Hofstra Law Review

Volume 1 | Issue 1 Article 2

1973

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MEDIATION AND ARBITRATION OF INTERNATIONAL DISPUTES

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IN this century, the peoples of the world have to a larger extent than ever before come to an understanding that in world affairs, as in domestic affairs, there can be no lasting peace without institutions for peaceful settlements of disputes and for peaceful political changes. When such institutions do not exist, nations, like individuals, are inclined to resort to self-help through non-peaceful means. Therefore, the peaceful settlement of international disputes, far from being a Utopian dream, has become a subject of the greatest seriousness and most pressing urgency, given added importance by the successive developments of this violent century. In the age of nuclear weapons, the peaceful settlement of disputes is a practical necessity for the survival of mankind.

During the latter part of the last century and the first third of this, the creation of international institutions for the promotion of arbitration, and the negotiation of treaties binding the United States to settle its differences with others through arbitration or conciliation, were among the most important diplomatic undertakings of this nation. Thus, according to one of our most distinguished diplomatic historians,[1]

> in the period between 1899 and 1933, a period of less than 35 years, the United States Government . . . signed and ratified a total of 97 international agreements dealing with arbitration and conciliation. This was in addition to the negotiation of a number of further agreements which, for one reason or another, never took effect. Seven of the agreements that went into effect . . . were multilateral agreements. Fifty of them were bilateral arbitration treaties or conventions. Forty were bilateral treaties or conventions of conciliation.

Among the most significant of all these agreements was the Hague Convention of 1899 (modified and improved at a Second Hague Conference in 1907). This agreement, formally styled the Convention of Pacific Settlement, was the basis for the establishment of the

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1. Kennan, *Arbitration and Conciliation in American Diplomacy*, 26 ARB. J. 1, 28 (1971).

Permanent Court of Arbitration, composed of panels of jurists from countries party to the agreement who would be available to arbitrate disputes between parties submitted to them.

In addition to the Permanent Court of Arbitration, a mechanism for arbitration between states is to be found in many bipartisan treaties providing for arbitration between the signatories. Here again, the United States has, in the past, taken a leading role, negotiating a large number of such treaties with most of the leading European powers and also with our neighbors in this hemisphere.[2] Worldwide, there are now some 300 treaties in force for the peaceful settlement of disputes through enquiry, mediation, conciliation, arbitration, judicial settlement or a combination of these methods. And there are now in force some 600 treaties which confer on the International Court of Justice, created under Article 34 of the United Nations Charter, jurisdiction to decide disputes as to the treaties' interpretation and application.

The Charter of the United Nations, in Article 1, paragraph 1, declares that one of the purposes of the organization is "to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace."

It states in paragraph 4 of the same Article, that the UN is intended to be "a center for harmonizing the actions of nations in the attainment of these common ends."

It commits all members, in Article 2, paragraph 3, "to settle their disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered."

And it further commits all members in Article 33, in regard to any disputes the continuation of which is likely to endanger the maintenance of international peace and security, "first of all" to "seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice."

Further, the growth of various international organizations such as the specialized agencies of the United Nations, or organizations dealing with such subjects as civil aviation, international development, and the like, has opened a field for *ad hoc* arbitration of disputes. This is particularly so because of the restrictions upon the accessibility of the International Court of Justice found in the lan-

2. *Id.* at 23, 24.

guage of Article 34 of the Charter (only States can be parties to cases before the Court); in fact, many of the constitutions of the specialized agencies contain provisions requiring that certain disputes shall be referred to arbitration.[3]

It is tempting to conclude from these statistics that the international community is making great strides in the field. But the enormous increase in the institutions for peaceful settlement has not been accompanied by a similar increase in the actual resort to such institutions.

But I believe that the pendulum is now starting to swing the other way. In particular, the development of nuclear weapons, and the breakup of the old power blocs (and thus the emergence of a multipolar international alignment rather than the basically bipolar one of Cold War days) has done much to renew attention given to international arbitration and similar devices. Even some persons who have shared Ambassador George Kennan's past unsympathetic position as regards the long quest toward arbitration and conciliation as international priorities, are coming to agree with his present views that

> in light of what has happened with respect to the development of nuclear armaments in the intervening twenty years [since 1952], [I should have been obliged] to give a much higher rating to the possible importance of international arbitration in the future than I was able to give to its importance in the past. . . . I am far from supposing that in these circumstances the arbitral or judicial process will become the sole means of settling international differences. There will always be situations to which the more flexible devices of old-fashioned political compromise, arranged through diplomatic channels, will be the best answer. But I could envision that in a situation where the use of force has been effectively ruled out by the uncontrollable and potentially suicidal nature of the only sort of force nations have schooled themselves to use, there may be a greater demand, and a greater usefulness, for formal procedures through which the peaceful settlements of international disputes can be effected; and as this situation grows upon us, the experience of our fathers' and grandfathers' generations in the development of the arbitral principle, and of

