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International Dispute Settlement: A Network of Cooperational Duties

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Abstract

This article identifies various duties of cooperation both in political and legal settlement strategies. A general, customary law-based duty of cooperation with a view to settlement, comprising a duty to negotiate, is inherent in the obligation to settle disputes peacefully. On the other hand, a general 'political exhaustion doctrine' does not exist. In diplomatic third party-based settlement, we find specific, i.e. procedural, obligations of cooperation. With regard to adjudication, the evolution of treaty law has seen the cooperational act of submission given at an increasingly early stage. The doctrine of non-frustration of adjudication functions as a corollary to the duties of cooperation. In international criminal justice, manifold duties of cooperation are binding erga omnes partes. The cooperational duties are placed in the context of two antagonistic trends in dispute settlement. One is the rise of adjudication which is found, for instance, in the creation of new courts. On the other hand, new and varied political means are resorted to, and justified by novel arguments, such as alternative dispute resolution (ADR). The international law of dispute settlement may be envisaged as a network of obligations. The hierarchical strand of the network is dominant where (quasi-)compulsory jurisdiction exists. Yet horizontal Westphalian elements persist. Finally, the network image applied to dispute settlement visualizes the oscillation of international law between Westphalianism and Constitutionalism.

Introduction

The thesis put forward in this article is that the international law of dispute settlement is transcending the phase of mere cooperation, as identified by *Wolfgang Friedman*,¹

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¹ W. Friedman, *The Changing Structure of International Law* (1964). See only the Declaration of President Bedjaoui. President of the ICJ, appended to the *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, 35 ILM (1996), 1345, para. 13: 'Witness ... the gradual substitution of an international law of cooperation for the traditional international law of co-existence, the emergence of the concept of "international community" ... The resolutely positivist, voluntarist approach of international law ... has been replaced by an objective conception of international law, a law more readily seen as the reflection of a collective juridical conscience and as a response to the social necessities of States organized as a community.'

and is displaying characteristics of a *network*. ‘Cooperation’ is the joint action of two or more subjects of international law or other international bodies, and means more than ‘coexistence’ or ‘coordination’. It means proactively working together, serving objectives that cannot be attained by a single actor.² International cooperation is the guiding principle of the United Nations.³ A general inter-state duty to cooperate in all fields is asserted by the Friendly Relations Declaration.⁴ Specific duties of cooperation have been established (in more or less hard law and more or less consistently) in international economic relations.⁵ In the 1970s and 1980s they were reclaimed with a view to a right to development, often associated with a novel concept of ‘solidarity’.⁶ Duties of cooperation play an important role in international environmental law⁷ and in the battle against terrorism.⁸ In contrast, the law of dispute settlement has rarely been analysed in this perspective.

I will argue that the international law of dispute settlement is not only built on cooperation, but even constitutes a network, as political scientists understand the term.⁹ A network is a structure situated on the scale between a horizontal/loose/market-like structure and a hierarchical/institutionalized/state-like one.¹⁰ In contrast to the type of a “state” with the structuring principle of hierarchy and of a

² Wolfrum, ‘International Law of Cooperation’, II *EPIL* (1995), 1242.

³ Arts 1 para. 3; 11; 13; Chap. IX of the UN Charter.

⁴ Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations (Annex to GA Res. 2625 (XXV) of 24 October, 1970, 9 *ILM* (1970), 1292 *et seq.*).

⁵ UN GA Declaration on the Establishment of a New International Economic Order of 1 May 1974 (UN Doc. A/RES/3201 (S-VI)), 13 *ILM* (1974), 715; GA Res. 3281 (XXIX), Charter of Economic Rights and Duties of States (1974), 69 *AJIL* (1975), 484; UN GA Declaration on International Economic Co-operation, in particular the Revitalization of Economic Growth and Development of the Developing Countries of 1 May 1990 (UN Doc. A/RES/S-18/3); GA Res. 49/97 on Strengthening International Organizations in the Area of Multilateral Trade of 19 Dec. 1994 (UN Doc. A/RES/49/97).

⁶ See, e.g., Flory, ‘Essai de typologie de la coopération bilatérale pour le développement’, *Annuaire français de droit international* 19 (1973) 696; *Idem*, ‘Souveraineté des Etats et coopération pour le développement’, 141 *RdC* (1974, I), 255; Abi-Saab, ‘Le droit au développement’, 44 *Schweizerisches Jahrbuch für internationales Recht* (1988) 9; P.-M. Dupuy, *Droit international public* (4th ed., 1998), at 567–577.

⁷ WTO Appellate Body Report in: *United States-Import Prohibition of Shrimp* (WT/DS58/AB/R) of 12 October 1998, 38 *ILM* (1999), 121 *et seq.*, para. 168, with reference to various documents mandating cooperation, concertation or consensus in order to achieve the goals of environmental protection.

⁸ See only SC Res. 1368 of 12 Sept. 2001, para. 4 of the preamble; SC Res. 1373 of 28 Sept. 2001, para. 7 of the preamble and para. 3(c) of the operative part.

