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Richard B. Bilder

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RICHARD B. BILDER**

## I. INTRODUCTION

From earliest times, third parties have played an important role in attempting to resolve interpersonal and intergroup conflicts. Indeed, the concept of third-party dispute settlement and roles of judge, arbitrator and mediator pervade all human societies and are closely linked to the emergence of political order and law.

It is not practical in this brief article to review either the long historical experience of international third party dispute settlement or the extensive descriptive and analytical literature it has produced.[1] My purpose

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** Burrus-Bascom Professor of Law, University of Wisconsin -Madison. B.A., Williams College, 1949; J.D., Harvard Law School, 1956.

1. This initial note is intended to provide an introductory bibliography of international third-party dispute settlement. Unless otherwise stated, works cited by author in subsequent notes refer to works more fully cited here.

For legally-oriented overviews of international dispute settlement see, *e.g.*, Bilder, *An Overview of International Dispute Settlement*, 1 EMORY J. INT'L DISPUTE RESOLUTION 1 (1986); Bilder, *International Dispute Settlement and the Role of Adjudication*, 1 EMORY J. INT'L DISPUTE RESOLUTION 131 (1987); MERRILLS, INTERNATIONAL DISPUTE SETTLEMENT (1984); INTERNATIONAL DISPUTES: THE LEGAL ASPECTS (H. Waldock ed. 1972); F. NORTHEDGE & M.DONELAN,INTERNATIONAL DISPUTES: THE POLITICAL ASPECTS (David Davies Memorial Institute 1971); O. Schachter, *International Law in Theory and Practice*, 178 RECUEIL DES COURS 10 (1981); Sohn, *The Future of Dispute Settlement*, THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW: ESSAYS IN LEGAL PHILOSOPHY, DOCTRINES AND THEORY 1121 (R. J. MacDonald & D. M. Johnson eds. 1983); D. Bowett, *Contemporary Developments in Legal Techniques in the Settlement of Disputes*, 180 RECUEIL DES COURS 177 (1983); Laylin, *Outlines for Third Parties in International Disputes*, 66 PROC. AM. SOC. INT'L L. 22 (1972); 4 C. DE VISCHER, THEORY AND REALITY IN INTERNATIONAL LAW (Corbett trans. 1968); INTERNATIONAL LAW: CASES AND MATERIALS ch. 13 (L. Henkin, R. Pugh, O. Schachter & H. Smits eds. 1980) [hereinafter Henkin]; H. LAUTERPACHT, THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY (1933); DISPUTE SETTLEMENT THROUGH THE UNITED NATIONS (K. Raman ed. 1977) [hereinafter Raman]; RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES sec. 902 (1988) [hereinafter RESTATEMENT]; Lachs, *Some Reflections on the Settlement of International Disputes*, 68 PROC. AM. SOC. INT'L L. 323 (1974); RANDOLPH, THIRD PARTY SETTLEMENT OF DISPUTES IN THEORY AND PRACTICE (1973); Pechota, *Complementary Structures of Third-Party Settlement in International Disputes* (UNITAR Study P.S. No. 3, 1971). On dispute settlement in particular fields, see Sohn, *Settlement of Disputes Arising Out of the Law of the Sea Convention*, 12 SAN DIEGO L. REV. 495 (1975); Bilder, *The Settlement of Disputes in the Field of the International Law of the Environ-*

is rather to suggest some basic questions and tentative answers which may help to provide a framework for further thinking, discussion and re-

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*ment*, 1 RECUEIL DES COURS 139 (1975). Hudec, *Reforming GATT Adjudication Procedures: The Lessons of the DISC Case*, 72 MINN. L. R. (1988); R. LILLICH (ed.), THE IRAN-UNITED STATES CLAIMS TRIBUNAL 1981-83 (1984).

Among recent legally-oriented empirical or otherwise less-traditional studies, see *e.g.*, Bailey, *Peaceful Settlement of International Disputes*, Raman, *supra*; T. FRANCK, THE STRUCTURE OF IMPARTIALITY (1968); J. GAMBLE & D. FISCHER, THE INTERNATIONAL COURT OF JUSTICE: AN ANALYSIS OF A FAILURE (1976); G. RAYMOND, CONFLICT RESOLUTION AND THE STRUCTURE OF THE STATE SYSTEM: AN ANALYSIS OF ARBITRATIVE SETTLEMENTS (1980); A. STUYT, SURVEY OF INTERNATIONAL ARBITRATIONS 1794-1970 (1972); F. NORTHEDGE & GRIEVE, INTERNATIONAL DISPUTES: CASE HISTORIES 1945-70 (1973); McGinley, *Ordering a Savage Society*, 25 HARV. INT'L. L. J. 43 (1984); Coplin & Rochester, *The Permanent Court of International Justice, The International Court of Justice, The League of Nations and the United Nations: A Comparative Empirical Survey*, 66 AM. POL. SCI. REV. 529 (1972); and L. PROTT, THE LATENT POWER OF CULTURE AND THE INTERNATIONAL JUDGE (1979).

For recent overviews of international dispute settlement primarily from an international relations or social psychological perspective, see *e.g.*, D.G. PRUITT & J.Z. RUBIN, SOCIAL CONFLICT: ESCALATION, STALEMATE, AND SETTLEMENT (1986); M. PATCHEN, RESOLVING DISPUTES BETWEEN NATIONS: COERCION OR CONCILIATION? (1988); J. BERCOVITCH, SOCIAL CONFLICTS AND THIRD PARTIES: STRATEGIES OF CONFLICT RESOLUTION (1984); W. ZARTMAN, THE 50% SOLUTION (1976); W. ZARTMAN, RIPE FOR RESOLUTION (1985); NEW ISSUES IN INTERNATIONAL CRISIS MANAGEMENT (G. Winham ed. 1988); D.G. PRUITT, NEGOTIATION BEHAVIOR (1981); J.Z. RUBIN, DYNAMICS OF THIRD-PARTY INTERVENTION: KISSINGER IN THE MIDDLE EAST (1981); J.Z. Rubin, *Experimental Research on Third-Party Intervention in Conflict: Towards Some Generalizations*, 87 PSYCHOLOGY BULL. 379 (1980); J.A. Wall, *Third Party Consultation as a Method of Intergroup Conflict Resolution*, 27 J. CONFLICT RESOLUTION 301 (1983). Among many other useful political or social science-oriented works, see *e.g.*, J.Z. RUBIN & B.R. BROWN, THE SOCIAL PSYCHOLOGY OF BARGAINING AND NEGOTIATION (1975); R.L. BUTTERWORTH, MANAGING INTERSTATE CONFLICTS 1945-1974 (1976); MANAGING INTERNATIONAL CRISES (D. Frei ed. 1982); N. CHOUCRI & R. NORTH, NATIONS IN CONFLICT (1976); R.J. RUMMEL, JR., UNDERSTANDING CONFLICT AND WAR (1975); G. SNYDER & P. DIESENG, CONFLICT AMONG NATIONS (1977); J.G. STOESSINGER, WHY NATIONS GO TO WAR (3d ed. 1982); Z. MAOZ, PATHS TO CONFLICT: INTERNATIONAL DISPUTE INITIATION 1816-1976 (1982); S. ROBERTS, ORDER AND DISPUTES (1979); C.R. MITCHELL, THE STRUCTURE OF INTERNATIONAL CONFLICT (1981); D. YOUNG, THE POLITICS OF FORCE (1968); R.N. LEBOW, BETWEEN PEACE AND WAR: THE NATURE OF INTERNATIONAL CRISIS (1981); D. YOUNG, THE INTERMEDIARIES: THIRD PARTIES IN INTERNATIONAL CRISES (1967); R. SMOKE, WAR: CONTROLLING ESCALATION (1977); THE MAN IN THE MIDDLE: INTERNATIONAL MEDIATION IN THEORY AND PRACTICE (S. Touval & I. Zartman eds. 1985); J.W. BURTON, CONFLICT AND COMMUNICATION (1969); J.W. BURTON, RESOLVING DEEP ROOTED CONFLICT (1987); J.R. MITCHELL, THE STRUCTURE OF INTERNATIONAL CONFLICT (1981); CONFLICT IN WORLD SOCIETY (M. Banks ed. 1984); R. FISHER & W. URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN (1981); R. JERVIS, PERCEPTION AND MISPERCEPTION IN INTERNATIONAL RELATIONS (1976).

There are also many case studies of third party intervention in particular conflicts or dispute, for example Rubin, *supra* (1981); M. HASTINGS & S. JENKINS, BATTLE FOR THE FALKLANDS (1983); R.L. KENNEDY, THIRTEEN DAYS: A MEMOIR OF THE CUBAN MISSILE CRISIS (1969); J. CARTER, KEEPING FAITH (1982).

Among the leading scholarly journals relevant to these problems are the American Journal of International Law, the Journal of Conflict Resolution, and the Negotiation Journal.

For examples of the recent interesting and sophisticated empirical and theoretical research on dispute processing within domestic societies, and particularly the United States, see *e.g.*, M. Galanter, *Adjudication, Litigation, and Related Phenomena*, LAW AND THE SOCIAL SCIENCES (L. Lipson & S. Wheeler eds. 1986); materials collected and cited in *Special*

search about the potential role of third party intervention.[2]

Several introductory comments may be in order. First, third party intervention is not simply a "legal" means of dispute settlement, but is relevant to many kinds of conflict resolution processes. International lawyers have tended, of course, to look principally at the more formal, institutionalized and "legal" aspects of international third-party dispute settlement—in particular, international adjudication.[3] The International Court of Justice's (I.C.J.'s) recent assertion of jurisdiction and ruling against the U.S. in the *Nicaragua* case[4], and the Reagan Administration's

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*Issue on Dispute Processing and Civil Litigation*, 15 LAW & SOC'Y REV. 389-928 (1980-81); DISPUTE RESOLUTION, (S. Goldberg, E. Green & F. Sander eds. 1985); DISPUTING IN AMERICA: THE CHANGING ROLE OF LAWYERS (E. Green, J. Marks & F. Sander eds. 1985) *See also* Sander, *Varieties of Dispute Processing*, 70 F.R.D. 111 (1976); and Galanter, *Reading the Landscape of Disputes: What We Know And Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4 (1983); C. WITTY, MEDIATION AND SOCIETY (1980); Silbey and Merry, *Mediator Settlement Strategies*, 8 LAW & POL'Y 7 (1987); Kressel & Pruitt, *Themes in the Mediation of Social Conflict*, 41 J. SOC. ISSUES 179 (1985); V. Aubert, *Competition and Dissensus: Two Types of Conflict and Conflict Resolution*, 7 J. CONFLICT RESOLUTION 26 (1963); T. Eckhoff, *The Mediator and the Judge*, 10 ACTA SOCIOLOGICA 158 (1986); O. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984); Mather & Ynvesson, *Language, Audience and the Transformation of Disputes*, 15 LAW & SOC. REV. 775 (1980-81); C. Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754; S. Merry, *Disputing Without Culture*, 100 HARV. L. REV. 2057 (1987); Fuller, *Mediation—Its Forms and Functions*, 44 So. CALIF. L. REV. 305 (1971); Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1979); Wagatswma & Rossett, *The Implications of Apology*, 20 LAW & SOC. REV. 461 (1980); B. Yngvesson, *Reexamining Continuing Relations and the Law*, 1985 WISC. L. REV. 623; S. Sibley and A. Sarat, Dispute Processing in Law and Legal Scholarship; DPRP Working Paper 8:9 (June 1988) (U. Wis.-Madison Inst. for Legal Studies); D. KOLB, THE MEDIATORS (1985).