3. Jully, *Arbitration and Judicial Settlement—Recent Trends*, 48 AM. J. INT'L L. 380 (1954); Eubanks, *International Arbitration in the Political Sphere*, 26 ARB. J. 129 (1971).

institutions and instruments of agreement based upon it, may come to have a more serious significance for us than it had in the years immediately before and after World War II.[4]

To these words of Mr. Kennan's, I would offer a most profound "amen." From my own experience, in a career which has included long and intimate association with the process of third-party settlement of disputes, both domestic and international, I have become convinced that the arbitral principle to which Mr. Kennan refers, continues to offer great possibilities for the peaceful settlement of disputes on the international level.

Within the United States, we have all seen the value of peaceful settlement procedures. These procedures can serve several purposes:

—They can provide a "cooling off period" for the fever of controversy to subside.

—They can help bring contending parties into touch with one another.

—They can help find the facts.

—They can help identify points of agreement.

—They can introduce the calming effect of impartial conciliation or judgment.

—They can mobilize public opinion against excessive claims.

—They can place responsibility on others for results for which the parties themselves could not accept responsibility.

All of these procedures are needed and adaptable to international disputes.

I have no illusions that institutions alone can solve the problem of persuading sovereign states to accept third party assistance as conciliators or arbitrators. I recognize that the central problem is one of national attitudes. The most important requirement for peaceful settlement is the willingness of nations to settle their differences by peaceful means. However, institutions can help shape national attitudes.

To this end, I have proposed the creation of a United Nations Conciliation and Mediation Service—a flexible set of procedures so efficient and so comprehensive that it could, if accepted and utilized, provide a substitute for armed conflict. A UN Service should include improvements in present procedures to meet three main needs:

In the first place, it should assure the greater availability of qualified persons for tasks of peaceful settlement. In almost all countries there are distinguished men whose personal qualities of integrity and

4. *Arbitration and Conciliation in American Diplomacy, supra* note 1 at 2, 3.

objectivity and practical experience enable them to discharge special responsibilities in the resolution of conflict. Let us find ways of making these men available to the UN—and to other international agencies.

In the second place, it should provide additional incentives for governments to resort to peaceful settlement. Nations will use available resources for peaceful settlement only as they are convinced of the benefits of cooperation—and of the costs of noncooperation.

In the third place, it should incorporate new approaches to dispute-settlement whose utility has been demonstrated in recent experience both domestically and internationally.

Julius Nyerere, the distinguished President of Tanzania, has called on all UN members to demonstrate what he so aptly describes as "the courage of reconciliation." The time has come to manifest that courage in the improvement of and utilization of third party settlement procedures in concrete dispute cases.

This is not to say that the United Nations has been totally impotent in rendering third party assistance in the settlement of disputes. The Secretary-General and his senior aides, as well as special United Nations mediators, have contributed to the cessation of hostilities in such far-flung places as Indonesia, West New Guinea, Cyprus and, in the past, in the Middle East.

I have already mentioned that impressive resources for peaceful settlement also have been developed by the Specialized Agencies of the United Nations. I have specifically in mind, for example, the procedures for enquiry and conciliation used by the International Labor Organization in the implementation of its members' commitments to fair labor standards; the methods employed by the International Telecommunication Union in resolving problems concerning the allocation of radio frequencies; and the techniques of arbitration and conciliation which the International Bank is now making available for the settlement of investment disputes.

Those who follow the activities of regional organizations or who have observed their work know of the accomplishments in this field of the Organization of African Unity and the Organization of American States. They too, however, would agree that there is need for improvement and modernization of their procedures.

While I have placed primary emphasis on institutions for third party settlement, we must not entirely ignore the resources available for bilateral settlement. For example, the United States has been participating with its immediate neighbors, Mexico and Can-

ada, in joint international commissions dealing with specific types of disputes arising in our bilateral relations.

I believe, further, that greater use can and should be made of the International Court of Justice as an instrument for pacific settlement. The Court is in danger of atrophy through non-recourse to it as a forum of settlement of disputes. This must not be allowed to happen.

President John F. Kennedy declared, in his memorable address at American University in June 1963, that "peace is a process, a way of solving problems."

The great challenge to the international community is to join together to strengthen the process of peace. Conciliation, mediation and arbitration are proven ways of solving problems. Let us hope that they will be utilized in the future, more frequently and more effectively than they have been in the past, in our quest "to save succeeding generations from the scourge of war."[5]

5. U.N. CHARTER, Preamble.