⁹ In the political scientists’ network analysis, the network concept is applied to political actors of entities, not primarily to individuals. The political science term ‘network’, which I rely on, does not mean *social* network, i.e. linkages between *people* in communities and organizations. My analysis is not based on the social scientists’ social network analysis as represented, e.g. by P. V. Marsden and N. Lin (eds), *Social Structure and Network Analysis* (1982) or by M. Castells, *The Information Age: Economy, Society and Culture*, vol. I: *The Rise of the Network Society* (1996).

¹⁰ Atkinson and Coleman, ‘Policy Networks, Policy Communities and the Problems of Governance’, 5 *Governance: An International Journal of Policy and Administration* (1992) 154; Mayntz, ‘Policy-Netzwerke und die Logik von Verhandlungssystemen’, in A. Héritier (ed.) *Policy-Analyse (Politische Vierteljahresschrift Special issue 24/1993)*, (1993), 39; Snyder, ‘Governing Economic Globalisation: Global Legal Pluralism and European Law’, 5 *ELJ* (1999) 334, at 372 and 339.

“market” with the structuring principle of anarchy, the particular feature of networks is the loose coupling of its components.¹¹

The paper first defines the concept of international dispute settlement (Section 1). It then revisits the traditional canon of dispute settlement means (Section 2). It continues to discuss general questions, such as an intrinsic general duty of cooperation in dispute settlement (Section 3), the principle of free choice (Section 4), the political-exhaustion doctrine (Section 5), and the principle of good faith as a source of cooperational duties (Section 6). The paper then presents some specific forms of cooperation in different forms of adjudication (Sections 7–9). The paper concludes that we have a genuine law of cooperation which needs to be seen in the context of antagonist trends in dispute settlement. The criss-cross of horizontal and vertical relationships in which states and dispute settlement institutions cooperate may be described as a network (Section 10).

1 The International Law Principle of Peaceful Settlement of Disputes

The principle of peaceful settlement of disputes is central to the UN system. It is enshrined in numerous conventions and is a customary law principle.¹² A ‘dispute’ was defined by the Permanent Court of International Justice in the *Mavrommatis* case of 1924 as ‘a disagreement on a point of law or fact, a conflict of legal views or interests between two persons’.¹³ The principle of peaceful settlement of disputes relates to ‘international’ disputes¹⁴ as opposed to ‘national’ or ‘domestic’ ones. What separates ‘the international’ from ‘the national’? I submit that the international element lies neither in the trans-border dimension nor is the concept of international disputes restricted to disputes between states. The criterion of ‘internationality’ of a dispute lies in the *legal substance of the dispute*. International disputes are those in which the rivalling claims are based on international law. This will *normally* go hand in hand with the parties being (at least so-called ‘limited’) subjects of international law. Correspondingly, international dispute *settlement* is present when the competent body or mechanism (tribunal, settlement conference, or other) is (at least in part)

¹¹ Jachtenfuchs, ‘Democracy and Governance in the European Union’, in A. Føllesdahl and P. Koslowski (eds), *Democracy and the European Union* (1998) 37, at 55.

¹² ICJ, *Case Concerning Military and Paramilitary Activities in and against Nicaragua, Merits* (Nicaragua v. USA), ICJ Reports (1986) 14, para. 290.

¹³ *Mavrommatis Palestine Concessions Case* (1924), PCIJ, Ser. A, No. 2, at 11. See on the existence of a dispute with reference to the Mavrommatis definition, ICJ, *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie, Preliminary Objections* (Libyan Arab Jamahiriya v. USA), judgment of 27 February 1998, 37 ILM (1998) 587, at 598, paras 21–38.

¹⁴ Compare the wording of Art. 2 para. 3 UN Charter.

constituted under and functions according to international, not purely national, rules.¹⁵

2 The Traditional Canon of Dispute Settlement Strategies

The pacific means of dispute settlement are traditionally classified into two groups: diplomatic-political means on the one hand, and adjudicational-legal means on the other. This distinction is based on the standards applied and on the binding nature of the process. Diplomatic-political procedures (such as negotiation, inquiry, mediation, conciliation) seek to reconcile interests and their outcome is not in itself binding. An ultimately binding result is reached only in the ideal case that the parties to the dispute reach an agreement. Legal-adjudicational procedures (arbitration and litigation) apply international law and determine rights; they culminate in a *binding* decision which cannot be unilaterally evaded by one party. I will now very briefly review the gamut of settlement strategies.