On the growing interest among U.S. scholars and practitioners in non-judicial or "alternative" dispute resolution, see references above and, L. KONOWITZ, ALTERNATIVE DISPUTE RESOLUTION: CASES AND MATERIALS (1985).

For interesting discussions of disputes and dispute processing from a broader cross-cultural and anthropological perspective, see e.g., Abel, *A Comparative Theory of Dispute Institutions in Society*, 8 LAW & SOC. REV. 217 (1973); S. ROBERTS, ORDER AND DISPUTES (1979); P. GULLIVER, DISPUTES AND NEGOTIATIONS: A CROSS-CULTURAL PERSPECTIVE (1979); THE DISPUTING PROCESS—LAW IN TEN SOCIETIES (L. Nader & H. Todd eds. 1978); F.G. Snyder, *Anthropology, Dispute Processes and Law: A Cultural Introduction*, 8 BRIT. J. L. & SOC'Y 141 (1981).

2. Certain parts of this paper draw upon my two articles on dispute settlement and adjudication, *An Overview of International Dispute Settlement*, *supra* note 1 and *International Dispute Settlement and the Role of Adjudication*, *supra* note 1.

3. *See, e.g.*, references cited in the first paragraph of *supra* note 1.

4. Case Concerning Military and Paramilitary Activities In and Against Nicargua (Nicar. v. U.S.), 1984 I.C.J. 392 (Judgment of Nov. 26, 1984 on Jurisdiction and Admissibility), *reprinted in* 23 I.L.M. 468 (1984); 1986 I.C.J. 14 (Judgment of June 27, 1986 on Merits), *reprinted in* 25 I.L.M. 1023 (1986). Among the many articles analyzing and discussing the decision and various aspects of the case, see, *e.g.*, articles and comments in 79 AM. J. INT'L L. at 373-405, 423-30, 652-64, and 992-1005 (1985) (dealing with jurisdictional phase), and 81 AM. J. INT'L L. at 77-183 (1987) (dealing with merits); Chayes, *Nicaragua, the United States and the World Court*, 85 COLUM. L. REV. 1445 (1985); Moore, *The Secret War in Central America and the Future of World Order*, 80 AM. J. INT'L L. 24 (1980); Reisman,

related decision to withdraw the declaration made by the U.S. in 1946 submitting to the Court's compulsory jurisdiction, has certainly heightened current interest in the role of international arbitral tribunals and courts.[5] In contrast, however, political scientists and social psychologists have focused their attention primarily on mediation and other non-binding types of dispute-resolution processes; indeed, their writings have largely ignored the role of either law or of formal legal techniques such as adjudication in international conflict resolution.[6]

Clearly, any approach to thinking about international conflict resolution should take into account *all* of the types of factors which may affect the usefulness and success of third party intervention—normative influences, power-political interests, the parties' perceptions and attitudes. Our understanding will best be served by pursuing both legal and social science research and combining a variety of disciplinary perspectives.

Second, third party dispute settlement is only one way of trying to resolve international conflicts, and can be understood only in the context of a general study of dispute-settlement problems and processes. While an exploration of these broad underlying questions is beyond the scope of this paper, they include: first, what do we mean by "conflicts" and "disputes"?; second, what causes conflicts and disputes?; third, do we need to settle conflicts and disputes, and, if so, which ones and why?; fourth, do states have any international obligation to settle their disputes peacefully?; fifth, what kinds of international disputes are there, how frequently do they arise, between or among what states, and involving what kinds of claims?; sixth, do disputes or conflicts follow typical patterns or "life cycles"?; seventh, what techniques or procedures are available in general for settling international disputes?; eighth, when is a dispute "settled"?; ninth, how can disputes be avoided?; and tenth, what is the relevance of law or normative considerations to dispute settlement?[7]

## II. WHAT DO WE MEAN BY "THIRD-PARTY DISPUTE SETTLEMENT"?

A "third-party" can be defined as an individual or collective that is external to a dispute between two or more others and that either tries to help the disputants reach a settlement or, in some cases, is authorized on its own to determine a settlement.[8] Thus, a third-party may be another state or group of states (i.e. Algeria in the U.S.-Iran hostage crisis); a governmental international organization (i.e. the U.N. or O.A.S.); an international court (i.e. the I.C.J.) or an arbitrator or arbitration panel (i.e. the

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*Has the International Court Exceeded its Jurisdiction?* 80 AM. J. INT'L L. 128 (1986).

5. *See* Secretary of State Schultz's letter to U.N. Secretary General, Oct. 7, 1985; Dept. of State statement of Oct. 7, 1985; and Legal Adviser Sofaer's statement of Dec. 4, 1985, all *reprinted in* 86 DEP'T ST. BULL. No. 2106 at 67 (Jan. 1986) and 24 I.L.M. 1742 (1985).

6. *See, e.g.*, the references cited in the third paragraph of *supra* note 1.

7. For a discussion of some of these broader issues, see, e.g., Bilder, *An Overview of International Dispute Settlement*, *supra* note 1.

8. This definition draws on, PRUITT AND RUBIN, *supra* note 1, at 165-66.

U.S.-Iran Claims Tribunal); a non-governmental organization (i.e. the International Committee of the Red Cross); or an individual or group of individuals functioning either in a representative capacity (i.e. a U.N.-appointed mediator) or conceivably in a private capacity. In the interest of impartiality, mediators, arbitrators or judges (or at least most of the judges on an international court) will usually be of a nationality other than that of the disputing parties. However, this need not be the case so long as the third-party is perceived by the disputants as "external" to the dispute and capable of performing impartially and effectively the role of a third-party. For example, the U.S. and Canada have frequently utilized binational panels in dispute settlement roles (i.e. the arbitral panels established under the Jay Treaty, the U.S.-Canada International Joint Commission, and the binational panels which will be set up to review antidumping and countervailing duty determinations under Chapter 19 of the proposed Canada-U.S. Free Trade Agreement).[9]

"Third-party intervention" has, in turn, been defined as "[I]ntervention into a dispute of a person or agency whose purpose it is to act as an instrument for bringing about a peaceful settlement of that dispute, while creating structures whereby the foundations of a lasting settlement may be laid,"[10] or, more broadly, as "[A]ny action taken by an actor that is not a direct party to the crisis, that is designed to reduce or remove one or more problems in the bargaining relationship and, therefore, to facilitate the termination of the conflict itself."[11] International lawyers and others appear to sometimes use the term "third-party dispute-settlement" to refer, not to the broad political processes of third-party intervention but only to the more formalized and regularized structure of norms, institutions, arrangements and procedures which are recognized parts of the international legal order — in particular, techniques and procedures for binding adjudication utilizing arbitral tribunals or the I.C.J. However, I will here use "third party intervention" and "third party dispute settlement" interchangeably. It is important to note that third parties can play an important part in managing, deescalating or damping disputes, even if such efforts do not result in a final resolution of the disputes. That is any enquiry into the role of third parties should appropriately address and encompass their function in "dispute-management and processing," as well as in "dispute resolution and settlement."

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9. *See* Bilder, When Neighbors Quarrel: Canada-U.S. Dispute Settlement Experience (the 1986-87 Claude T. Bissell Lectures, University of Toronto), Inst. for Legal Studies, Univ. of Wisconsin Law School, Disputes Processing Research Program Working Paper 8:4 (May 1987); J.-G. Castel, *The Settlement of Disputes Under the 1988 Canada-United States Free Trade Agreement*, 83 AM. J. INT'L. L. 118 (1989); McDorman, *The Dispute Settlement Regime of the Free Trade Agreement*, 2 REV. INT'L. BUS. L. 303 (1988).

10. BERCOVITCH, *supra* note 1, at 13, citing Harbottle, *The Strategy of Third Party Intervention in Conflict Resolution*, 35 INT'L J. 118, 120 (1979-80).

11. Young, *infra* note 17, at 34.

## III. DO STATES HAVE AN OBLIGATION TO SUBMIT THEIR DISPUTES TO THIRD PARTIES EITHER FOR HELP OR FOR BINDING SETTLEMENT?

It is well established that, absent special agreement, states have no obligation to submit their disputes to third parties either for help in achieving settlement or, *a fortiori*, for binding settlement by such third parties.[12] Consequently, the use of most third-party dispute settlement techniques, and in particular resort to arbitration or judicial settlement, depends upon the acquiescence of the disputing parties and cannot occur without their consent.

However, those states that are members of the U.N. (which means, in effect, almost all of the world's nations) have assumed under the Charter treaty obligations to accept at least some limited types of third party intervention, particularly as regards disputes whose continuation "[i]s likely to endanger the maintenance of international peace and security."[13] And, under Art. 33(2) of the Charter, the Security Council shall, when it deems necessary, call upon the parties to settle their dispute by the means (which include third-party means) listed in Art. 33(1) of the Charter.

It is, of course, also open to nations to enter into international agreements with each other which include so-called "compromissory clauses" or other obligations and arrangements to settle their disputes peacefully, and a great number (probably thousands) of such agreements are in effect.[14] Frequently, such agreements will not only include general obliga-

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12. *See, e.g., An Overview of International Dispute Settlement, supra* note 1, at 7-13. *See also* Henkin, *supra* note 1, at 910, "As long as a State does not resort to force, there has been no disposition to find a violation of law in failure to settle disputes peacefully, as by leaving them unsettled."

*See also* RESTATEMENT, *supra* note 1, sec. 902, comment (e):

> 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. Eastern Carelia (Finland v. Russia), 1923 P.C.I.J., ser. B, No. 5 at 27 (Advisory Opinion of July 23). Consequently, international claims cannot, in the present state of the law as to international jurisdiction, be submitted to a tribunal, except with the consent of the States concerned.

Reparation for Injuries, 1949 I.C.J. Rep. 177-78 (Advisory Opinion of April 11).

As to arbitration, see also the *Ambatielos* case (Greece v. U.K.) 1953 I.C.J. 10, 19 (Judgment of May 19) ("a State may not be compelled to submit its disputes to arbitration without its consent.").

13. *See, inter alia*, U.N. Charter arts.1(1), 2(3), 33, Ch. VI (arts. 33-38) and Ch. VII (arts. 39-51).

14. For example, there are some 250 agreements, bilateral and multilateral, conferring on the I.C.J. jurisdiction over disputes as to the interpretation or application of the agreements. *See* 1983-84 I.C.J.Y.B. 51-56, 92-108 (1984). *See generally*, Sohn, *Settlement of Disputes Relating to the Interpretation and Application of Treaties*, 150 RECUEIL DES COURS (1976) and Morrison, *Treaties as a Source of Jurisdiction for the International Court of Justice*, in THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS (L.F. Damrosch ed. 1987) [*hereinafter* Damrosch]. There are many additional agreements containing provisions for dispute settlement by means other than reference to the World Court. *See, e.g.*, Sohn, *supra* note 1, and UNITED NATIONS, A SURVEY OF TREATY PROVISIONS FOR THE PACIFIC SET-

tions of peaceful settlement, but will require, recommend, or provide procedures for the use of specific dispute settlement techniques, such as conciliation, arbitration, adjudication or other third party techniques.

It is an interesting question whether the international community interest in peaceful settlement of disputes suggests the need for expanding the duty of states to resort to at least certain non-binding methods of third-party dispute-settlement, even in the absence of their consent.

