, available at <http://www.icj-cij.org>.
- Hague Convention for the Pacific Settlement of International Disputes 1899 – available at [www.pca-cpa.org/ENGLISH/BD/#Conventions](http://www.pca-cpa.org/ENGLISH/BD/#Conventions).
- Hague Convention for the Pacific Settlement of International Disputes 1907 – available at [www.pca-cpa.org/ENGLISH/BD/#Conventions](http://www.pca-cpa.org/ENGLISH/BD/#Conventions).

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### Useful further reading

- *An Agenda for Peace, Preventive Diplomacy, Peacemaking and Peace-keeping*, Report of the Secretary-General pursuant to the statement adopted by the Summit Meeting of the Security Council on 31 January 1992, UN Doc. A/47/277 (1995), **paras 25, 37**, available at <http://www.un.org/Docs/SG/agpeace.html>.
- Manila Declaration on the Peaceful Settlement of Disputes, UN General Assembly Resolution 37/10 (1982), available at <http://www.un.org/documents/ga/res/37/a37r010.htm>.

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## 3.1 Introduction to diplomatic means of dispute resolution

See Collier and Lowe, Readings, at pp.19–20. The UN Charter, in Article 2, imposes an obligation on members to refrain from the threat or use of force and to settle international disputes by peaceful means. **Article 33(1) of the UN Charter** sets out the main mechanisms for the peaceful settlement of international disputes. It provides:

‘The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.’

Collier and Lowe note that ‘[t]here is in one sense a progression evident in that list as it moves from negotiation to the International Court. The processes tend to become more formal. The extent to which third parties are involved in settling the dispute between the parties increases.’ (Collier and Lowe, *The Settlement of Disputes in International Law*, p.7) However, they proceed to note that ‘the tendency to think of the various settlement procedures as a pyramid up which states climb, from the base of negotiations to the apex of the ICJ, is quite wrong’ (Collier and Lowe, p.8).<sup>1</sup>

<sup>1</sup> See readings for Section A, Chapter 1.

The various mechanisms and processes referred to in Article 33(1) of the UN Charter, and explored in this chapter, are alternatives – they may be selected and used separately or, on occasion, in combination, with a view to finding a resolution to the dispute.

Bear in mind that because of the consensual nature of international adjudication and arbitration (see Section A, Chapters 1–5 and Section B, Chapter 4), the diplomatic means of dispute settlement do not generally operate under the ‘shadow of law’ as Chinkin puts it, in contrast to alternative dispute resolution (ADR) mechanisms such as mediation at the domestic level (see Chinkin in the Essential reading for Chapter 4, pp.126–127). In many instances the diplomatic means of dispute settlement may be the only means available to settle the dispute because procedural impediments bar recourse to adjudication. They may also provide the means through which parties to a dispute can eventually agree to submit the dispute, or aspects of it, to a court or tribunal for a binding decision.

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## 3.2 Negotiation

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### Essential reading

- ☐ *Merrills*, Chapter 1.
  - ☐ Anderson, D. ‘Negotiation and Dispute Settlement’ in Evans (ed.) *Remedies in International Law: The Institutional Dilemma*. (Oxford: Hart Publishing, 1998).
  - ☐ *US Diplomatic and Consular Staff in Tehran* (United States v Iran) 1980 ICJ Rep., **paras 1–31**, and **39–45**, available at <http://www.icj-cij.org>.
  - ☐ *Case Concerning Gabcikovo-Nagymaros project*, (Hungary/Slovakia) 1997 ICJ Rep, **para. 125 ff**, available at <http://www.icj-cij.org>.
  - ☐ *Case Concerning Land and Maritime Boundary between Cameroon and Nigeria*, 1998 ICJ Rep. **para. 56**, available at <http://www.icj-cij.org>.
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Negotiation remains the principal, and most flexible, means of settling international disputes, and plays an important role in the prevention and management of international disputes, as well as in

their resolution. Treaties frequently refer to negotiation as the principal means of attempting to settle a dispute. For example, as noted in Chapter 1, Article 27 of the Convention on Biological Diversity provides that disputes between parties as to the interpretation or application of the Convention should be settled by negotiation, and that if agreement cannot be reached by negotiation the parties to the dispute may have resort to other peaceful means. Article 283 of the UN Convention on the Law of the Sea (UNCLOS) provides that the parties to a dispute arising under UNCLOS should proceed expeditiously to an exchange of views regarding settlement by negotiation or other peaceful means.

The means through which negotiations are conducted are at the discretion of the parties to the dispute. They generally take place through diplomatic channels, but may also be conducted in the context of intergovernmental organisations or through specially convened summit meetings.

