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International Dispute Settlement: Principles and Concepts

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 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.

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

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.

This first introductory chapter aims to identify the basic framework for the settlement of international disputes by discussing the main principles of international dispute settlement and the concepts used in the settlement of disputes. This chapter looks at the general principles of practice across dispute settlement methods and institutions, rather than engaging in a discussion on every court and tribunal individually.

1.1 The Peaceful Settlement of Disputes

International dispute settlement has long been viewed through the lens of the question of whether international law and international relations require a compulsory method to settle disputes, a question which is inextricably linked to the idea that dispute settlement is necessary to avoid recourse to war or armed force.[1] From the 1870s onwards, proposals for the establishment of some system to arbitrate international disputes were becoming common.[2] The trust in international arbitration found confirmation in the increased practice of international arbitration, and the relative successes of arbitration to settle disputes, such as the arbitration of the *Alabama claims* between the United Kingdom and the United States in 1872, and the *Fur Seal Arbitration* between the same parties, concluded in 1892.

These successes resulted in a formalisation of international arbitration as a method of dispute settlement through the creation of the Permanent Court of Arbitration (PCA) during the first Hague Peace Conference of 1899.[3] International arbitration was already then seen in its connection to avoid recourse to war in addition to being considered as a means to ensure implementation of international law. This goal had been vigorously defended during the 1899 Hague Peace Conference and finds reflection in Article 1 of the 1899 Convention for the Pacific Settlement of International Disputes which established the PCA:

> With a view to obviating, as far as possible, recourse to force in the relations between States, the Signatory Powers agree to use their best efforts to insure the pacific settlement of international differences.

[1] See M. E. O'Connell, 'Arbitration and Avoidance of War: The Nineteenth-Century American Vision', in C. P. R. Romano (ed.), *The Sword and the Scales: The United States and International Courts and Tribunals*, Cambridge, 2009, pp. 30–45.

[2] W. G. Grewe, *The Epochs of International Law*, Berlin, 2000, p. 517; M. E. O'Connell, 'Arbitration and Avoidance of War: The Nineteenth-Century American Vision', in C. P. R. Romano (ed.), *The Sword and the Scales* (n. 1) pp. 30–45.

[3] Hague Convention on Pacific Settlement of International Disputes (Hague, I) (adopted 29 July 1899, entered into force 4 September 1900).

There was, however, no compulsory submission of disputes to the PCA.

The Second Hague Peace Conference which was convened in 1907 renewed enthusiasm for the idea of a permanent tribunal with compulsory jurisdiction, but no substantial adaptations were made to the PCA. The Second Hague Peace Conference, however, did result in the signature of the Hague Convention on the Limitation of Employment of Force for Recovery of Contract Debts (Hague II, also known as the 'Drago Porter Convention').[4] The Convention was important for the agreement of the states parties to prohibit the use of armed force for the 'recovery of contract debts claimed from the Government of one country by the Government of another country as being due to its nationals'.[5] The Convention links the prohibition of the use of force to recover contract debts to dispute settlement, since it also provides that the undertaking not to use force is 'not applicable when the debtor State refuses or neglects to reply to an offer of arbitration, or, after accepting the offer, prevents any compromise from being agreed on, or, after the arbitration, fails to submit to the award'.[6]

The creation of the Permanent Court of International Justice (PCIJ) in 1920 was another important step in the rise of international dispute settlement and its link to the prohibition of the use of force. The PCIJ had no compulsory jurisdiction, despite proposals to that effect from the Advisory Committee of Jurists headed by the Belgian Baron Descamps,[7] but its permanent and especially its standing character was considered a major achievement. Importantly, the PCIJ was seen as part of the 'system of war prevention',[8] but the PCIJ was also established in the context of a strong belief not only in the settlement of disputes to avoid war, but also in an institutionalisation to bring about peace and development.[9]

After the Second World War, the United Nations (UN) and its principal judicial organ, the International Court of Justice (ICJ) were established. The UN and the ICJ were seen as important institutions in the avoidance of the use of force in international relations. This is reflected by the obligation for UN member states to settle their disputes by peaceful means set out in Article 2(3) of the UN Charter, the first time that the peaceful settlement of disputes was established as a freestanding obligation. It is not a coincidence that the obligation to settle disputes in a peaceful way is