## IV. WHY DO DISPUTING STATES TURN TO THIRD PARTIES?

Third party dispute settlement is primarily a supplementary means of conflict resolution. Typically, it will be used only when either: (1) the disputing states are unwilling to reach a settlement themselves and wish the help of third parties to do so; or (2) a third party is otherwise authorized or in a position to intervene to affect the settlement or outcome of the dispute. Professor Louis Sohn points out that, "[I]t is an axiom of international diplomacy that the most efficient method of settling international disputes is through negotiations between the two governments concerned, without any meddling of third parties, other states or international organizations," and that "in most instances negotiations lead to a solution."[15] Negotiations are the preferred means of resolving disputes for many reasons. Perhaps the most important is that it is the least risky way the parties can try to resolve their dispute. Thus, negotiation permits each state maximum control over both the dispute settlement process and outcome, since each state always has the option of simply walking away from the negotiation and *not* agreeing. In contrast, any kind of third-party involvement carries a risk of reducing a disputing state's flexibility and freedom to do what it wants, and of somehow trapping it into an undesirable outcome. Some other advantages of negotiation are that negotiation places responsibility for resolving the dispute on the parties themselves, who are in the best position to develop a sensible, workable and acceptable solution. Negotiation works toward a freely agreed rather than imposed solution, which is likely to have maximum acceptability and stability, negotiation favors compromise and accommodation, which is most likely to preserve good long-term cooperative relations between the parties, and negotiation is generally simpler and less costly than alternative dispute settlement methods. So long as disputing states are making some progress towards solving their dispute themselves, they will normally have little reason to turn to third parties, and, conversely, third parties will have little reason to intervene.

Consequently, one would expect disputing states to seek or acquiesce in third-party intervention only when their own efforts to reach a negotiated settlement have been unavailing and are at an impasse, and where neither prefers such a failure to reach agreement to the alternative possi-

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TLEMENT OF INTERNATIONAL DISPUTES, at 1949-62 (1966).

15. Sohn, *supra* note 1, at 1122.

bility of continuing to seek settlement through assistance by, or delegation to, third parties. In this case, both parties may choose to ask third parties for help in their attempts to reach an agreement or, at the extreme, they may simply ask or allow a third party to determine the settlement or outcome.

Presumably, in deciding whether to seek or acquiesce in third-party dispute settlement procedures, each party will weigh what it thinks it may gain from such intervention against the risks and constraints on its control of the situation and outcomes that the particular third party techniques may involve. We would expect that, typically, the party in the more powerful negotiating position might be particularly reluctant to accept third party intervention, since such intervention may have the effect of counterbalancing or neutralizing its bargaining power. But sometimes, even for the stronger party, the risks of conflict, continued dispute, or unfavorable internal or external public opinion may outweigh even substantial risks from third party intervention.

Of course, a state's apparent consent to third party intervention may not in fact be serious or sincere; a state may pretend to agree simply to appeal to internal or external public opinion or seem like a "good citizen," but without any real intention of compromise or cooperation in a good faith effort to settle the dispute. Indeed, both disputing parties may find it useful to appear to be doing something by accepting third party intervention, even though neither really expects such intervention to be successful, or at least to do any more than ratify the outcome that would have occurred anyway. In some cases, for example, agreements may contain nominal obligations, included solely to pacify an internal political constituency of one of the parties, which neither expects to be observed. If and when such "noncompliance" occurs, the party will complain and dispute the matter although it cannot in good faith insist on its position. By resorting to third party dispute settlement techniques, including adjudication, the parties can delay and look as though they are trying to adjust the question while ultimately reaching the outcome they always intended.[16]

In practice, the context of each dispute and conflict is likely to be unique, and many factors may bear upon the willingness of disputing states to seek or accept third party intervention. In the first place, such attitudes obviously will vary depending on the particular circumstances and stakes involved, the type of intervention contemplated, and who the third parties are likely to be. For example, a state may be willing to accept non-binding U.N. mediation but not a binding I.C.J. decision, or accepting fact-finding by neutral State 'A' but not hostile State 'B'. Second, as a threshold condition, disputing states must believe that there are

16. For an interesting discussion of such "latent" functions of adjudication, see Hudec, *Transcending the Ostensible: Some Reflections on the Nature of Litigation Between Governments*, 72 MINN. L. REV. 211 (1987).

things third parties can do that are more likely to be helpful than harmful and they must be willing, at a minimum, to let third parties try. This means that third-party intervention will often have at least two stages or phases: an initial "jurisdictional" phase in which the parties are persuaded to seek or acquiesce in a third party having some role (or the third party otherwise establishes its right to do so); and a substantive or "merits" phase where the third party actually attempts to help settle the dispute. Third, it may not always be easy to say when the disputants are in fact at an "impasse"; for example, a state in a weaker bargaining position may seek third party intervention in hopes of thus obtaining an outcome better than it can obtain itself, even though it is prepared, if its efforts to involve third parties prove unsuccessful, to agree to a less favorable settlement. Fourth, even where states are reluctant to accept third party intervention, they may, as previously noted, have previously undertaken legal obligations to do so under the U.N. Charter, the I.C.J. statute or other international agreements. Indeed, serious problems may arise where a third party, at the request of one party to a dispute, intervenes based on what it construes as the other party's prior consent, but the other party is no longer willing to accept such intervention or claims that it had never given consent. Recent experience, in the *Nicaragua* and other cases, raises questions as to the usefulness or effectiveness of third party intervention in the absence of real and continuing consent on the part of all of the disputing parties.

Finally, third party intervention may occur even in the absence of impasse between disputing states or indeed of real consent by one or both parties. Thus, the third state may have its own interest in promoting or preventing a particular outcome (i.e., helping an ally or hurting an enemy). Indeed, in some situations, the "selfish interest" of the intervening state may be so great that its role is better analyzed as that of a third party to the dispute, rather than as an external third party concerned only with helping the parties resolving the dispute. Or, as often the case, the international community as a whole may have its own interest in resolving conflicts or preventing unjust or unstable settlements which might escalate or spill over to threaten other states. Much of the U.N.'s interventionary authority, under Chapters VI and VII of the Charter, are based on this premise. Indeed, it is worth noting that the international community might wish to intervene even if the disputing states were able themselves to agree easily on a settlement with which they were quite content. For example, the U.N. or third states might wish to intervene in a bilateral settlement of a transfrontier pollution dispute in which the two states agreed to solve the problem by dumping large amounts of the pollutant into the ocean in a way which threatened serious injury to the ocean environment.

## V. WHY ARE THIRD PARTIES WILLING TO INTERVENE?

Performing a third-party role in dispute settlement is not an easy task; it can be arduous and costly (i.e., the U.S. role in the various mid-

east crises), dangerous (i.e., the assassination of Count Bernadotte) or unrewarding (i.e., the U.S. role in the Falkland-Malvinas war). Indeed, third parties may run serious risks of becoming caught up in, or blackmailed into, a continuing role in a long-drawn-out dispute or conflict, or of being blamed by one or both of the parties for unfavorable outcomes.

There appear to be various reasons why third parties are willing to intervene, including the following:

First, the third-party may have a legal or institutional responsibility to do so; it may simply be the third party's job or *raison d'etre*. For example, serving as third parties in dispute settlement for which international judges, arbitrators and U.N. Secretary-Generals are paid.

Second, the third party may have a sense of public responsibility, as well as perhaps a desire for the prestige and honor that may accompany a successful third party role. Algeria's role in the Iran Hostages dispute, the Pope's role in the Argentina-Chile Beagle Channel dispute, or the Soviet mediation of the Kashmir dispute may be examples.

Finally, as previously noted, the third party may have its own interests or the interests of an ally at stake, which it believes will be protected or advanced by its intervention and third-party role.

Of course, several of these motives may combine — as may be the case, for example, with U.S. intervention in the Middle East or the "Contadora" states' intervention in the Nicaraguan conflict.

## VI. WHAT KINDS OF THIRD-PARTY TECHNIQUES ARE AVAILABLE?

The most usual and accepted list of methods of peaceful settlement of international disputes — and the one most familiar to international lawyers — is that set forth in Article 33 of the U.N. Charter — negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, and resort to the U.N. or other international organization dispute settlement procedures. In essence, this list of methods reflects a spectrum or continuum of techniques ranging from so-called "diplomatic means," which give control of the outcome primarily to the parties themselves, to so-called "legal means" which give control of the outcome primarily to a third party or parties. That is, the principal difference among these techniques is in the extent to which third parties can legitimately participate in helping to bring about or determining the settlement and, conversely, the extent to which the parties can reject a settlement proposed by the third party. In practice, distinctions between these techniques may be more theoretical than real, and a particular process of dispute settlement may combine elements of various techniques. For example, international arbitration or adjudication may often embody compromises reflecting strong elements of negotiation or mediation among the arbitrators or judges, at least some of whom may see their role as safeguarding the interests or representing the point of view of one or the other party. Negotiators will often have to make their

bargaining decisions with the possibility of third party intervention, or perhaps even resort to adjudication, in mind.

The more traditional third-party methods of peaceful settlement, each of which has its own distinctive characteristics, are the following:

Good offices and mediation[17] are techniques in which the parties, unable to resolve a dispute by negotiation, request or agree to limited intervention by a third party to help them break the impasse. In the case of good offices, the role of the third party is usually limited to simply bringing the parties into communication and facilitating their negotiations. In the case of mediation, the mediator usually plays a more active part in facilitating communications and negotiations between the parties, and is sometimes permitted or expected to advance informal and nonbinding proposals of his or her own. President Carter's mediation leading to the Egypt-Israel Peace Treaty is a recent example of successful mediation.

Fact-finding, inquiry and conciliation[18] are methods of settlement in which the parties request or agree to the intervention of a third party, usually on a more formal basis, for the purpose of determining particular facts or otherwise conducting an impartial examination of the dispute and, if the parties so agree, attempting to suggest or define the terms of a mutually acceptable settlement. Like mediation, the report of a fact-finding body or conciliation commission is normally non-binding, although the third party finding or recommendation may exercise an important influence on the settlement. A recent example of a successful use of a formal inquiry procedure is the 1961 "Red Crusader" inquiry into the facts concerning the stopping by a Danish fishery protection vessel of a British trawler off the Faroe Islands. A recent example of successful conciliation is the special commission established by Norway and Iceland to make recommendations concerning their dispute over the apportionment of the continental shelf off Jan Mayen Island; the Commission's Report, recommending joint development of hydrocarbon production, was implemented by the conclusion of a 1981 Norway-Iceland Treaty on the matter.

Arbitration[19] involves the reference of a dispute or series of disputes, by the agreement of the parties to an *ad hoc* tribunal for binding deci-

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17. *See, e.g.*, MERRILLS, *supra* note 1, at ch. 1; Darwin, *Mediation and Good Offices*, in Waldock, *supra* note 1, at 83; Raman, *supra* note 1, at ch. 3. *See generally*, O. YOUNG, THE INTERMEDIARIES: THIRD PARTIES IN INTERNATIONAL CRISES (1967).

18. *See, e.g.*, MERRILLS, *supra* note 1, at chs. 3 and 4; Fox, *Conciliation*, in Waldock, *supra* note 1, at 159; BAR-YAACOV, THE HANDLING OF INTERNATIONAL DISPUTES BY MEANS OF INQUIRY (1974); COT, INTERNATIONAL CONCILIATION (1972); Firmage, *Fact-Finding in the Resolution of International Disputes: From the Hague Peace Conference to the United Nations*, 1971 UTAH L. REV. 421 (1971).