Negotiations are not always directed at full settlement of every aspect of the dispute. They may be directed at different goals, for example:

- the avoidance of a dispute (through prior consultations and agreement)
- the management of an existing dispute (for example, negotiations to agree on an appropriate dispute settlement mechanism, or to define the parameters of the dispute)
- the implementation of a judgment or award.

These possibilities are considered further below.

### 3.2.1 Dispute avoidance

Prior consultation and negotiation on an *ad hoc* or institutionalised basis can play an important role in preventing potential disputes. For example, international environmental law and the law of international watercourses impose certain obligations upon states to consult with other potentially affected states before conducting certain activities on their own territory, where those activities affect or may affect other states. For example:

- In the 1957 *Lac Lanoux* arbitration, between France and Spain, the dispute concerned proposed activities of an upstream state affecting an international watercourse. The arbitral tribunal noted that the upstream state was entitled to exercise its rights, but could not ignore the interests of the downstream state, which was entitled to demand that its rights be respected and its interests taken into consideration. Accordingly, the upstream state had an obligation to consult the downstream state, and to take its interests into account, but the downstream state had no right of veto. This kind of obligation is now enshrined in the 1997 Convention on Non-Navigational Uses of International Watercourses (not in force), and in numerous agreements related to specific international watercourses (i.e. rivers or lakes which form or cross national boundaries). They are also reflected in the International Law Commission's 2001 Draft Articles on the Prevention of Transboundary Environmental Harm, and in certain regional environmental agreements, such as the 1991 Espoo Convention on Environmental Impact Assessment in a Transboundary Context.



- Such consultation mechanisms may be institutionalised – for example, the 1909 Boundary Waters Treaty between the US and Canada established the International Joint Commission, which is still in existence and provides a forum to help prevent and resolve disputes relating to the use and quality of boundary waters.

The World Trade Organization (WTO) Dispute Settlement Understanding (DSU) (see Section A, Chapter 4) also incorporates an obligation to enter into consultations prior to entering into the adjudicative phase of the dispute settlement mechanism (WTO DSU, Article 4). Certain WTO provisions also contain so-called ‘transparency’ provisions on notification of proposed trade measures, which can also be seen as mechanisms to ensure prior notice and consultation, with a view to avoiding potential trade disputes. See, for example, WTO Agreement on the Application of Sanitary and Phytosanitary Measures, Annex B (this is available at: <http://www.wto.org>).

### 3.2.2 Dispute management

Where full settlement of a dispute cannot be achieved by negotiation, there may be nonetheless a possibility to negotiate partial or interim solutions. For example, Articles 74 and 83 of the UN Convention on the Law of the Sea require parties to that Convention to try to agree provisional arrangements of a practical nature where they are unable to agree upon the delimitation of maritime boundaries. Such arrangements are without prejudice to the final delimitation. See Anderson in the Essential readings, ‘Negotiation of a *Modus Vivendi*’, p.117.

Where states are unable to negotiate a full settlement of the dispute, they may well negotiate as to appropriate ways to try to resolve the dispute – for example by agreeing on recourse to other means of dispute settlement such as conciliation, arbitration or judicial settlement. In these circumstances, the parties may negotiate in order to identify an appropriate forum for the resolution of the dispute, and to specify more clearly the dispute that exists between them and the questions to be put to a conciliation commission, arbitral tribunal or judicial body. The result of such negotiations may be embodied in a *compromis* (see, for example, the *Eritrea-Yemen Agreement on Principles*, in Chapter 1).

### 3.2.3 The relationship between negotiation and adjudication

Anderson notes (essential reading, p.115) that ‘[n]egotiation is a means of settlement which is available at all stages of the existence of the dispute or difference. Talks cannot be prevented or excluded by recourse to other means of settlement, including recourse to the United Nations or the judicial process’.

As noted above, states may, by negotiation, agree to submit their dispute to a judicial body such as the International Court of Justice. Other questions may arise about the relationship between negotiation and adjudication, for example:

- Are parties to a dispute obliged to attempt to negotiate a settlement **before** one party seeks to submit the dispute to judicial settlement?

- Can negotiations aimed at settling a dispute take place **pending** judicial or arbitral proceedings relating to that dispute, and, if so, what is the impact of those negotiations on the judicial or arbitral proceedings?