[4] Convention on the Limitation of Employment of Force for Recovery of Contract Debts (Hague, II) (adopted 18 October 1907, entered into force 26 January 1910).
[5] Article 1(1) Convention on the Limitation of Employment of Force for Recovery of Contract Debts ('Drago Porter Convention').
[6] Ibid. Article 1(2). [7] C. Rousseau, *Droit International Public*, Paris, 1979, p. 327.
[8] W. G. Grewe, *The Epochs of International Law*, Berlin, 2000, p. 616.
[9] See L. Tosi, 'The League of Nations: An international relations perspective' (2017) 22 *Uniform Law Review*, 148–57 and M. Erpelding, B. Hess, and H. Ruiz Fabri, *Peace through Law : The Versailles Peace Treaty and Dispute Settlement After World War I*, Baden-Baden, 2019.

provided in Article 2(3) of the UN Charter, before the prohibition on the use of force, provided for in Article 2(4) of the UN Charter. The sequence is notable but also indicates that the principle that states should settle their disputes by resort to peaceful means is the counterpart of the prohibition of the use of force in international relations. Since then, the peaceful settlement of disputes has been repeated and confirmed in various instruments. For example, UNGA Resolution 2626 (XXV) containing the 'Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations' ('Friendly Relations Declaration') contains multiple references to the prohibition of the use of force in international relations, and the obligation for states to settle international disputes by peaceful means.

The obligation on states to settle disputes by peaceful means resulting from Article 2(3) of the UN Charter should primarily be read as an obligation directed to and binding upon all UN member states. Yet it is safe to conclude that the obligation for states to settle disputes by peaceful means also applies beyond the UN member states to all states in their conduct.

At its core, the obligation to settle disputes by peaceful means implies simply that states should use any peaceful means to settle their disputes, with the exclusion of resort to force. While the obligation to settle disputes by peaceful means can therefore be mostly understood and given legal significance in its negative construction by reference to the countervailing prohibition on the use of force, it has a very strong principled and symbolic function.[10]

The obligation does not impose any obligation as such to settle disputes. However, in respect of the latter, reference should be made to Article 33 of the UN Charter which contains an obligation for UN member states to settle 'any dispute, the continuance of which is likely to endanger the maintenance of international peace and security'. This article contains a positive obligation on UN member states to settle their disputes if these are likely to endanger the maintenance of international peace and security. The aforementioned 'Friendly Relations Declaration' both confirms these principles and adds that in the event of failure to reach a solution by any means of settlement chosen, states are under an obligation to continue to seek a settlement of the dispute by other peaceful means to be agreed upon by parties. Moreover, the Declaration adds that all states, including states not parties to the dispute, are under an obligation to 'refrain from any action which may aggravate the situation so as to endanger the maintenance of international peace and security'. The 1982 'Manila Declaration on the Peaceful Settlement of International Disputes' reaffirms these principles.[11]

[10] O. Corten, F. Dubuisson, V. Koutroulis and A. Largewall, *Une Introduction Critique au Droit International*, Brussels, 2017, p. 543.

[11] United Nations General Assembly Resolution 37/10 ('Manila Declaration on the Peaceful Settlement of International Disputes').

The obligation to settle disputes by resort to peaceful means also does not impose any specific choice of dispute settlement method. States involved in a dispute need to consent to the settlement of the dispute and retain the choice to freely determine the method of settlement.

1.2 State Consent and the Free Choice of Means of Settlement

The sovereign equality of states, a firmly established principle of public international law which implies that irrespective of size or power states have equal rights and capacities,[12] implies two important principles of international dispute settlement: the need for states to consent to the settlement of a dispute and the free choice of means of settlement.