19. *See, e.g.*, MERRILLS, *supra* note 1, at ch. 5; Fox, *Arbitration*, in Waldock, *supra* note 1, at 101; WETTER, THE INTERNATIONAL ARBITRAL PROCESS PUBLIC AND PRIVATE (1979); S. SCHWEBEL, INTERNATIONAL ARBITRATION: THREE SALIENT PROBLEMS (1987); SIMPSON AND FOX, INTERNATIONAL ARBITRATION (1959); Sohn, *The Function of International Arbitration Today*, 1 RECUEIL DES COURS 108 (1963); CARLSTON, THE PROCESS OF INTERNATIONAL ARBITRATION (1946).

sion, usually on the basis of international law. The parties by agreement establish the issue to be arbitrated and the machinery and procedure of the tribunal, including the method of selection of the arbitrator or arbitrators. While arbitration is normally binding, it is open to the parties to provide that the tribunal's opinion will be only advisory. The 1978 U.S.-French Air arbitration over a dispute concerning the interpretation of the U.S.-French Air Agreement is a recent example of a successful arbitration.

Judicial Settlement[20] involves the reference of the dispute, by the agreement or consent of the parties, to the International Court of Justice or some other standing and permanent judicial body for binding decision, usually on the basis of international law. Again, if the rules establishing the court so allow, the parties may agree to an advisory or nonbinding opinion rather than a binding decision, or to a declaratory judgment specifying the principles which the parties should apply in the settlement of their dispute. The *Gulf of Maine* case between the U.S. and Canada is a recent example of successful judicial settlement under the procedures of the I.C.J.

Another method is settlement through the United Nations or other global or regional international organizations or agencies.[21] In some circumstances, the parties may request the assistance of the U.N., a regional organization, or another international organization in settling their dispute, or the U.N. or another organization (for example, a regional organization) may on its own motion legitimately intervene in the dispute, at least for the purposes of trying to bring about a peaceful settlement. Sometimes a third party may ask for the organization's intervention. This assistance may, *inter alia*, take the form of good offices, mediation, fact-finding or conciliation. The rights and obligations of the parties and authority of each organization in these respects are in each case set out in their respective Charters and other constitutive instruments, as well as developed through their practice. The U.N.'s various attempts to deal

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20. *See, e.g.*, MERRILLS, *supra* note 1, at ch. 6; Bilder, *International Dispute Settlement and the Role of International Adjudication*, *supra* note 1, Damrosch, *supra* note 14; T. FRANCK, JUDGING THE WORLD COURT (1986); R. FALK, REVIVING THE WORLD COURT (1986); Bilder, *Some Limitations of Adjudication as an International Dispute Settlement Technique*, 23 VA. J. INT'L L. 1 (1982); Allott, *The International Court of Justice*, in Waldock, *supra* note 1, at 128; S. ROSENNE, THE WORLD COURT (3d ed. 1973); S. ROSENNE, THE LAW AND PRACTICE OF THE INTERNATIONAL COURT (1965); JENKS, THE PROSPECTS OF INTERNATIONAL ADJUDICATION (1964); the excellent collections of articles in THE FUTURE OF THE INTERNATIONAL COURT OF JUSTICE (L. Gross ed. 1976); and JUDICIAL SETTLEMENT OF INTERNATIONAL DISPUTES (H. Mosler & R. Bernhardt eds. 1979); Schachter, *supra* note 1; Sohn, *supra* note 1, and references cited *infra* note 33; and the many additional articles cited in these works. For a listing and brief description of the various present international courts, see Sohn, *supra* note 1, at 1127-30.

21. *See* MERRILLS, *supra* note 1, at chs. 8 and 9; Bowett, *The United Nations and Peaceful Settlement;* Waldock, *supra* note 1, at 179; and Raman, *supra* note 1. Some international agreements empower the organizations established by them to render a binding decision. *See* RESTATEMENT sec. 902, reporter's note 6, at 176. *See also* Sohn, *supra* note 1.

with Middle Eastern, Iran-Iraq, and many other problems are familiar examples of the attempted use of this technique.

The international system has developed a wide variety of institutions, arrangements, procedures and norms through which These kinds of techniques can be invoked and implemented. These include over a hundred international organizations; international courts such as the I.C.J., the Court of the European Communities and the European and American Courts of Human Rights; arbitral tribunals such as the U.S.-Iran Claims Tribunal currently sitting in the Hague; GATT dispute-settlement panels; many binational commissions such as the Canada-U.S. International Joint Commission and so forth.

There are, of course, other sorts of distinctions that can usefully be drawn. For example, two social psychologists, Dean Pruitt and Jeffrey Rubin, suggest the following several broad contrasting types of third-party roles:[22]

- *Formal vs. Informal Role.* Is the third party intervening pursuant to a formal understanding or legal precedents (i.e. under U.N. authorization or the "compromissory clause" of an agreement), or is the intervention informal and without express legitimation?
- *Individual vs. Representative Role.* Is the intervenor acting in a personal capacity, or in a representative capacity (i.e. as a government or international organization official)?
- *Invited vs. Non-Invited Role.* Is the intervenor acting pursuant to an express or implied invitation or with the parties' consent, or on its own or some other third party initiative (or conceivably against the expressed wishes of one or both of the parties)?
- *Impartial vs. Partial Role.* Is the intervenor impartial or neutral, or is it biased in favor of one party or a particular result?
- *Advisory vs. Directive Role.* Is the intervenor's role wholly or primarily advisory, with the aim of helping the parties achieve their own solution, or can the intervenor determine all or part of the settlement or outcome?
- *Content-Oriented vs. Process-Oriented Roles.* Does the intervenor's role focus primarily on the actual content of the dispute (the issues of substance under consideration), or primarily on the process of decision-making (the way in which the discussions are taking place)?

## VII. HOW CAN THIRD PARTIES HELP

As indicated, in the case of advisory and non-binding techniques such as good offices, mediation, fact-finding and conciliation, the third party's role is usually limited to helping the parties to negotiate their own settlement of their dispute. In contrast, in the case of directive and binding techniques such as arbitration and judicial settlement, responsibility for settlement of all or part of the issues in dispute is removed from the

22. PRUITT AND RUBIN, *supra* note 1, at 166-69.

parties' direct control and the third party is authorized to decide the matter for them. In each case, of course, the actual - or even potential - presence and activities of a third party may have various effects upon the dynamics of the disputing process and the disputing parties'relationships, some helpful, but some, perhaps not.

How can third parties help the disputants achieve a settlement themselves? A good deal of research has been done to identify the general functions that mediators and other non-directive third parties can perform and the specific kinds of things they can do that are likely to be most useful.

Pruitt and Rubin, for example, describe the type of negotiating impasse which may call for third-party assistance:

> Positions tend towards rigidity because the protagonists are reluctant to budge lest any conciliatory gesture be misconstrued as a sign of weakness. Moreover, the parties may lack the imagination, creativity, and/or experience necessary to work their way out of the pit they have jointly engineered — not because they don't want to but because they don't know how. Thus, for a variety of reasons, disputants are sometimes either unable or unwilling to move toward agreement of their own accord. Under the circumstances, third parties often become involved at the behest of one or more of the disputants, or on their own initiative.[23]

They suggest and discuss a variety of ways in which a third party can help the parties break out of such an impasse.[24] One way is by modifying the physical and social structure of the dispute. For example, the third party can structure communication between the principals; open and neutralize the site in which problem-solving takes place, impose time limits, and infuse resources. Another way is by modifying the issue structure. For example, the third party can assist the disputants to identify existing issues and alternatives; help them to package and sequence issues in ways that lead towards agreement; and introduce new issues and alternatives that did not occur to the disputants themselves. Finally, the third party can increase the disputant's motivation to reach agreement. For example, it can facilitate their making concessions without loss of face, engender mutual trust, encourage their venting and coming to grips with irrational feelings, and respect their desire for autonomy.

Another commentator, Jacob Bercovich, divides third party aims into process objectives and outcome objectives, each of which he in turn subdivides into two categories: (1) information search (i.e., establishing communication, searching for common principles) and, (2) social influence (i.e., persuading the parties to converge on an acceptable outcome). Bercovich sees third party behavior as implemented through certain tactics which he calls (1) reflective behavior (i.e., receiving, transmitting and

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23. *Id.* at 165.
24. *Id.* at 169-79.

interpreting messages and signals reflecting and influencing how the parties perceive their situation); (2) non-directive behavior (i.e., influencing the context and structure of the conflict by controlling publicity, controlling the environment, controlling resources, reducing pressure and recasting issues); and (3) directive behavior (i.e., influencing the parties perceptions and motivation through making proposals, a judicious exercise of power and promises of resources).[25]

Other commentators suggest other types of potential third-party contributions, or classify third-party objectives or functions in a somewhat different way. For example, Oran Young classifies third party objectives as: (1) informational (i.e., offering information or increasing communication); (2) tactical (i.e., offering services); (3) supervisory (i.e., monitoring an agreement); and (4) conceptual (i.e., offering new ideas for a settlement).[26] Indeed, there is now a rich literature suggesting imaginative techniques through which third parties may help parties in an impasse "get unstuck" — for example, by creating a "hurting stalemate," providing "decommitting formulas" or "bypass solutions," "changing or reframing the game," using "single text procedures," and so forth. I have suggested elsewhere that a principal reason why disputing parties may not be able to reach a settlement agreement is that they distrust each other or are otherwise concerned with what they see as very serious risks potentially involved in such an agreement. In this case, third parties can play a crucial role in dispute settlement by helping the parties in a variety of ways to manage these risks - for example, by monitoring or verifying performance, serving as escrow agents, or providing guarantees.[27] Third party risk management devices of this kind may be particularly useful, for example, in facilitating dispute-settlement arrangements in which distrust is a particularly serious obstacle, such as armistice or peace agreements or agreements seeking to resolve complex and emotional racial, ethnic or religious conflicts.

What about more directive techniques of third party intervention such as adjudication, in which third parties have authority themselves to determine how the dispute is to be settled? While we will look at adjudication shortly, two of the most important ways in which this kind of third party technique can help disputing parties can be briefly mentioned here.

First, adjudication can dispose of the matter. It is often more important to the parties that a dispute be settled than that it be settled in a particular way. Where negotiations are unsuccessful, adjudication or other third party disposition of the matter provides an alternative way in which the parties can put the dispute behind them and move on to other things.

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25. BERCOVITCH, *supra* note 1, at ch. 5, esp. 96-108.

26. Young, *supra* note 1, and Young, *Intermediaries: Additional Thoughts on Third Parties*, 16 J. CONFLICT RESOLUTION 51 (1972).

27. *See* R. BILDER, MANAGING THE RISKS OF INTERNATIONAL AGREEMENT (1981).

Second, adjudication can permit concessions without "loss of face" or bureaucratic risk. Since adjudication involves an impersonal decision by a third party, neither of the governments of the parties (or the officials involved) can be held directly responsible for the outcome. There are probably a number of disputes where governments are relatively indifferent as to the outcome and would normally be willing to negotiate a compromise settlement, but where, for internal political or other reasons, they are unable to concede or even compromise the issue in negotiations. Third-party settlement is a politically useful way by which foreign offices can dispose of such problems without taking direct responsibility for concessions. In effect, they can "pass the buck" for not "winning" the dispute to the third-party tribunal — "Don't blame us, blame the judge!"