**Are parties to a dispute obliged to attempt to negotiate a settlement prior to recourse to judicial settlement?**

In the *Cameroon v Nigeria* case (essential reading, para. 56), the ICJ stated that there is no general rule in the UN Charter or otherwise in international law that the exhaustion of diplomatic negotiations constitutes a precondition for the matter to be referred to the Court. It noted however that such a precondition of this type may be, and is often, included in compromissory clauses of treaties. It further noted that such a precondition may also be included in a special agreement whose signatories then reserve the right only to submit the case to the Court only if negotiations have failed to result in settlement after a certain period of time has elapsed. Finally, the Court noted that states remain free to insert into their optional clause declaration accepting the compulsory jurisdiction of the Court a reservation excluding those disputes for which the parties involved have agreed or subsequently agree to resort to an alternative method of peaceful settlement. In that case, the fact that Cameroon and Nigeria had attempted to resolve some of the boundary issues dividing them during bilateral contacts did not imply that either one had excluded the possibility of bringing any boundary dispute concerning it before the other fora, and in particular the ICJ (Judgment on Preliminary Objections, 11 June 1998, para. 56). On the Optional Clause (Article 36(2) ICJ Statute), see Section A, Chapter 2, and *Merrills*, Chapter 6, pp.132–134. For those of you who choose to continue your study, this issue will be addressed in more detail in Section C, Chapter 4.

**Can negotiations aimed at settling a dispute take place *pending* judicial or arbitral proceedings relating to that dispute, and, if so, what is the impact of those negotiations on the judicial or arbitral proceedings?**

In the *Aegean Sea Continental Shelf* (Greece v Turkey) case, the ICJ noted that the jurisprudence of Court provided various examples of cases in which negotiations and recourse to judicial settlement by Court have been pursued *pari passu*, and confirmed that the ‘fact that negotiations are being actively pursued during the present proceedings is not, legally, any obstacle to the exercise by the Court of its judicial function’. Hence judicial proceedings may be discontinued where negotiations result in settlement of the dispute (ICJ Reps. 1978, 12, para. 29, available at <http://www.icj-cij.org>).

In the *Diplomatic and Consular Staff in Tehran* case (US/Iran), the ICJ considered whether its competence to decide the case might have been affected by the setting up of a commission by the UN Secretary-General ‘to undertake a fact-finding mission to Iran to hear Iran’s grievances and to allow for an early solution of the crisis between Iran and the US’. Iran and the US had agreed to the establishment of a Commission on that basis. The Court noted that the Secretary-General’s Commission was established as an instrument for mediation, conciliation and negotiation to provide a means for easing the crisis, not as a tribunal empowered to decide matters of fact or law in a dispute between the parties. It held that

the establishment of the Commission with the agreement of the two states could not therefore be considered in itself in any way incompatible with the continuance of parallel proceedings before the court. (*Diplomatic and Consular Staff in Tehran*, Judgment of 24 May 1980, paras 39–43, available at <http://www.icj-cij.org>.)

Some provisional measure orders of the International Tribunal for the Law of Sea, made pending constitution of an arbitral tribunal to decide a dispute, have directed parties to a dispute to exchange views and/or information, or to conduct studies. Such measures may facilitate amicable settlement of the dispute.<sup>2</sup>

In a speech to the Sixth Committee of the UN General Assembly in October 2005, the President of the ICJ observed that

‘While the Court’s function is to decide disputes through the application of international law, its principal objective is the peaceful settlement of disputes. Therefore the Court welcomes any attempt by States to settle their dispute by peaceful means even if that settlement takes place outside the Court. If the negotiations fail, the Court naturally regains its role of ultimate legal arbitrator. Even the simple fact that a case is on the docket of the Court can act as an incentive for parties to negotiate a settlement to their dispute in accordance with international law.’<sup>3</sup>

<sup>2</sup> See, for example, the case between Malaysia and Singapore concerning land reclamation activities in the Straits of Johor, discussed in Chapter 1. Information on this case is available at <http://www.pca-cpa.org/ENGLISH/RPC/#Malaysia/Singapore>.

<sup>3</sup> The full text of the speech is available at: <http://www.icj-cij.org/icjwww/ipresscom/iprstatement.htm>.

### 3.2.4 The role of negotiation in the implementation of judgments or arbitral awards

Negotiations may also be required after arbitral or judicial proceedings in order to determine how to implement an award or judgment. **For example:**

In the *Gabcikovo-Nagymaros (Hungary/Slovakia)* case, the ICJ made certain findings as to the legal positions of the parties to the dispute but stated that ‘[t]he Parties will have to seek agreement on the modalities of the execution of the Judgment in the light of this determination, as they agreed to do in Article 5 of the Special Agreement [to submit the dispute to the Court]’. (*Gabcikovo-Nagymaros* case, Judgment, para. 131, available at <http://www.icj-cij.org>). It went on to state that ‘[i]t is not for the Court to determine what shall be the final result of these negotiations to be conducted by the parties. It is for the Parties themselves to find an agreed solution that takes account of the objectives of the treaty’. (*Gabcikovo-Nagymaros* case, Judgment, para. 141, available at <http://www.icj-cij.org>). The ICJ cited its earlier judgment in the *North Sea Continental Shelf* cases, stressing that ‘[the Parties] are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it’ (*North Sea Continental Shelf* cases, 1969 ICJ reps, p.47, para. 85).