1.2.1 State Consent to Dispute Settlement

The principled sovereign equality of states in international law entails the need for the states involved in a dispute to consent to the settlement of a dispute and to the means of settlement. Indeed, despite the general obligation to settle international disputes peacefully, general international law does not impose on states a particular means of dispute settlement. No state is, without consenting, under an obligation to agree on a particular means of settlement of disputes – consent is a necessary prerequisite for the settlement of disputes between states. This prerequisite of consent is valid for all methods of settlement, but has also a practical function in the context of diplomatic methods such as negotiation, good offices and mediation where, by necessary implication, the state needs to participate actively in settling the dispute. In such cases, the consent is of both a principled and a practical relevance.

This fundamental principle of international law has long been recognised by international courts and tribunals. In its Advisory Opinion on the 'Status of Eastern Carelia', the PCIJ noted:

> it is well established in international law that no State can, without its consent, be compelled to submit its disputes with other States either to mediation or to arbitration, or to any other kind of pacific settlement.[13]

The principle of state consent is sometimes expressed through the notion of 'jurisdiction *ratione voluntatis*' in international adjudication and arbitration.[14] However, since state consent forms the basis of any dispute

[12] M. N. Shaw, *International Law*, 8th ed., Cambridge, 2017, p. 168.
[13] Permanent Court of International Justice, Status of Eastern Carelia, Advisory Opinion, 1923 PCIJ (ser. B) No. 5 (23 July 1923), p. 27.
[14] See e.g. *Impregilo S.p.A.* v. *Argentine Republic*, ICSID Case No. ARB/07/17, Brigitte Stern dissenting opinion.

settlement method, it has a more fundamental character than the jurisdictional requirements contained in the *expression* of such consent. In other words, jurisdiction is created by consent.[15]

Consent can be expressed in various ways, which are either implicit in the method of settlement chosen or regulated by the statutes or rules governing formalised dispute settlement methods such as international adjudication or arbitration. If states opt for diplomatic dispute settlement methods, the consent to settle a dispute by negotiation or mediation can easily be derived from the participation by states in these procedures. The more formal the dispute settlement method, however, the more the expression of consent is formalised and subject to specific requirements included in the relevant statutes of international courts and tribunals, or the rules of procedure chosen in case of arbitration.

Generally, consent to jurisdiction is expressed by an international instrument such as a treaty, where states parties formally consent to the jurisdiction outlined therein. As a matter of principle, consent to jurisdiction cannot be derived from custom.[16] Where states expressly agree in an international instrument to settle a given dispute by immediate resort to international adjudication or arbitration, such treaty is referred to as a 'special agreement' or 'compromis'.[17]

States may also stipulate an agreement in a bilateral or multilateral treaty covering certain substantial issues to submit disputes relating to the treaty to international adjudication or arbitration or any other method (or combination thereof) of settlement. Such agreement is provided for in a clause referred to as a 'compromissory clause'. An example is Article 1 of the Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes[18] which provides:

> Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol.

States, however, are often free to make reservations to compromissory clauses in treaties, in which case, and depending on the precise formulation of the treaty, states will be bound by the substantive obligations contained therein but not the dispute settlement clause.

The advantage of a 'compromis' compared to 'compromissory clauses' resides in the fact that it guarantees the 'direct and immediate consent of

[15] H. Thirlway, *The International Court of Justice*, Oxford, 2016, p. 36. [16] *Ibid.*, 36.
[17] H. Thirlway, 'Compromis', in *Max Planck Encyclopedia of Public International Law*, Oxford, 2006, para. 1.
[18] Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes (adopted 24 April 1963, entered into force 19 March 1967) UNTS 596.

both parties',[19] and to that extent is different from 'compromissory clauses' which contain a generalised advance consent of states.

Another form of consent may be found in a 'compromissory treaty', a particular form of treaty containing the consent of a group of states, where a certain set of defined disputes may, if they occur, be submitted to international adjudication or arbitration. The difference between this type of treaty and the two other forms of consent lies in the fact that in the case of a 'compromissory treaty' the subject matter of the treaty is the organisation of the settlement of disputes. An example is the so-called 'Pact of Bogota' signed in 1948[20] which has often been invoked as a basis for the jurisdiction of the International Court of Justice.[21]

In the case of compromissory treaties or compromissory clauses, states consent in advance to having a range of disputes settled in a particular manner. In such instances, there may be a certain lapse of time between consent expressed by states and the actual submission of a dispute to a defined method of settlement. Similarly, treaties may contain a compromissory clause without the possibility for states to make reservations or opt out of the compromissory clause. In such cases, despite the remoteness between the consent and the actual submission of a dispute, and the impossibility for states to sign and ratify a treaty without accepting the compromissory clauses, the fundamental principle that states have consented to submit a dispute to adjudication or arbitration remains intact.