## VIII. WHICH TECHNIQUES WORK BEST?

A great deal of experience and writing exists concerning the relative advantages and disadvantages of various techniques and when and how each can best be employed.[28] For example, J.G. Merrills, assessing the value of conciliation as a dispute settlement technique, concludes:

> Conciliation has proved most useful for disputes where the main issues are legal, but the parties desire an equitable compromise . . . . In cases of this type, conciliation would appear to offer two advantages over arbitration *ex aequo et bono*, the obvious alternative.
> First, because of the way conciliation is conducted — through a dialogue with and between the parties—there is no danger of it producing a result that takes the parties completely by surprise, as sometimes happens in legal proceedings. Secondly a commissions' proposals . . . are not binding and, if unacceptable can be rejected.[29]

Merrills and others have attempted similar types of assessments of other techniques. Moreover, there is now a considerable body of theoretical and empirical research, historical and political analysis, and biographical and anecdotal reporting concerning such "how to do it" questions as the most appropriate timing of intervention, characteristics of a third party, site selection, the pros and cons of publicity in mediation, and so forth. In this brief overview, however, only a few very broad generalizations can be suggested.

First, different kinds of disputes will obviously call for different methods of settlement. The craft of effective dispute settlement involves judging what method or combination of methods may be most useful in helping to resolve the particular dispute and how and when such techniques can best be employed. Among the factors affecting such a choice will be:

- the subject-matter and characteristics of the dispute (e.g., whether

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28. *See* references in *supra* note 1. For excellent brief evaluations of various techniques from an international lawyer's perspective, see MERRILLS, *supra* note 1.

29. *Id.* at 66.

it involves a dispute about the facts, the law, at the law should be, the terms of a particular allocation, or procedural issues);
- the nature of the relations between the parties, e.g., whether they are "repeat players" having continuing relations with each other or only infrequently have occasion to interact or deal with each other, and whether there is generally friendship and trust or enmity and distrust between them;
- the parties' perceptions and emotional attitudes as to the importance of the dispute (i.e., whether it is considered a matter of "vital interest" or national prestige, or either party feels it "cannot afford to lose");
- the past history of this and other disputes between the parties (i.e., the "stage" of the dispute and extent to which positions have changed or hardened, and precedents as to how the parties have handled such problems in the past);
- the potential effect of the dispute on other states or the international community (e.g., whether it is a matter potentially affecting international peace and security) and the availability or willingness to serve of appropriate third parties and the resources they are able or willing to deploy.

Second, the various techniques are not mutually exclusive, nor are the boundaries between them rigidly drawn. A number of them are usually employed either *seriatim* (although in no mixed order), or in combination to supplement or complement each other. For example, the recent 1982 U.N. Convention on the Law of the Sea and the 1988 Convention on the Regulation of Antarctic Mineral Resource Activities, both of which deploy a variety of techniques to deal with diverse types of disputes that may arise, show how these possibilities can be exploited in an innovative and imaginative way. As Professor Oscar Schachter has pointed out, "Flexibility and adaptability to the particular circumstances are the essential characteristics of these various procedures. There is little to be gained by seeking to give them precise legal limits or procedural rules as a general matter.[30]

Similarly, Judge Manfred Lachs, in his individual opinion in the 1978 *Aegean Sea Continental Shelf* case (Greece v. Turkey) commented:

> There are obviously some disputes which can be resolved only by negotiations, because there is no alternative in view of the character of the subject-matter involved and the measures envisaged. But there are many other disputes in which a combination of methods would facilitate their resolution. The frequently unorthodox nature of the problems facing States today requires as many tools to be used and as many avenues to be opened as possible, in order to resolve the intricate and frequently multi-dimensional issues involved. It is sometimes desirable to apply several methods at the same time or successively. Thus, no incompatibility should be seen between the various instru-

30. SCHACHTER, *supra* note 1, at 205.

ments and fora to which States may resort, for all are mutually complementary.[31]

Third, it is often useful to develop structured institutions and arrangements, such as international courts or fact-finding agencies, and to have them in place, ready for use, and easily available if need should arise. However, in other cases, it may be better to deal with problems as they arise, on a pragmatic, flexible and *ad hoc* basis, rather than to try to force dispute-management efforts onto the Procustean bed of some possibly unsuitable and inflexible already established dispute settlement institution.

Fourth, the choice of techniques and the way they are employed should, where relevant, take into account the particular dispute-settlement experience of the states involved. Every bilateral or other international relationship has its own unique character and environment which shapes both the kinds of disputes that arise and how these particular states tend to deal with them. Some states (i.e. Canada and the U.S.) have developed special dispute management systems - a unique set of practices, procedures, techniques and institutions - to deal with their particular quarrels.

Finally, a specific list of techniques will not exhaust the possibilities. It will always be open to the disputing parties, or to third parties, to modify or adapt most of these techniques (except in the case of judicial settlement by an existing court with established rules), or to creatively develop such additional methods as their needs and ingenuity suggest. Moreover, since every dispute or conflict will be unique, generalizations such as these, or particular "rules" or "formulas," should be applied with caution.

## IX. THE ROLE OF ADJUDICATION

In view of current interest regarding the proper role of adjudication as a method of international dispute settlement, particularly in the wake of the World Court's decision in the *Nicaragua* case, some remarks on this technique in particular may be appropriate. Again, it is not practical to review here the very extensive literature analyzing the experience, procedures role and significance of international arbitral tribunals and courts, and more particularly, the I.C.J.[32] However, I would suggest the following general points.

As is the case with respect to any method of dispute settlement, in deciding whether to use adjudication, the parties to a dispute will weigh its potential advantages against its disadvantages.[33] Among the potential

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31. 1978 I.C.J. 52 (Dec. 19, 1978).

32. *See, e.g.*, Bilder, *International Dispute Settlement and the Role of Adjudication*, *supra* note 1, and other references *supra* notes 1 and 20.

33. For discussion of the advantages and disadvantages of adjudication and reasons why states may be reluctant to accept adjudication and, in particular, the compulsory jurisdiction of the I.C.J, *see, e.g.*, Bilder, *International Dispute Settlement and the Role of*

advantages of adjudication, are: (i) it is dispositive, ideally, at least putting an end to the dispute; (ii) it is impersonal, permitting the parties to pass responsibility for unfavorable outcomes to the tribunal; (iii) it is principled and impartial, ostensibly deciding the matter by neutral principles rather than power, bias or whim; (iv) it is serious and demonstrates that the state instituting suit really believes in its claim; (v) it is orderly and can be useful in resolving complex factual and technical disputes; (vi) it can sometimes "depoliticize" a dispute, reducing tensions or buying time; (vii) it can provide rules socially useful for guiding conduct and resolving disputes more broadly; (viii) it can reflect, and educate the com-

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*Adjudication, supra* note 1, at 144-65; T. FRANCK, *supra* note 20; SCHACHTER, *supra* note 1, at 207-11; Vallat, *Foreword* in Waldock, *supra* note 1; MERRILLS, *supra* note 1, at 107-13; M. NORTHEDGE & DONELON, *supra* note 1, at 321-29; Gross, *Role of International Adjudication*, and Rovine, *The National Interest and the World Court*; Hudec, *Transcending the Ostensible: Some Reflections on the Nature of Litigation Between Governments*, 72 MINN. L. REV. (1987); Higgins, *The Desirability of Third Party Adjudication: Conventional Wisdom or Continuing Truth?*, in INTERNATIONAL ORGANIZATION: LAW IN MOVEMENT 37 (J. Fawcett & R. Higgins eds. 1974); Lachs, *A Few Thoughts on the Independence of Judges of the International Court of Justice*, 25 COLUM. J. TRANSNAT'L L. 593 (1987); Owen, *Compulsory Jurisdiction of the International Court of Justice: A Study of Its Acceptance by Nations*, 3 GA. L. REV. 704 (1969); Shihata, *The Attitude of New States Toward the International Court of Justice* 19 INT'L. ORG. 203 (1965); J. GAMBLE & D. FISHER, THE INTERNATIONAL COURT OF JUSTICE (1975); Dalfen, *The World Court in Idle Splendour: The Basis of State Attitudes*, 23 INT'L J. 124 (1967); Brauer, *International Conflict Resolution: The ICJ Chambers and the Gulf of Maine Dispute*, 23 VA. J. INT'L L. 463, 468-73 (1983); De Visscher, *Reflections on the Present Prospects of International Adjudication*, 50 AM. J. INT'L L. 467 (1956); E. MCWHINNEY, THE WORLD COURT AND THE CONTEMPORARY INTERNATIONAL LAW-MAKING PROCESS (1979); Falk, *The Role of the International Court of Justice*, 37 J. INT'L AFF. 253 (1984); R. FALK, REVIVING THE WORLD COURT (1986); W. JENKS, THE PROSPECTS OF INTERNATIONAL ADJUDICATION (1964); and generally other sources cited *supra* notes 1 and 20. As indicated, explanations of why states are generally reluctant to agree to adjudicative or "legal" techniques of dispute settlement often emphasize states' lack of confidence in the predictability of such procedures and their concern over their loss of control over outcomes. *See, e.g.*, D. Bowett, *supra* note 1, at 180-81:

> [While] specific reasons change from State to State, the basic reason for avoiding legal settlement is simply that States prefer to retain control over the settlement process, so as to ensure that any settlement is acceptable to them, or, if that cannot be achieved, that no settlement is reached. With the political techniques they retain such control — though this is less true when the pressures of United Nations organs are brought to bear — whereas with legal techniques States evidently feel that they lose control.

Some commentators suggest a distinction between so-called "legal" or "justiciable" disputes, on the one hand, and "political," "non-legal" or "non-justiciable" disputes, on the other; the implication is that some disputes have inherent characteristics that make them either particularly appropriate or inappropriate for the use of adjudication as a dispute settlement technique. Others, with whom I agree, are of the view that, while state attitudes towards accepting the risks of adjudication and the usefulness of adjudication will obviously differ in different circumstances, in principle all international disputes are "justiciable." *See, An Overview of International Dispute Settlement, supra* note 1, at 15-17. For discussion, see, *e.g.*, SCHACHTER, *supra* note 1, at 211-15 and Schachter, *Compulsory Jurisdiction in Cases Involving the Use of Force*, in Damrosch, *supra* note 14; Henkin, *supra* note 1, at 829-31; Darwin, *General Introduction* in Waldock, *supra* note 1, at 6-13; RESTATEMENT, *supra* note 1, sec. 903, reporter's note 7; J. GAMBLE & R. FISCHER, *supra* note 1, at 20.

munity as to social values and interests of the international community more broadly, apart from those of the parties alone, and; (ix) it can be system-re-enforcing, supporting respect for and the development of international law.

But, there are also a number of potential disadvantages of adjudication: (i) it involves the possibility of losing; (ii) adjudicative settlement may be illusory or superficial, deciding the "legal" but not the "real" issues in dispute; (iii) it can be inflexible, resulting in a "win-lose" rather than a compromise decision; (iv) it can be judgmental, labeling one party as a "lawbreaker," rather than providing for a shared acceptance of responsibility as a facesaving way out of a conflictual situation; (v) it looks primarily to the past rather than to the future, possibly jeopardizing the maintenance of a useful ongoing relationship; (vi) it is conservative; (vii) its results are unpredictable; (viii) it may not be impartial; (ix) an adjudicative settlement is imposed on the parties; (x) it is adversarial and may escalate the dispute or conflict; (xi) it may freeze the parties' options and discourage settlement; (xii) it can be complex and costly, and; (xiii) there is no assurance that an adjudicative decision will be enforceable.