**Note:** in the *Gabcikovo-Nagymaros* case, the Court also noted the potential role that third parties might play in facilitating agreement on implementation of the judgment through mediation or good offices, noting that:

‘During this dispute both parties have called upon the assistance of the Commission of the European Communities. Because of the diametrically opposed positions the Parties took with regard to the required outcome of the trilateral talks which were envisaged, those talks did not succeed. When, after the present judgment is given, bilateral negotiations without preconditions are held, both parties can profit from the assistance and expertise of a third party. The readiness of the parties to accept such assistance would be evidence of the good faith with which they conduct bilateral negotiations in order to give effect to the Judgment of the Court’ (*Gabcikovo-Nagymaros* case, Judgment, para. 143, available at <http://www.icj-cij.org>).

Mediation and/or good offices may also play an important role in the implementation of judgments and awards. See section 3.3 below.

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## 3.3 Mediation and good offices

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### Essential reading

- *Merrills*, Chapter 2.
- Franck, T.M. ‘Administrative Impartiality as Fairness: the UN Secretary-General’s Good Offices and other ‘Third Party’ Functions’ in Franck, T.M. (ed.) *Fairness in International Law and Institutions*. (Oxford: Clarendon Press, 1995).

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### Useful further reading

- *An Agenda for Peace, Preventive Diplomacy, Peacemaking and Peace-keeping*, Report of the Secretary-General pursuant to the statement adopted by the Summit Meeting of the Security Council on 31 January 1992, UN Doc. A/47/277 (1995), paras 25, 37, available at <http://www.un.org/Docs/SG/agpeace.html>.
- 

### 3.3.1 Features of mediation

Mediation involves the intervention of a third party, acting as a go-between or channel of communication for the parties to the dispute and/or seeking actively to assist the parties to resolve their dispute by making proposals. Merrills notes that the mediator generally makes proposals informally and on the basis of information supplied by the parties, rather than on the basis of his or her own investigations.

Key aspects of mediation therefore include:

- The involvement of a third party (i.e. there must be a willing third party mediator, acceptable to both parties to the dispute).
- The consent of the parties to the dispute (i.e. they must request mediation, or accept an offer of mediation by a third party).
- The process is essentially non-legal (e.g. the mediator may informally put forward proposals that may be acceptable to

parties to resolve dispute but not based on an analysis of their legal positions).

- The process is non-binding (i.e. the parties retain control of the outcome of the mediation).

The level of intervention of the mediator may vary from case to case. Mediation can comprise a means of **facilitating negotiation** (e.g. the good offices of the UN Secretary-General – see below, section 3.3.2) or incorporate a **more active role** for the mediator in advancing proposals aimed at compromise. Merrills refers to mediation as ‘adjunct to negotiation’. Touval and Zartman have suggested that mediation can cover a variety of **different strategies**:

- communication (e.g. facilitating negotiations between the parties where they cannot deal directly with each other)
- formulation (e.g. suggesting potentially mutually acceptable proposals for settlement)
- manipulation (e.g. pushing or influencing the parties to the dispute towards a particular outcome).<sup>4</sup>

As indicated in Merrills, there are many **examples** of mediation in international disputes. When you read Chapter 2 of Merrills, **note** the identity of the mediator in the different cases discussed – for example, the mediator may be:

- an individual (e.g. the Pope (acting through an envoy) in the Argentina-Chile Beagle Channel dispute)
- a state (e.g. Algeria in the dispute between Iran and the US; or the US in the Falklands dispute between the United Kingdom and Argentina)
- a regional, international or non-governmental organisation (e.g. the World Bank in the dispute between India and Pakistan over the Indus River; the European Community in the Yugoslav crisis).

<sup>4</sup> See Bercovitch, ‘Mediation in International Conflict’, pp.125–152, at pp.138–39 in Zartman and Rasmussen (eds), *Peacemaking in International Conflict: Methods and Techniques*. (Washington DC: United States Institute of Peace Press, 1997).

### 3.3.2 Good offices

The distinction between mediation and good offices may be blurred. In general terms, good offices may be characterised as rather less proactive than mediation – involving the facilitation of negotiation rather than actively seeking and proposing solutions. However, the distinction is rarely clear-cut – there are various diverse examples of the exercise of the UN Secretary-General’s good offices function in international disputes. These are discussed in the chapter by Franck in the Essential readings, as well as in Merrills, Chapter 2. Franck emphasises the important role of the good offices function of the UN Secretary-General as a ‘catalyst for compromise, a formulator of implementing procedures and institutional structures, a symbol of fairness which makes it less politically dangerous for adversaries to compromise’ (readings, p.211).

