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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 UN Charter to 'settle their international disputes by peaceful means in such a manner that international

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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), proclaimed:

> 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, for example the terms of reference for an inquiry or conciliation commission 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 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

[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 H. Darwin, 'Negotiation' in C. M. H. Waldock (ed.), *International Disputes: The Legal Aspects*, London, 1972, ch. 2A; F. S. Northedge and M. D. Donelan, *International Disputes: The Political Aspects*, London, 1971, ch. 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, ch. 2A; B. Starkey, M. A. Boyer and J. Wilkenfield, *Negotiating a Complex World*, Lanham, MD, 1999; I. W. Zartman and J. Z. Rubin (eds.), *Power and Negotiation*, Ann Arbor, MI, 2000; and V. A. Kremenyuk (ed.), *International Negotiation*, 2nd edn, San Francisco, 2002.

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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 co-ordination with regard to both the competition laws and the deceptive marketing practices laws of the two states.

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

[3] See B. R. Campbell, 'The Canada–United States antitrust notification and consultation procedure' (1978) 56 *Can. Bar Rev.* 459 at 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* 127.

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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.[4]

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 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.[5]

The role of consultation at different stages of a dispute may be seen in the *Land Reclamation* case.[6] Here, Malaysia brought proceedings against Singapore in response to reclamation activities being undertaken by the latter in the Straits of Johor, claiming that, as the activities were damaging

[4] *Lake Lanoux Arbitration (France* v. *Spain)* (1957) 24 ILR 101 at 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* 30.

[5] 24 ILR 101 at 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.* 212; and F. L. Kirgis, *Prior Consultation in International Law*, Charlottesville, VA, 1983, ch. 2.

[6] *Case Concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia* v. *Singapore)*, Provisional Measures Order of 8 October 2003, 126 ILR 487; and see J. G. Merrills, 'New horizons for international adjudication' (2006) 6 *Global Community YBILJ* 47 at 48–57.

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and had been carried out without notification or consultation, Singapore had breached its obligations under the 1982 Law of the Sea Convention. Malaysia first sought provisional measures of protection from the International Tribunal for the Law of the Sea, and, in its order in 2003, the Tribunal put on record various undertakings from the parties with regard to the sharing of information and co-operation and required them to set up a group of independent experts to investigate the dispute and make recommendations. The group submitted its recommendations as requested, which provided the basis for an agreement settling the dispute which shortly afterwards was incorporated in an arbitration award on agreed terms. Under the settlement, the two states set up a joint mechanism designed to promote co-operation between them in the future. Thus, here consultation played a triple role, providing the basis for Malaysia's initial claim, then forming part of a transitional framework in the provisional measures order, and finally supplying a major component of the final settlement.

Another 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 for 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. First, 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 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.

When arrangements for consultation are agreed upon in advance, questions may naturally arise as to whether they have been complied with if one party adopts measures to which the other takes exception. In the *Pulp Mills on the River Uruguay* case,[8] for example, Argentina took Uruguay to the

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

[8] *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay)*, Judgment [2010] ICJ Rep. 14 and see C. R. Payne, Note (2011) 105 *AJIL* 94.

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International Court of Justice claiming, inter alia, that the latter had failed to notify and consult with Argentina before authorising the construction of two large pulp mills on the river which forms the international boundary. The obligations in question were contained in a bilateral treaty, the 1975 Statute of the River Uruguay, and, after examining the parties' conduct, the Court ruled that Uruguay had indeed breached its procedural obligations under the Statute. Argentina further claimed that Uruguay had violated its substantive obligations under the treaty, on account of the ecological impact of the pulp mills, but the Court found that this claim was not made out. Co-operative arrangements for utilising shared resources such as boundary rivers are increasingly common nowadays, and this case is a good illustration of their significance.

In the *Sarayaku* case,[9] the Inter-American Court of Human Rights was required to examine the scope of a state's obligation to consult an indigenous community when undertaking development projects that may affect their lands. The case arose because in 1996 Ecuador had granted oil concessions in the ancestral lands of the Sarayaku community without any consultation. Although it was recognised that the community had suffered harm from the concessions because it was unable to practice its traditional means of subsistence and had lost freedom of movement, Ecuador argued that a duty to consult only arose when Ecuador subsequently ratified the International Labour Organization's 1989 Convention No. 169. The Court, however, disagreed and holding that the obligation to consult is a general principle of international law, found Ecuador liable. Although necessarily to be seen in the context of its rather specialised subject matter, this decision clearly has important implications for the responsibilities of states towards their indigenous peoples.

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 example, 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' 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

[9] *Kichwa Indigenous Community of Sarayaku* v. *Ecuador*, Inter-American Court of Human Rights (ser. C) No. 245 (2012). See also L. Brunner and K. Quintana, 'The duty to consult in the Inter-American system: legal standards after *Sarayaku*' (2012) 16 *ASIL Insights*, Issue 35.

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'concurrence' was chosen 'to convey the idea of a presumption that was to be observed in favour of the member's proposal'.[10] 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 decision-making 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 was 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 an allegation of a failure to carry out the agreed procedure may itself become a disputed issue.

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; therefore 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 co-ordination 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.

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 is 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

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

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procedures have been developed, there is, as we have noted, an important 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; for example, between trade departments in the case of a commercial agreement, 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 whenever the respective interests are at stake, and in case they cannot reach agreement, the dispute shall be submitted to the two Governments.[12]

[11] Kirgis, *Prior Consultation* (n. 5) p. 375. See also I. W. Zartman (ed.), *Preventive Negotiation*, Lanham, MD, 2001.
[12] See the Additional Act to the three Treaties of Bayonne (1866), Art. 16, in (1957) 24 ILR 104.

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In the case of a recurrent problem or a situation requiring continuous supervision, states may decide to institutionalise negotiations 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. 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 Canada–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.[13]

A commission of the second type was created in the Agreement of 2013 which settled the *Aerial Herbicide Spraying* case.[14] Ecuador had brought a case in the International Court against Colombia over the alleged spraying of toxic chemicals near, at and across their common border. However, the two states then concluded an Agreement which established an exclusion zone in which Colombia would not conduct aerial spraying and which also set up a Joint Commission to ensure that spraying outside the zone did not cause herbicides to drift into Ecuador. The Agreement also provided for the possibility of reducing the width of the exclusion zone, as well as operational parameters for Colombia's spraying programme, arrangements to exchange information and a mechanism for dispute settlement. Ecuador regarded the Agreement as fully satisfying its claims. Accordingly, it arranged for the court proceedings to be discontinued.

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 France–Spain 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

[13] 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* 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* 38.

[14] See *Aerial Herbicide Spraying (Ecuador* v. *Colombia)*, Order of 13 September 2013 [2013] ICJ Rep. 278.

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(unsuccessfully) the idea of a fourth mixed commission which would 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 bypassed 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 George H. 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 disadvantage, however, that so visible a performance may encourage the striking of attitudes which are at once both unrealistic and difficult to abandon. It is therefore probable that, for states with a serious interest in negotiating a

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

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