As previously noted, adjudication has generally played only a rather limited role in the settlement of international disputes. While nations often pay lip-service to the ideal of judicial settlement, in practice they have entrusted relatively few significant disputes to international tribunals. During the period of 1946 through 1985, the International Court of Justice had only 72 cases submitted to it; it rendered 45 judgements in contentions cases and 17 advisory opinions. Moreover, countries have been particularly reluctant to obligate themselves in advance to compulsory binding adjudication of their potential disputes with other countries—particularly disputes concerning issues that may involve what they consider "vital" national interests. In general, they have been willing to do so, at most, only when their commitment to such compulsory jurisdiction is restricted in terms of subject matter or otherwise carefully circumscribed.

In my opinion, this reluctance of states to submit disputes to arbitral or judicial settlement will continue for some time to come. Thus, for the near future at least, the prospects for widespread acceptance of the general compulsory jurisdiction of the I.C.J. under the Optional Clause of Article 36(2) of the Court's Statute do not seem to me bright.[34] In partic-

34. By 1988, only 46 of the 159 members of the U.N. had declarations in effect accepting the Court's compulsory jurisdiction under the optional clause. For comprehensive reviews and analysis of experience respecting the I.C.J.'s compulsory jurisdiction (the so-called "optional clause" of Article 36(2) of the I.C.J. Statute), see, *e.g.*, Damrosch, *supra* note 14; Gross, *Compulsory Jurisdiction Under the Optional Clause: History and Practice*, in DAMROSCH, *supra* note 14, at 19; Merrills, *The Optional Clause Today*, 1979 BRIT. Y.B.I.L. 87 (1979); Giustini, *Compulsory Adjudication in International Law: The Past, the Present and Prospects for the Future*, 9 FORDHAM INT'L L.J. 213 (1985-86); Scott and Carr, *The International Court of Justice and Compulsory Jurisdiction: The Case for Closing the*

ular, I believe that, in the aftermath of the *Nicaragua* case, it is unlikely that the U.S. will soon resume its acceptance of the optional clause, except possibly with very broad reservations—although it is my personal belief that it is in our national interest to do so.[35]

While adjudication may not be the best way of resolving every dispute, there are clearly a number of situations in which adjudication, or at least the availability of adjudication, can perform a very useful dispute settlement function. In practice, most disputes do not involve issues of significant or "vital" national concerns. In these cases, while each party may prefer to win the dispute, the stakes involved are limited and each can afford to lose. Adjudication is one good way in which the parties can achieve their most important objective in these situations — disposing of the dispute. Indeed, to the extent that states can be assured that a commitment to adjudication will be restricted to less vital issues, they will be more willing to agree, even in advance, to adjudication. Thus, nations have frequently been willing to agree to compromissory clauses providing in advance for compulsory jurisdiction over disputes arising out of treaties concerned with specialized matters of clearly defined scope and limited import, such as commercial treaties. The U.S. for example, is party

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*Clause*, 81 AM. J. INT'L L. 57 (1987). On the Court's jurisdiction under "compromissory clauses," see, *e.g.*, Charney, *Compromissory Clauses and the Jurisdiction of the International Court of Justice*, 81 AM. J. INT'L L. 855 (1987). Morrison, *Treaties as a Source of Jurisdiction, Especially in U.S. Practice*, in DAMROSCH, *supra* note 14, at 58.

35. For recent discussions of U.S. attitudes regarding international adjudication and the Court's compulsory jurisdiction, see in particular Panel Discussion, *Current Developments Concerning the Settlement of Disputes by Arbitration and the World Court*, 83rd Annual Mtg. of Am. Soc. of Int'l L. (Chicago) (April 5-8, 1989) to be printed in 1989 PROC. AM. SOC. INT'L. L. ___; DAMROSCH, *supra* note 14; T. FRANCK, *supra* note 20; *Symposium*, 81 AM. J. INTL. L. 1 (1987). Suggestions have been made for various types of reservations to meet the Administration's concerns and permit resumed U.S. acceptance of the compulsory jurisdiction of the I.C.J. They include reservations excluding from the jurisdiction of the Court matters involving national security or the use of force or matters referred to other dispute-resolution procedures or matters under consideration by the U.N. Security Council; excluding jurisdiction when the applicant party's declaration of acceptance of the Court's compulsory jurisdiction was made for the purpose of filing the individual suit; and providing for the possibility of denunciation of the U.S. acceptance with immediate effect. Suggestions have also been made for modification or elimination of certain U.S. reservations in its 1946 declaration of acceptance, particularly the multilateral treaty (Vandenberg) reservation and the "self-judging" domestic jurisdiction (Connally) reservation. *See, e.g.*, Damrosch, *supra* note 14; Sohn, *Suggestions for the Limited Acceptance of Compulsory Jurisdiction of the International Court of Justice by the United States*, 18 GA. J. INT'L & COMP. L. 1 (1988); D'Amato, *Modifying U.S. Acceptance of the Compulsory Jurisdiction of the World Court*, 79 AM. J. INT'L L. 385 (1985); D'Amato, *The United States Should Accept, by a New Declaration, the General Compulsory Jurisdiction of the World Court*, 80 AM. J. INT'L L. 331 (1986); Gardner, *U.S. Termination of the Compulsory Jurisdiction of the International Court of Justice*, 24 COLUM. J. TRANSNAT'L L. 421 (1986); Morrison, *Reconsidering United States Acceptance of the Compulsory Jurisdiction of the International Court of Justice*, 148 WORLD AFF. 63 (1985); Ende, Comment, *Reaccepting the Compulsory Jurisdiction of the International Court of Justice: A Proposal for a New United States Declaration*, 61 WASH. L. REV. 1145 (1986).

to more than 60 bilateral and multilateral agreements containing such "compromissory clauses."

Among the types of disputes in which adjudication is likely to be particularly useful are: (a) disputes in which governments are indifferent to outcome, but for internal political or other reasons are unable to concede or even compromise the issue in negotiations (i.e., minor boundary disputes or substantively unimportant but emotionally volatile issues of title to small or insignificant areas of territory); (b) disputes involving difficult factual or technical questions in which the parties may be prepared for a compromise solution but where, either because of the complexity of the situation or internal political pressures, they cannot evolve a basis for developing a viable compromise (i.e., again certain complex boundary or maritime, continental shelf, or fishery resource zone delimitation issues); and (c) some particularly awkward or dangerous disputes, in which resort to judicial settlement may be a politically acceptable way of buying time and containing a volatile situation while solutions are sought over time.

Moreover, international tribunals, simply by being available, may help avoid, or induce the settlement of, disputes. Even if states choose only infrequently to invoke the International Court's jurisdiction under the Optional Clause or "compromissory clauses" in relevant agreements, that does not mean such commitments are useless. On the contrary, since each party to a dispute covered by such provisions knows that the other can resort to the Court, a party that wishes to avoid adjudication will have more incentive to reach a negotiated settlement. That is, where the parties have conferred potential jurisdiction on an international tribunal, their decisions and bargaining, like those of parties to domestic disputes, will be more likely to occur "in the shadow of the law." J.G. Merrills comments:

> [T]he value of arrangements for dispute settlement is not to be judged solely by the cases. For a provision for compulsory arbitration by its very existence can discourage unreasonable behaviour and so may be useful even if it is never invoked.[36]

It is also important to note that, for many people throughout the

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36. MERRILLS, *supra* note 1, at 88. In this context, it is amusing to compare an ancient Chinese suggestion that a good way to encourage dispute-settlement by the parties themselves is to provide only very bad courts. The 7th century Emperor K'ang Hsi is reported to have said:

> Law suits would tend to increase to a frightful amount, if people were not afraid of the tribunals, and if they felt confident of always finding in them ready and perfect justice. As man is apt to delude himself concerning his own interests, contests would then be interminable, and the half of the Empire would not suffice to settle the lawsuits of the other half. I desire, therefore, that those who have recourse to the tribunals should be treated without any pity, and in such a manner that they shall be disgusted with law, and tremble to appear before a magistrate.

R. DAVID & J.E.C. BRIERLEY, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY 520 (1978), citing S. VAN DE SPRENKEL, LEGAL INSTITUTIONS IN MANCHU CHINA 77 (1962).

world, international adjudication symbolizes civilized and ordered behavior and the rule of law in international affairs. Whatever the truth may be as to how the international legal system actually works, public judgments as to the relevance and effectiveness of international law are at least in part based on whether the public sees international courts, and particularly the International Court of Justice, as playing a significant role in international dispute settlement. If many states (particularly the important ones) are willing to submit their disputes to impartial settlement and show respect for the International Court, this will be taken by the public as meaning that international law is in itself relevant and worthy of respect, and the public will believe in and support international law. If, on the other hand, important states show indifference or contempt for international adjudication and the Court, the public is likely to conclude that international law is meaningless and withdraw their belief and support. Indeed, these public attitudes may in turn over time reflect back on official and bureaucratic attitudes towards and respect for international law. Consequently, if a state believes that its national interest will be furthered by wider global respect for international law, it will arguably also have an interest in doing what it can to strengthen and support the role of international adjudication.

Finally, even if the role of international adjudication is limited and there is no international court with general compulsory jurisdiction, there can still be effective dispute settlement and a workable international legal order. The international legal order is different in many respects from national legal orders, and need not operate in exactly the same way.[37] Moreover, we are coming to realize that, even in the domestic legal system, adjudication plays a largely supplementary or "back up" role, and that much of the work national courts do is in effect mediation or conciliation.[38]

In sum, since adjudication can be a particularly useful tool in our tool-box of dispute settlement techniques, it is important that it be kept ready at hand, easily available and employed to the fullest whenever its use is warranted. Even if adjudication is not a panacea for problems of world order, it makes sense to do all that we can to strengthen and encourage the greater use of judicial institutions, and to improve their ability to respond in flexible ways to nations' dispute settlement needs.

It is relevant in this respect to note that the Soviet Union's recent apparent change of attitude and new receptiveness towards the compulsory jurisdiction of the World Court, and towards multilateral conflict resolution techniques more generally, at least as stated in Premier

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37. *See* discussion in Bilder, *International Dispute Settlement and the Role of Adjudication*, *supra* note 1; Allott, in Waldock, *supra* note 1, at 128-32; Schachter, *supra* note 1, at ch. III and 207-11.

38. *See, e.g.*, references on dispute processing in the U.S. cited in *supra* note 1, and, particularly, Galanter, *supra* note 1.

Gorbachev's September, 1987 Pravda articles,[39] may represent a unique "window of opportunity" for strengthening international dispute-management institutions, which the U.S. and other western nations ought seriously to explore.

## X. SOME LIMITATIONS OF THIRD PARTY DISPUTE SETTLEMENT

While third-party intervention is usually helpful and undertaken for benevolent motives, this may not always be the case. There are some potential drawbacks of third party dispute settlement.[40]

Even well-meaning intervention may get in the way of or discourage the parties' own settlement efforts, making things worse rather than better. This may be true in particular where the intervention is premature or inept, or where the third party is an "officious intermeddler," butting into a situation without invitation and against the parties wishes. But even if intervention is invited, it may be the case that "too many cooks may spoil the soup" or that things somehow go wrong.

Third party intervention will not necessarily produce a fair or stable settlement or outcome. Even where third party intervention is ostensibly "neutral," it may often have the effect of supporting the position and interests of one or another of the parties. Moreover, to the extent intervention by third parties typically produces outcomes differing from those which would have resulted from negotiations based on the effective power of the disputing states acting solely by themselves,the outcomes and "settlements" resulting from intervention may distort rather than reflect real underlying power relationships and be unstable. Indeed, where third parties artificially constrain real pressures, the result may be that over time "the boiler will explode" or "the toothpaste squeeze out of the tube somewhere else," producing even greater problems in the future.