Good offices may facilitate the implementation of judgments or awards of international courts and tribunals. For example, the UN Secretary-General has been involved in efforts to implement the judgment of the ICJ in the Land and Maritime Boundary case between Cameroon and Nigeria. In this regard, the Secretary-General established a Mixed Commission to address aspect of implementation of the judgment.<sup>5</sup>

<sup>5</sup> Further information on the Cameroon-Nigeria Mixed Commission is available at: [http://www.un.org/Depts/dpa/prev\\_dip/afri/office\\_for\\_srs/cnmc/bkground.htm](http://www.un.org/Depts/dpa/prev_dip/afri/office_for_srs/cnmc/bkground.htm).

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### Activity 3.1

In the *Agenda for Peace*, the UN Secretary-General suggested that:

‘While the mediator’s effectiveness is enhanced by strong and evident support from the [Security] Council, the General Assembly and the relevant member States acting in their national capacity, the good offices of the Secretary-General may at times be employed most effectively when conducted independently of the deliberative bodies. Close and continuous consultation between the Secretary-General and the Security Council is, however, essential to ensure full awareness of how the Council’s influence can best be applied and to develop a common strategy for peaceful settlement of specific disputes’ (para. 37).

Do you agree with this approach? Under what circumstances do you think the good offices of the UN Secretary-General are more likely to be successful in assisting parties to resolve the dispute between them?

Feedback: see page 44.

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## 3.4 Fact-finding and inquiry

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### Essential reading

- *Merrills*, Chapter 3.
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### 3.4.1 Features of inquiry as a means of dispute settlement

**Inquiry** as a distinct form of dispute resolution process involves an independent investigation of an issue disputed by two or more parties. The principal features of inquiry in this context are:

- It involves an inquiry into facts, not law. Collier and Lowe (essential readings, p.24) note that ‘if the dispute is a factual one, inquiry may itself settle it; if it has any legal content, inquiry may help to do so’.
- It involves the establishment of a specific type of panel to carry out the inquiry.
- It does not result in a binding outcome, unless the parties agree otherwise.
- The nature of the proceedings may vary – in some cases, inquiry proceedings can resemble arbitration or a judicial process, involving written submissions and oral hearings. See, for example, Merrills’ discussion of the *Red Crusader* inquiry at pp.53–56, and the *Letelier and Moffitt* case at pp.56–59.

These features are discussed in detail in Merrills, Chapter 3, and in the chapter by Collier and Lowe in the Essential reading. The underlying rationale of fact-finding and inquiry is that by seeking an objective assessment of the issue in dispute, a way may be found for comprehensive resolution of the dispute.

### 3.4.2 Commissions of Inquiry under the Hague Conventions

The 1899 Hague Convention provided for commissions of inquiry in cases of differences of an international nature involving neither honour nor vital interests, and arising from a difference of opinion on points of fact, to 'facilitate a solution of these differences by elucidating the facts by means of an impartial and conscientious investigation' (1899 Hague Convention, Article 9). After early experience with the *Dogger Bank* inquiry (see Merrills, pp.47–48), the provisions on commission of inquiry were further elaborated in the 1907 Hague Convention (see section III, 1907 Hague Convention).

The Permanent Court of Arbitration has developed Optional Rules for Fact-Finding Commissions of Inquiry (1997). These build on the provisions of the 1899 and 1907 Hague Conventions to provide a self-contained procedural framework. Further information is available at <http://www.pca-cpa.org>.

### 3.4.3 Fact-finding and inquiry in international organisations

Fact-finding and inquiry continue to play an important role in international relations. However, as Merrills notes, in practice commissions of inquiry as provided in the Hague Conventions have been little used. Instead, commissions of inquiry have tended to be established under the auspices of international organisations, such as the League of Nations, the United Nations or the International Civil Aviation Organization. For example, in 1999 the UN Commission on Human Rights called on the UN Secretary-General to establish an international commission of inquiry in relation to East Timor 'to gather and compile systematically information on possible violations of human rights and acts which may constitute breaches of international humanitarian law committed in East Timor since...January 1999...and to provide the Secretary-General with its conclusions with a view to enabling him to make recommendations on future actions...' (Commission on Human Rights, Resolution 1999/S-4/1). The International Commission of Inquiry on East Timor, established in response to this request, submitted its report in January 2000 (UN Document A/54/726, S/2000/59, 31 January 2000).