It is important to note at this point that specific methods of settlement or courts and tribunals may also provide for specific modes for consent, such as the so-called 'optional clause' provided in Article 36(2) of the Statute of the ICJ. These specific modes for consent will be discussed throughout this book in the various chapters dedicated to the particular dispute settlement methods.

1.2.2 Free Choice of Means of Settlement

The principle of sovereign equality of states and the need for states to consent to have their disputes settled imply that states are free to choose the means of dispute settlement. As explained by the ICJ in the *Obligation to Negotiate Access to the Pacific Ocean* case,[22] in the context of the discussion on whether there exists an obligation to negotiate based on the general principle of the peaceful settlement of disputes:

[19] H. Thirlway, 'Compromis' (n. 17), para. 26.
[20] American Treaty on Pacific Settlement (signed 30 April 1948, entered into force 6 May 1949) 30 UNTS 55.
[21] See E. Valencia-Ospina, 'Bogotá Pact (1948)', in *Max Planck Encyclopedia of Public International Law*, Oxford, 2006.
[22] *Obligation to Negotiate Access to the Pacific Ocean (Bolivia* v. *Chile)*, Judgment of 1 October 2018, [2018] ICJ Rep. 507.

> The Court recalls that, according to Article 2, paragraph 3, of the Charter of the United Nations, '[a]ll Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered'. This paragraph sets forth a general duty to settle disputes in a manner that preserves international peace and security, and justice, but there is no indication in this provision that the parties to a dispute are required to resort to a specific method of settlement, such as negotiation. Negotiation is mentioned in Article 33 of the Charter, alongside 'enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements' and 'other peaceful means' of the parties' choice. However, this latter provision also leaves the choice of peaceful means of settlement to the parties concerned and does not single out any specific method, including negotiation. Thus, the parties to a dispute will often resort to negotiation, but have no obligation to do so.[23]

The free choice of means is a fundamental principle of international dispute settlement and is sometimes explicitly included in dispute settlement provisions of international treaties.[24] It is explicitly included in the 'Friendly Relations Declaration', which links the free choice of means to the sovereign equality of states,[25] as does the 1982 Manila Declaration.[26] To a large extent, the freedom of choice is implicit in the need for states to consent to have their disputes settled, since the expression of consent to have a dispute settled necessarily implies choosing a *particular* type of procedure or method of settlement in the expression of consent. The free choice of means is only subjected to the limitation that all parties to the dispute need to consent to the *same* method of settlement.

1.3 The Notion of 'Dispute'

What constitutes a dispute is central to any discussion of international dispute settlement. The question of whether a 'dispute' exists between parties is of fundamental importance, with the existence of a dispute often forming one of the bases upon which a court or tribunal's jurisdiction is

[23] *Ibid*., para. 165.

[24] See e.g. Article 280 of UNCLOS: 'Nothing in this Part impairs the right of any States Parties to agree at any time to settle a dispute between them concerning the interpretation or application of this Convention by any peaceful means of their own choice.'

[25] See e.g. the following statement of the 'Friendly Relations Declaration': 'International disputes shall be settled on the basis of the sovereign equality of States and in accordance with the principle of free choice of means. Recourse to, or acceptance of, settlement procedure freely agreed to by States with regard to existing or future disputes to which they are parties shall not be regarded as incompatible with sovereign equality'. See also, for a discussion of the Declaration on this precise point: *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Judgment of 1 October 2018, [2018] ICJ Rep. 507, para. 166.