As a corollary to the previous point, the possibility of third party intervention may sometimes lead to or prolong disputes and conflicts by encouraging parties (particularly weaker parties) to be more aggressive or intransigent than they would otherwise normally dare to be. For example, it has been suggested that the Arab states have little reason to refrain from hostile actions against Israel, or to reach a definitive settlement with

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39. Mikhail Gorbachev, *The Realities and Guarantees of a Secure World*, Pravda, Sept. 17, 1987; USSR Mission to the UN, Press Release No. 119 (Sept. 17, 1987), suggesting, *inter alia*, that the International Court's "mandatory jurisdiction should be recognized by all on mutually agreed conditions," that "the permanent members of the Security Council, taking into account their special responsibility, are to make the first step in that direction," and that "the international community should encourage the United Nations Secretary General in his missions of good offices, mediation and reconciliation" (at 11-12). *See also, e.g.*, the Soviet Union's announcement on March 8, 1989, that it would accept the compulsory jurisdiction of the International Court of Justice with respect to disputes concerning five international human rights treaties, N.Y. Times, March 9, 1989, at 1, col. 4; *see also* Lewis, *Moscow Says World Court can Decide Soviet Disputes*, N.Y. Times, Nov. 3, 1988, at 4, col. 7.

40. *See also* PRUITT AND RUBIN, *supra* note 1, at 179-82.

it, so long as they believe from experience that any severe Israeli sanctions or retaliation will always be nullified by U.N. or other third party intervention.

Third party intervention - or even its possibility in the future - can hinder or chill negotiations by encouraging an exaggeration or freezing of the parties' positions. Each will be aware of the tendency of mediators (and even arbitrators and judges) to "split the difference" and seek a compromise; consequently, rather than focusing on settling the matter themselves, they may seek to put themselves in the best position to "win" any third party intervention.

In trying to help resolve a dispute or conflict, third parties can become enmeshed in it, thus widening, complicating and prolonging the dispute. For example, one or another of the disputants may come to perceive the third party as really an ally or an enemy; persuade, coerce or trick it into "taking sides;" or "blackmail" it into a continuing role in the dispute. In this event, the third party may become part of the problem rather than its solution.

Finally, third parties will often have their own interests at stake in intervening in a conflict or dispute, which may distort their settlement efforts or cause them to seek outcomes not in accord with the parties desires or interests. Indeed, sometimes a third party may have a mischievous or malevolent purpose, seeking to prevent the conflict or dispute from being resolved or to "keep the pot boiling" to suit the third party's own purposes.

## XI. How Important Is Third Party Dispute Settlement And Does It Really Work?

It is difficult to measure precisely and objectively either the practical significance or success of third party dispute settlement. Clearly, any such judgments will vary with the situation under examination and the perspective of the observer. Moreover, in assessing importance or success, we may have to answer the question "as compared to what?" However, we can probably say at least a few things.

As indicated, most disputes are - and should be - settled through direct negotiations. Thus, third party intervention will usually be less important, effective or efficient than settlement directly by the parties themselves.

However, while precise data is lacking, recent studies suggest that third party intervention in international conflicts often can play a significant role - a result in accord with long human experience and intuition. In particular, there is evidence that, while third party intervention does not always provide a final settlement to a conflict or dispute, it often seems to keep things from getting worse. For example, Bercovitch, analyzing data involving 310 conflicts from 1945-74, found that in 235 of these conflicts, or 82 percent of the total, there was some form of official third-party intervention, primarily by the U.N. and in the form of media-

tion, and that it was useful in at lest abating conflict in a substantial number of these situations.[41] He concludes that third party intervention seems to be an important method for managing international conflict, and that:

> [S]tudies show that institutional third parties can be particularly useful in abating, insulating and restraining international conflict, though not in settling it. We do not know, however, whether conflicts in which the parties accept the intervention of an outsider are more, or less, likely to terminate in a settlement. Nor do we know whether a better, or even a similar outcome could not have been attained and without the participation of a third party. Until we have some answers to these questions, third parties' contributions to successful outcomes should be kept in their proper, and critical, perspective.[42]

Similarly, Pruitt and Rubin conclude that: "In the last analysis, however, it is our view that third parties are enormously helpful and important in the reduction and resolution of differences."[43]

Certainly, there is much to be said for techniques which stop the parties from fighting and keep them talking, even if a definitive solution proves for the moment elusive. Sometimes, if matters can just be put "on hold," time and changing attitudes, interests and circumstances may provide opportunities for settlement not presently apparent.

It is usually assumed, probably correctly, that third party intervention is much more widely used in relatively "unimportant" than "important" types of disputes. But it is also evident that third parties do, at least occasionally, help parties resolve "important" disputes. If third party intervention is in fact useful in resolving a number of less important and even a few important disputes, it would certainly seem to be performing a significant function, even if it cannot help in all disputes.

Finally, regarding adjudication, it seems fair to conclude that despite the relatively small number of these cases — perhaps in all only several hundred intergovernmental arbitrations and less than 85 contentious cases in the World Court (33 in the P.C.I.J. and some 50 in the I.C.J.), many of these cases have involved disputes of considerable significance. Among these important cases are the *Alabama Claims*, *Bering Sea*, *North Atlantic Fisheries*, *Lake Lanoux*, *Island of Palmas*, *Trail Smelter*, *Rann of Kutch*, *Channel Islands* and *Beagle Channel* arbitrations, and the *Gulf of Maine*, *North Sea Continental Shelf* and *Iranian Hostage* cases. Moreover, these decisions have helped to establish principles and rules which have helped resolve or avoid other international disputes.

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41. BERCOVITCH, *supra* note 1, at 92-93 and 113-15 (using data from Butterworth).

42. *Id.* at 113-15.

43. Pruitt and Rubin, *supra* note 1, at 179. For a discussion of the role of third-party dispute settlement techniques in helping nations to manage the risks of their international cooperation and reach international agreements, see Bilder, *supra* note 27, at 56-61.

## XII. SOME CONCLUDING REFLECTIONS

What is the proper role of third party techniques in managing international disputes and what can we do to improve their usefulness? In summary, the following are some of my suggestions.

First, we should recognize that the best way of dealing with international disputes is by negotiations between the parties themselves, and the most important and useful thing third parties usually can do will be to supplement and assist this process. Consequently, our efforts should be directed particularly to improving facilitative techniques such as mediation, fact-finding and conciliation. Certainly, we should also encourage the use of more directive techniques such as adjudication, but with awareness that arbitration and judicial settlement are likely to play only a limited role in international dispute settlement for some time to come.

Second, while third party techniques will often be useful, we should not expect more than they can deliver. For example, even the most skilled use of third party techniques usually will not succeed in bringing unwilling parties, who have fundamental differences, to agreement. However, we should also remember that third party intervention can be useful and "successful" simply by restraining or isolating conflict, buying time, or keeping a situation from getting worse, even if it does not bring about a final settlement.

Third, while we should certainly continue to learn more about various methods of third-party intervention, such as mediation, and improve our ability to use them effectively, we should be careful not to overemphasize the importance of mere technique or "gimmicks." There are few secrets and little magic in successful dispute settlement. The most important factor will continue to be whether the parties want — or can be persuaded to want — the dispute settled. The most important qualities of a third party will continue to be traditional "old-fashioned" virtues — common sense, honesty, trustworthiness, patience, integrity, stamina, courage, intelligence, competence, sensitivity to the concerns of others, conscientiousness, impartiality and good will. And luck will always help.

Fourth, we should try to better understand and develop dispute-management systems between or among particular states or groups of states.[44] Dispute settlement is a complex process, in which a variety of techniques may appropriately play a part. Each international relationship exists in a unique environment, and may require its own special approach or "mix." Thus, the U.S. and Canada historically have developed and may be able most appropriately to use one type of dispute-management system, while U.S.-Soviet relationships may most appropriately call for a completely different kind of system.

Fifth, in thinking about dispute settlement, we should not forget the great importance of doing more to avoid disputes. Thus, we should de-

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44. *See* Bilder, *supra* note 9.

velop and improve arrangements and mechanisms designed both to keep disputes from occurring and to permit them to be dealt with at an early stage, before political interests become vested, emotions become involved, or positions harden.[45] Such dispute avoidance measures might include prior agreement on clear rules and workable arrangements; prior notification and consultation, and the establishment of *ad hoc* or permanent binational commissions or joint agencies.

Sixth, we should be sensitive to the possible relevance to any dispute of the particular cultural attitudes and responses towards conflict and dispute-settlement of the parties involved, and take such perspectives into account in deciding on the appropriateness of different approaches or techniques. For example, Chinese, Japanese and certain other non-Western societies appear traditionally to have given particular emphasis to nonadversarial techniques of mediation and mutual accommodation as a way of dealing with disputes, and to have been particularly reluctant to use adjudication or other adversarial or "legally-oriented" methods. Again, different societies may have different perspectives regarding the types of individuals most worthy of respect and trust and most suitable to perform third-party roles; thus, in some cultures, eminent lawyers may be appropriate mediators or dispute resolvers, while in others, political or religious leaders may be more suitable.

Seventh, we should study possibilities for improving old third party institutions and procedures and developing new ones. Clearly, there is much to be said for having institutions or procedures in place, more easily available to parties if they wish to use them — although it is open to question whether new institutions in themselves will make much difference without some change in underlying state attitudes. Certainly, one of the most important things we can do is to foster an international atmosphere in which third-party intervention and efforts to promote peaceful settlement of disputes are considered routine,appropriate, legitimate and acceptable. There are several ideas worth exploring regarding improvements to be made and possible new developments in our dispute management institutions.

One idea is to expand the availability and use of non-binding conciliation processes and of the advisory jurisdiction of international tribunals. As indicated, governments have been reluctant to accept binding judicial settlement since they see legally binding judgments as posing special risks — even though their fears may be unrealistic and unlikely to come to pass. Conciliation and advisory or non-binding adjudication, on the other hand, can offer many advantages of impartial third-party factual and legal determination while reducing some of its most significant risks. In many cases, a recommendation or advisory decision may in fact provide a

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45. *See, e.g.*, Bilder, *An Overview of International Dispute Settlement*, *supra* note 1, at 29-31; R. KIRGIS, PRIOR CONSULTATION IN INTERNATIONAL LAW: A STUDY OF STATE PRACTICE (1983).

mutually acceptable basis for resolution of the dispute; however, each party will have the assurance that, should its worst fears be realized and the decision prove unacceptable, it can legally refuse to comply with it, incurring only limited public relations costs. While binding adjudication may in principle be preferable, non-binding conciliation or adjudication may in some situations be the most that one or both parties will agree to, and in that event, better than nothing. The thus far successful experience of the newly formed Inter-American Court of Human Rights with advisory jurisdiction is suggestive in this respect.[46]

Another idea is to develop a wider, more easily available, and more credible array of international fact-finding, monitoring and verification facilities. For example, proposals have been made in the U.N. for the development of permanent fact-finding institutions, and even for the establishment of International Satellite Monitoring Agency to help verify arms control or similar agreements. I have elsewhere suggested the possibility of establishing an essentially independent and neutral entity (e.g., a "Facility for International Risk Management") outside the U.N. framework and free of direct government control, which would be available to states, at their request and with their sharing of costs, to perform verification, monitoring, escrow or other risk-management functions; such a facility might take, for example, the form of an international corporation, along the lines of EUROCHEMIC, or a nongovernmental organization, such as the International Committee of the Red Cross.[47]

Still another possibility is to explore ways of making international adjudication, and in particular the I.C.J., more acceptable, accessible and flexible.[48] As indicated, any substantial change in the willingness of state's to use international adjudication or the I.C.J. is likely to require a fundamental change in state attitudes and in their willingness to face the

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46. *See, e.g.*, Buergenthal, *The Advisory Practice of the Inter-American Court of Human Rights*, 79 AM. J. INT'L L. 1 (1985). *See generally*, for arguments for more pragmatic, flexible and non-binding types of risk-management and dispute-resolution arrangements, R. BILDER, MANAGING THE RISKS OF INTERNATIONAL AGREEMENT (1981).