### 3.4.4 Fact-finding and inquiry in multilateral treaties

A number of multilateral treaties make provision for fact-finding and inquiry as a potential means of dispute settlement. **For example:**

- Under Article 90 of the **1977 Additional Protocol I to the 1949 Geneva Conventions**, an International Fact-Finding Commission is established. The Commission is competent to inquire into any facts alleged to be a grave breach as defined in the Geneva Conventions and the Protocol, or other serious violations of the Conventions or the Protocol, and to facilitate, through its good offices, the restoration of an attitude of respect for the Geneva Conventions and the Protocol. In other situations, the Commission may institute an inquiry at the

request of a party to the conflict only with the consent of the other party concerned. The Commission submits a report on findings of fact with such recommendations as it may deem appropriate. By 2004, 68 states parties to the Protocol had made declarations under Article 90 recognising the competence of the International Fact-Finding Commission.

- Article 33 of the **1997 Convention on Non-Navigational Uses of International Watercourses** provides that in the event of a dispute between two or more parties concerning the interpretation or application of the Convention, the parties shall seek to reach agreement by negotiation, or through good offices, mediation or conciliation, through joint watercourse institutions, or by agreeing to submit the dispute to arbitration or the ICJ. If they are unable to settle the dispute in such a way within six months, the dispute shall be submitted to impartial fact-finding. Article 33 sets out basic procedural rules for the establishment and operation of a Fact-finding Commission. The Commission is to submit a report to the parties concerned setting forth its findings and reasons and such recommendations as it deems appropriate for an equitable solution of the dispute, which the parties concerned must consider in good faith.

A specific type of fact-finding mechanism, the World Bank Inspection Panel and similar mechanisms, are considered in Chapter 5 below.

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## 3.5 Conciliation

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### Essential reading

- *Merrills*, Chapter 4.
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### 3.5.1 Features of conciliation

**Conciliation** generally involves an impartial examination of a dispute by a conciliator or a conciliation commission established by the parties that attempts to assist parties to resolve the dispute by defining and recommending the terms of a possible settlement. The parties are required to consider in good faith the recommendations of the conciliation commission, but are not obliged to accept them. Conciliation entails the formal involvement of a third party, but it does not entail a binding outcome. The precise nature of conciliation proceedings may vary depending upon the circumstances of the case. Collier and Lowe note (Essential reading, p. 29) that conciliation combines characteristics of inquiry and mediation. In some instances, conciliation may resemble ‘institutionalised negotiation’ or mediation, with the commission structuring and assisting dialogue between the parties to the dispute. In other cases, conciliation may involve more formal procedures for consideration of the merits of the respective positions of the parties and proposals for settlement based upon that consideration (see *Merrills*, pp.72–73).



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**Activity 3.2**

In the *Rainbow Warrior* case between New Zealand and France, the UN Secretary-General was asked to give a binding ruling. The case arose out of the sinking in New Zealand of the Greenpeace ship, the *Rainbow Warrior*. Among the issues that the UN Secretary-General was asked to address were:

- ☐ the amount of compensation payable to New Zealand
- ☐ the fate of two French officers responsible for sinking the vessel, who had been tried and sentenced to ten years imprisonment in New Zealand.

New Zealand sought US\$ 9 million compensation, while France offered US\$ 4 million. France also sought the return of the French officers to France, but could not guarantee that they would be required to serve their term of imprisonment (UN Secretary-General: Ruling on the *Rainbow Warrior* Affair between France and New Zealand, 74 *International Law Reports* 241 (1986) or 26 *International Legal Materials* 1346 (1986)).

With regard to compensation, the Secretary-General awarded US\$ 7 million, without providing reasons for his decision in the published award. With regard to the fate of the French officers, the Secretary-General noted that if he was to fulfil his mandate adequately, he would have to find a solution that 'both respects and reconciles [the] competing positions [of the parties]'. The award was not reasoned and did not in itself comprise a legal evaluation of the rights and obligations of the parties. The Secretary General ordered that the French officers be transferred to a French military facility on an isolated island outside of Europe for a period of three years.

**Consider** Merrill's suggestion that the *Rainbow Warrior* report more closely resembles conciliation (Merrills, p.109) than arbitration. Do you agree?

Feedback: see page 44.

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### 3.5.2 The conciliation procedure

Conciliation procedures may vary, comprising in some instances written and oral proceedings, or no formal 'pleadings' as such. Some treaties contain specific conciliation rules.

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**Activity 3.3**

Briefly review the conciliation rules contained in at least **two** of the following:

- ☐ Annex V, UNCLOS, available at [http://www.un.org/Depts/los/convention\\_agreements/texts/unclos/annex5.htm](http://www.un.org/Depts/los/convention_agreements/texts/unclos/annex5.htm).
- ☐ Permanent Court of Arbitration Optional Conciliation Rules, available at <http://www.pca-cpa.org/ENGLISH/BD/#Procedure>.
- ☐ UN Model Rules on Conciliation in General Assembly resolution 50/50 (1995), available at <http://www.un.org/documents/ga/res/50/a50r050.htm>.