[26] General Assembly Resolution 37/10 ('Manila Declaration on the Peaceful Settlement of International Disputes').

grounded,[27] and directly relates the exercise by a court or tribunal of its arbitral or judicial function.[28] More fundamentally, the question whether a 'dispute' exists between parties is essential to establish and delimit the issues upon which a court or tribunal is empowered to pronounce itself resulting in a final and binding decision.[29] However, certain dispute settlement methods, such as that provided by the GATT and the World Trade Organization Dispute Settlement Understanding does not limit settlement to 'disputes', but extends also to 'situations' and 'non-violation complaints' in case a benefit under a WTO Agreement is being nullified or impaired.[30]

The existence of a dispute, as put by the ICJ, is 'a condition of the Court's jurisdiction'.[31] It is a question that precedes those relating to the existence of jurisdiction of a court or tribunal:

> Even before turning to the questions of jurisdiction and admissibility, the Court has first to consider the essentially preliminary question as to whether a dispute exists and to analyse the claim submitted to it.[32]

In the *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *United Kingdom)* case, the Court noted that

> The Court's jurisprudence treats the question of the existence of a dispute as a jurisdictional one that turns on whether there is, in substance, a dispute, not on what form that dispute takes or whether the respondent has been notified (see paragraph 38 above).[33]

[27] See generally: J. McIntyre, 'Put on notice: the role of the dispute requirement in assessing jurisdiction and admissibility before the International Court' (2018) 19 *Melbourne Journal of International Law*, 546 and B. I. Bonafé, 'Establishing the existence of a dispute before the International Court of Justice: Drawbacks and implications' (2017) 45 *Questions of International Law*, 3–32.

[28] As emphasized by Judge Crawford: 'the rationale behind requiring a legal dispute is to ensure that the Court has something to determine: it protects the Court's judicial function which, in a contentious case, is to determine such disputes' (*Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom), Preliminary Objections*, Judgment of 5 October 2016, Dissenting Opinion of Judge Crawford, [2016] ICJ Rep. 833, para. 3.

[29] M. N. Shaw, *Rosenne's Law and Practice of the International Court (1920–2015)*, 5th ed., Leiden, 2016, Volume II (Jurisdiction), p. 527.

[30] See Art. 3(3) WTO DSU and Article XXIII (1)(b)-(c) GATT.

[31] *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *India)*, Jurisdiction and Admissibility, Judgment [2016] ICJ Rep. 255, para. 33.

[32] *Nuclear Tests (New Zealand* v. *France)* (Merits), Judgment, 20 December 1974 [1974] ICJ Rep. 457, paras 22–4.

[33] *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom), Preliminary Objections, Judgment of 5 October 2016*, [2016] ICJ Rep. 833, para. 45.

The need for the existence of a dispute most often results from the fact that statutes of courts and tribunals, international treaties containing compromissory clauses and arbitration rules require the existence of 'a (legal) dispute' for the establishment of jurisdiction.

Article 36(2) of the Statute of the ICJ thus provides that

> The states parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all *legal disputes* concerning [. . .].[34]

Article 21 of the Statute of the ITLOS provides that

> The jurisdiction of the Tribunal comprises all *disputes* and all applications submitted to it in accordance with this Convention and all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal.[35]

Article IX of the Genocide Convention contains a compromissory clause which states

> *Disputes* between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.[36]

The UNCITRAL Arbitration Rules, which are widely used in international commercial arbitration and investor-state arbitration, and have also been used in inter-state arbitrations, also refer to the existence of disputes between parties:

> Where parties have agreed that *disputes* between them in respect of a defined legal relationship, whether contractual or not, shall be referred to arbitration under the UNCITRAL Arbitration Rules, then such *disputes* shall be settled in accordance with these Rules subject to such modification as the parties may agree.[37]

While these examples recognise the requirement of the existence of a dispute, they do not provide a definition of what constitutes a 'dispute'. The PCIJ famously posited in its decision in the *Mavrommatis Palestine Concessions* case that a dispute can be defined as 'a disagreement on a point of law or fact or, a conflict of legal views or of interests between

[34] Emphasis added. [35] Emphasis added.
[36] Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277 (emphasis added).
[37] Article 1(1) UNCITRAL Arbitration Rules (emphasis added).