47. *See* Bilder, *An Institution to Monitor Treaties*, 18 INT'L PRAC. NOTEBOOK 13 (Apr. 1982) (Amer. Branch, Int'l Law Assoc.) and Milwaukee Journal Mar. 14, 1982, at part 9. On verification, *see generally*, Bilder, *supra* note 46, at 119-39; Trimble, *Beyond Verification: The Next Step in Arms Control*, 102 HARV. L. REV. 885 (1989); M. KREPON, ARMS CONTROL - VERIFICATION AND COMPLIANCE (1987); W. POLLER (ed.), VERIFICATION AND ARMS CONTROL (1985).

48. For recent discussions of the I.C.J. and suggestions for broadening its role, see the references cited in *supra* notes 1, 20, and 33, and also Allott, *supra* note 1, at 134-58; Gross, *supra* note 1; Gross, *The International Court of Justice: Consideration of Requirements for Enhancing its Role in the International Legal Order*, 65 AM. J. INT'L L. 253 (1971); Sohn, *supra* note 1; U.S. DEPARTMENT OF STATE, STUDY ON WIDENING ACCESS TO THE INTERNATIONAL COURT OF JUSTICE (1976), *reprinted in* DIGEST OF U.S. PRACTICE IN INTERNATIONAL LAW 650 (Mcdowell ed. 1976); Murphy, *The World Court and the Peaceful Settlement of International Disputes*, 7 GA. J. INT'L & COMP. L. 551 (1977); Dillard, *The World Court: Reflections of a Professor Turned Judge*, 27 AM. U.L. REV. 205 (1978); Petren, *Some Thoughts on the Future of the International Court of Justice*, 6 NETH. Y.B.INT'L.L. 59 (1975).

risks inherent in binding third-party dispute settlement techniques. But some procedural innovations may be of help. For example, the recent expansion of the availability and use of the I.C.J.'s chamber procedure is one useful step in this direction.[49] Professor Louis Sohn's proposal for step-by-step acceptance of the Court's compulsory jurisdiction — the idea of slicing or fractionating types or degrees of commitment to adjudication into less-risky and more-acceptable packages — is another suggestive and innovative type of approach.[50] Another idea is that the U.S. consider entering into special dispute settlement agreements with the Soviet Union and perhaps other major powers *outside* the Article 36(2) "optional clause" framework - providing for the compulsory submission of carefully specified types of treaty or other disputes to special chambers of the International Court of Justice. Among the various other suggestions which have been made and debated are: permitting wider access to the I.C.J. or other international courts by international organizations, nongovernmental organizations, or even individuals; restricting the types of reservations which can be made to acceptance of the compulsory jurisdiction of the I.C.J. under the "optional clause"; completely discarding the concept of compulsory jurisdiction; expanding the "law" the I.C.J. can draw on under Article 38 of its statute to include U.N. General Assembly declarations; and so forth. We might consider whether at least some of the so-called "alternative dispute resolution" (ADR) techniques, such as "minitrials," currently being discussed and experimented with within the U.S. and some other national legal systems, have possible application to international problems and are worth exploring.

We should also try to strengthen the ability of third parties in appropriate situations to intervene on a temporary basis in disputes and conflicts simply to keep matters "on hold" and from getting worse, while providing time or a "waiting period" in which the disputing states or third parties can seek solutions. Precedents include the power of the I.C.J., under Article 41 of its statute, to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party, as well as the activities of

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49. *See, e.g.*, Schwebel, *Ad Hoc Chambers of the International Court of Justice*, 81 AM. J. INT'L L. 831 (1987). Most of the cases submitted to the Court since 1982 have been under the chamber procedure. There are indications that the State Department strongly favors use of the chamber procedure and, indeed, may contemplate that future submissions to the Court be only to such a panel. *See* 1989 PROC. AM. SOC. INT'L. L., *supra* note 35. Certainly the panel concept has proven popular, and it is arguable that any device which encourages a willingness by states to resort to the Court is for the good. On the other hand, there may be some question whether, if all states choose to use only such specially selected panels, the International Court of Justice will remain in fact a "World Court", rather than simply being a series of *ad hoc* arbitral tribunals sitting at a common seat. That is, to the extent that the extensive use of the chambers procedure tends to erode the concept and integrity of the Court as a global institution, or encourages the attitude that its international judges are inherently biased or untrustworthy, there may be serious reason for concern.

50. Sohn, *Step-by-Step Acceptance of the Jurisdiction of the International Court of Justice*, 58 A.S.I.L. PROC. 131 (1964).

various U.N. peacekeeping forces. We should explore whether there might be additional ways of temporarily restraining and preventing escalation of disputes to permit time and opportunity for settlement.

Also, we should attempt to develop ways of better utilizing national legal systems to implement international dispute-management objectives should be developed. Proposals to allow the I.C.J. to give advisory opinions to national courts on questions of international law would be one interesting step in this direction.[51] Other possibilities might include agreements facilitating access to national courts or agencies by alien individuals, corporations or even foreign governments seeking domestic remedies for particular kinds of transnational problems, such as transfrontier pollution disputes; or an agreement, similar to the N.Y. Arbitration Convention, expressly providing for implementation by a respondent state and third states of the obligation of states under the U.N. Charter to comply with a judgment of the I.C.J.

Eighth, we should give more emphasis and support to innovative research about the international dispute process and techniques of international dispute management and settlement, particularly empirical and interdisciplinary studies.[52] This research should include investigations of the broad underlying questions concerning the causes, characteristics, and "life cycle" of disputes noted at the beginning of this paper. Particular questions relevant to third party dispute-settlement which might merit more attention and additional research including the following:

- What factors influence disputing states' perceptions of the acceptability, authority, and persuasiveness of third parties? What qualities really are most important? In particular, what do we mean by "neutrality," "impartiality" or "lack of bias," how important are perceptions as to the neutrality of third parties to the success of their efforts, and how can we best ensure that third parties are in fact neutral and unbiased? Even though every human being, inevitably, may have biases, can't people still be counted on to conscientiously perform roles which require them to act "neutrally," and how can we strengthen such traditions? What are the pros and cons of utilizing

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51. *See, e.g.*, Schwebel, *Preliminary Rulings by the International Court of Justice at the Instance of National Courts*, 28 VA. J. INT'L L. 495 (1988); Gross, *supra* note 48 ; Sohn, *Broadening the Advisory Jurisdiction of the International Court of Justice*, 77 AM. J. INT'L L. 124 (1983); Goldklang, *House Approves Proposal Permitting ICJ to Advise Domestic Courts*, 77 AM. J. INT'L L. 338 (1983); McLaughlin, *Allowing Federal Courts Access to International Court of Justice Advisory Opinions: Critique and Proposal*, 6 HASTINGS INT'L & COMP. L. REV. 745 (1983).

52. For listings of academic and other study programs and institutes and organizations involved in research relating to conflict resolution and dispute settlement, see INSTITUTE FOR WORLD ORDER, PEACE AND WORLD ORDER STUDIES: A CURRICULUM GUIDE 373-86 (3d ed. 1981). A number of these, such as the Program on Negotiation at Harvard Law School and its Harvard Negotiation Project, expressly adopt an interdisciplinary approach. There is a need, in particular, to integrate the insights of legal and social science research in this respect, and to provide more occasions for lawyers and social scientists interested in these problems to talk and work together.

an international institution, such as the U.N., in a third party role, as contrasted with a state or individual?
- What do we mean by "settlement of a dispute" or an "acceptable outcome" and, in particular, what affects the parties' perceptions as to the "equity" or "fairness" of a particular outcome? Is "fairness" primarily substantive or procedural, against what base lines or by what criteria are the parties likely to judge it, and how can we best achieve it? More generally, how can we best define or measure the "quality" of dispute resolution processes and outcomes?
- Can we say anything about when is the "right time" for various types of intervention? How important are personal interrelations between individual participants in settlement processes? Can nongovernmental organizations play a more useful role in dispute settlement?
- How can disputing parties best protect themselves against improper overreaching or counterproductive interference by a third party? How can a third party best protect itself from becoming enmeshed or blackmailed in the dispute?
- What affects third party perceptions of the legitimacy and persuasiveness of the disputing parties' positions? Is there a difference between the type of argumentation the parties use in negotiation to try to persuade each other, and the type of argumentation they use in third party contexts to try to persuade the third party?
- What role do international law, generalized norms, or general "public opinion" and the attitude of third states play in dispute resolution? What does "social pressure" mean and how does, or can, it affect dispute-resolution processes? Are perceptions of legitimacy relevant only to adjudication or other "legal" techniques of settlement, or do they affect non-adjudicative methods of third-party settlement as well?
- In what kind of cases is it important to successful intervention that the third party be able to provide specific resources, particularly the resources to help the parties manage the risks of potential settlement arrangements,and how can such resources be made more available?
- What do we mean by "face" — the quality of respect or reputation that states (and officials) seem so concerned with "losing" by giving in to settlements, and how can we reduce the obstructive influence of such considerations on settlement efforts?
- What is the effect of "trust" and "distrust" on dispute settlement efforts, and how can third parties help disputing states to overcome or counterbalance distrust?
- Is it desirable or undesirable for a third party to be "powerful" or have some independent basis of influence over the disputing parties? More generally, what is the role of power or force in third party settlement? Can there be anappropriate role for "creative coercion."
- In what respects do mediators or conciliators behave differently from adjudicators or judges, and what makes them act and see their roles as different? What do the parties, or the "general public", ex-

pect of third parties entrusted with these different roles?
- How can third parties better contribute to the settlement of the complex and pervasive internal racial, ethnic and religious strife which increasingly threatens international order (e.g., in South Africa, the Middle East, Cyprus, Northern Ireland, Sri Lanka, and elsewhere)? Clearly, it is becoming increasingly difficult to draw any sharp lines between international (or external) and domestic (or internal) disputes. Do we need to develop new approaches or ways of thinking to help us to deal effectively with these "mixed" or "transnational" kinds of disputes?

Ninth, the international community should be more assertive in insisting that parties accept third party intervention in disputes which threaten international peace and security or, indeed, the international community's general welfare. It is now widely recognized that, for better or worse, the world has become an interdependent community and that serious disputes and conflict are now everyone's business. The idea that states are free to conduct their quarrels however they wish and without regard to the cost to others is outdated and has no place in a nuclear age.

Finally, once again, we should not forget that international third party dispute settlement has a symbolic significance as well as practical importance. The concept that disputes and conflicts within a group are not simply the business of those directly involved but are of concern of every member is at the root of civilized and ordered society. Consequently, third party dispute settlement, and institutions such as the International Court of Justice which implement its use, can encourage growing perceptions of international community and play a crucial role in the development of a more peaceful, just and decent world.