What are the principal features of conciliation proceedings reflected in these rules? What is the rationale for the development of conciliation rules of this type? What provisions do the rules contain about the nature of any findings or recommendations of the conciliation commission?

Feedback: see page 44.

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### 3.5.3 Conciliation in international treaties

Conciliation generally plays a significant role in dispute settlement provisions in multilateral treaties. In treaties, conciliation may be one among a number of optional dispute settlement mechanisms, or it may be mandatory (on request of one party) where other mechanisms have failed to resolve the dispute. For example, as noted in Section A, Chapter 2, and in Chapter 1, in the 1992 Convention on Biological Diversity, a dispute must be submitted to conciliation at the request of one party to the dispute where other diplomatic means have failed to provide a solution, and where the parties have not agreed to submit the dispute to arbitration or adjudication. The 1969 Vienna Convention on the Law of Treaties, in Article 66, provides for the submission of disputes concerning the application or interpretation of certain provisions of the Vienna Convention to conciliation in accordance with the procedure set out in the Annex to the Convention.

Conciliation also plays an important role in the dispute settlement system of the 1982 UN Convention on the Law of the Sea (UNCLOS). The dispute settlement provisions of the UNCLOS have been referred to in Section A, Chapter 2 and Section B, Chapter 1.

Under Article 284 of UNCLOS, parties may agree to seek to resolve a dispute between them by conciliation. There is also the possibility of compulsory conciliation in UNCLOS. As noted in Chapter 1 above, Article 298 UNCLOS allows states to exclude certain disputes, including those relating to sea boundary delimitation, from the compulsory procedures entailing binding decisions in Article 287. If a state opts to do this, Article 298 imposes an obligation in certain circumstances to accept instead submission of the dispute to conciliation under Annex V, section 2 UNCLOS. Where a dispute is submitted to conciliation under Annex V, section 2, the parties are then under an obligation to negotiate an agreement on the basis of the report of the conciliation committee. If they do not, then unless they otherwise agree they must, by mutual consent, submit the question to one of the binding procedures provided in Article 287 of UNCLOS.

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#### Activity 3.4

What is the relationship between conciliation and arbitration in the UN Convention on the Law of the Sea?

Feedback: see page 45.

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### 3.5.4 Conciliation in foreign investment disputes

Chapter 2 considered the arbitration mechanism of the International Centre for Settlement of Investment Disputes. The ICSID Convention also provides for conciliation of investment disputes between states and nationals of other states. To date, this option has been little-used: by October 2004, only 4 out of 145 ICSID cases involved conciliation proceedings. However, this may change over time as the ICSID Secretariat takes steps to promote awareness and use of ICSID conciliation procedures.

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**Activities 3.5–3.6**

**3.5** Identify the principal differences between conciliation and arbitration.

**3.6** What are the main distinctions between conciliation and mediation?

Feedback: see page 45.

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### 3.6 The choice of dispute resolution process

The preference of a state for one of the above mechanisms, or for arbitral or judicial proceedings, for the settlement of any particular dispute is likely to depend on a number of factors, including:

- the subject-matter of the dispute
- the identity of the other disputing party (or parties)
- the availability of the various mechanisms.

States may be influenced for example, by a need or desire to:

- maintain general friendly relations with the other party to the dispute
- retain some control over the outcome of the dispute
- address the concerns of specific domestic interest groups
- address the concerns of other interested states or international organisations.

On a more practical level, they may be influenced by factors such as the costs and/or duration of any proceedings.

As Anderson notes (Essential reading, p.112), the principal advantage for states of negotiation as a means for the settlement of international disputes is that they retain control over the outcome – parties to the dispute remain free to negotiate on any terms they wish. States may however progress quickly towards looking to judicial settlement if they see no hope of reaching a negotiated settlement (for example, the *Hostages* case in the ICJ). Similarly, the availability of negotiation as a possible means of dispute settlement presupposes that there are bilateral relations between the parties to the dispute. Where no such relations exist, or they are strained, the involvement of a third party through mediation or good offices may be a more viable option, where a suitable and acceptable third party mediator is available.

Complex international disputes often involve a suite of dispute settlement processes: for example, as described by Merrills (in Chapter 2), mediation has played a significant role in high profile disputes such as those in the former Yugoslavia. In such circumstances, the possibility of an international court or tribunal resolving all aspects of the dispute may be remote, but nonetheless discrete aspects of the dispute may still form the subject of a case before such a body.

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**Reminder of learning outcomes**

By this stage you should be able to:

- identify and explain the various diplomatic means available for the resolution of international disputes

- ☐ explain the principal features of and distinctions between the various means
- ☐ assess why states, or others involved in international disputes, might prefer particular means of dispute resolution
- ☐ discuss aspects of the relationship between adjudicatory and non-adjudicatory means of dispute resolution.

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### Sample examination questions

**Question 1** Why might the parties in an international dispute look to a third party mediator to assist them in attempting to reach a settlement? How might such a mediator be selected? What factors might facilitate the reaching of a mediated agreement?

**Question 2** Discuss the approach taken by the International Court of Justice to claims that it should not entertain applications which have been submitted to it while negotiations or other dispute resolution processes are being sought.

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### Advice on answering the questions

**Question 1** *These issues are addressed in section 3.3 of this chapter and in Chapter 2 of Merrills, as well as the Readings by Collier and Lowe and by Franck. When you answer this question, you should ensure that you address each of the three elements of the question.*

**Question 2** *In answering this question it is helpful to make reference to the various means of dispute resolution identified in Article 33 of the UN Charter. As noted in this chapter and in the readings, these mechanisms are not mutually exclusive. Your answer to this question should make reference to cases before the International Court of Justice in which other dispute settlement procedures have also been ongoing: for example, some of the cases referred in section 3.2.3 above, as well as other examples referred to in the Readings. These include the Aegean Sea Continental Shelf case; the Border and Transborder Armed Actions (Honduras-Nicaragua) case; the Diplomatic and Consular Staff in Tehran case; and the Cameroon-Nigeria case. This issue is discussed specifically in the article by Anderson, and at pp. 18–23 of Merrills.*

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### Feedback to activities: Chapter 3

**Activity 3.1** *Aspects of this issue are discussed by Franck in the essential readings. As Franck notes, the good offices function of the UN Secretary-General can derive from a mandate from the political organs of the UN, the Security Council or General Assembly, from the Secretary-General's own authority and initiative, or upon the request of the parties to the dispute. In the case of Cambodia, there was a General Assembly resolution inviting the UN Secretary-General to exercise good offices, but the Secretary-General acted on the basis of independent authority. In other cases, the Secretary-General has been asked to act, in effect, as an emissary of the UN political organs, in circumstances where those bodies have already expressed a view on the matter in question – for example in relation to Iraq's invasion of Kuwait in 1990. Such a mandate can impact on the perceived impartiality and independence of the Secretary-General as a mediator. It may also constrain the exercise of the Secretary-General's good offices function, for example, by foreclosing certain settlement options.*

**Activity 3.2** *Read Merrills' discussion of this case at pp. 100, 108–109 and 111–12.*

**Activity 3.3** *Conciliation rules will generally cover issues such as:*

- ☐ *The initiation of conciliation proceedings.*
- ☐ *The appointment of conciliators/the conciliation commission.*
- ☐ *The procedures and functions of the commission, for example:*
  - *sources of information*
  - *whether hearings will be held or the parties make written submissions*
  - *the way in which the conciliation commission will take decisions (e.g. unanimously or by majority).*
- ☐ *Representation of the parties in conciliation proceedings.*
- ☐ *The outcome of the conciliation proceedings: the report or recommendations of the conciliation commission.*
- ☐ *The nature of the conciliation commission's report or recommendations (generally not binding).*
- ☐ *The obligation of the parties to consider the commission's recommendations in good faith.*
- ☐ *Preservation of the legal positions of the parties.*
- ☐ *Costs of proceedings.*
- ☐ *Administrative support to the conciliation commission.*

**Activity 3.4** *You should be able to explain the role of conciliation and arbitration in the dispute settlement system established by UNCLOS. You may need to refer back to Chapter 1 of this section, and to Merrills, Chapter 8, to answer this question.*

**Activity 3.5** *The main difference between arbitration and conciliation is that conciliation does not generally entail a binding outcome. While arbitration results in a binding award (see Chapters 1 and 2), a conciliation commission makes recommendations which the parties to the dispute generally undertake to consider in good faith. Arbitration is a legal means of dispute resolution and involves a legal evaluation of the respective rights and obligations of the parties to the dispute. While conciliation commissions investigate the dispute between the parties, conciliation is aimed more generally at finding a resolution of the dispute that is acceptable to both parties. Once again, the distinctions between the processes may be blurred in some instances – see, for example, the Rainbow Warrior case referred to in section 3.5.1 above.*

**Activity 3.6** *The distinction between conciliation and mediation processes may not always be entirely clear-cut. In general terms, conciliation tends to be a more institutionalised process, involving the establishment of a conciliation commission, and conducted in accordance with procedural rules (such as the conciliation rules established under the auspices of the Permanent Court of Arbitration, Annex V to UNCLOS, or under the ICSID Convention). The recommendations of the conciliation commission tend to be rendered formally and on the basis of an investigation by the commission, whereas a mediator may make proposals more informally and on the basis of information and views provided by the parties to the dispute (see generally, Merrills, p.27). Parties generally undertake to consider the conciliation commissions' recommendations in good faith.*