A ‘Political’ Means

1 Negotiation

Negotiation is communication, without third-party involvement, directed at achieving a joint decision. Negotiations are still the basic means of dispute settlement;¹⁶ they figure as such in almost all general dispute settlement conventions¹⁷ and in virtually

¹⁵ This includes international arbitration tribunals choosing as their procedural law (as the *lex arbitri*) the domestic law of their seat because such choice is allowed by international law. An international dispute (defined by the applicable law) may also be resolved by a national institution, e.g. by a domestic court. For example, violations of crimes against humanity and serious violations of international humanitarian law are tried by national courts which have jurisdiction under the principle of universal jurisdiction. See the Belgian trials initiated in April 2001 on crimes committed during the 1994 massacres in Rwanda. The legal basis is a Belgian Act of 1993 Concerning the Punishment of Grave Breaches of the Geneva Conventions and the Act Concerning the Punishment of Grave Breaches of International Humanitarian Law of 10 February 1999 which implements the Genocide Convention of 1948 (transl. of the latter Act, 38 ILM (1999), at 918 *et seq.*). Nevertheless, conflicts of jurisdiction between national and international courts may arise.

¹⁶ ICJ, *North Sea Continental Shelf Cases*, ICJ Reports (1969) 3, at 47, para. 86: ‘There is no need to insist on the fundamental character of this method of settlement.’ Negotiations are of course also a basic form of cooperation in all kinds of situations, but this general function will be left aside here.

¹⁷ See Art. 1 of the General Act (Pacific Settlement of Disputes) of 26 September 1928, LNTS vol. XCIII, no. 2123, 343; Art. 1 of the Revised General Act for the Pacific Settlement of International Disputes, adopted by the General Assembly on 28 April 1949, UNTS 71, no. 912, 101; Art. 2, para. 2 of the Pact of Bogotá (American Treaty on Pacific Settlement of 30 April 1948, UNTS vol. 30 (1949), no. 449 (Eng. text at 84)); Art. 1 of the European Convention for the Peaceful Settlement of Disputes of 29 April 1957, UNTS (1958), no. 320, at 243–256.

all settlement clauses incorporated in material treaties.¹⁸ Negotiations aim to produce a *consensual* resolution to a dispute. Such resolution draws its legitimacy from consent, but this legitimacy is tainted by power disparities.

2 Fact-finding

The second diplomatic strategy is inquiry or fact-finding. The purpose of fact-finding commissions is to facilitate the solution of disputes arising predominantly from a difference of opinion *on facts* by elucidating these facts.¹⁹ In recent decades, the concept of fact-finding has been visibly positively reappraised.²⁰ International conventions, such as the United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses of 1997, even provide for *compulsory* fact-finding in the event of a dispute.²¹

Commissions of inquiry have been established, both on the national plane after the collapse of illegitimate regimes (recall the Truth Commissions in South Africa), and on the international plane. One important example is Guatemala's Historical Clarification Commission, which has been characterized by its coordinator as a 'hybrid institution' 'located in a no man's land between domestic and international law'.²²

3 Mediation, Good Offices and Conciliation

The next so-called diplomatic strategies are *mediation*, *good offices* and *conciliation*. The description of international mediation given in Article 4 of the Convention for the

¹⁸ See only Art. 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes of the WTO Agreement (WTO DSU), 33 ILM (1994), 1126 *et seq.*: 'Consultations'; Art. 283 of the United Nations Convention on the Law of the Sea of 10 December 1982 (UNCLOS), 21 ILM (1982) 1261–1354: 'Obligation to exchange views'.

¹⁹ Cf. Art. 9 of the Convention for the Pacific Settlement of International Disputes of 18 October 1907, in Permanent Court of Arbitration (ed.), *Basic Documents* (1999), 17 *et seq.*

²⁰ See only the Permanent Court of Arbitration Optional Rules for Fact-Finding Commissions of Inquiry, effective 15 December 1997, in: Permanent Court of Arbitration, *supra* note 19, at 177 *et seq.* Provision for an international fact-finding commission for the investigation of serious violations of humanitarian law is made by Art. 90 of the Protocol Additional to the Geneva Conventions of 12 August 1949 relating to the protection of victims in international armed conflicts (Protocol I) of 8 June 1977, 16 ILM (1977), 1391, 1429. But although more than 50 contracting parties have accepted the commission's competence, no single case has been investigated yet. See Condorelli, 'La Commission internationale humanitaire d'établissement des faits: un outil obsolète ou un moyen utile de mise en oeuvre du droit international humanitaire?', 83 *IRRC* (June 2001), 393.

²¹ 36 ILM (1997), 700, art. 33, paras 3 to 9: Establishment of an impartial fact-finding commission at the request of any party to the dispute. The Commission must adopt a report by a majority vote. As regards fact-finding, an interesting feature of the WTO DSU panel procedure is the interim review stage (Art. 15 DSU (note 18)). The panel establishes the facts (which are in most cases very complicated and disputed) in an interim report that is formulated in cooperation with the parties. See similarly Arts 2016–2017 NAFTA Agreement (Canada-Mexico-United States: North American Free Trade Area Agreement) of December 1992, 32 ILM (1993) 605 *et seq.*

²² Tomuschat, 'Between National and International Law: Guatemala's Historical Clarification Commission', in: V. Götz, P. Selmer and R. Wolfrum (eds), *Liber amicorum Günther Jaenicke — zum 85 Geburtstag* (1998) 991, quotations at 1010–1011. Another example is the 'International Commission of Inquiry concerning the assassination of the President of Burundi on 21 October 1993 and the massacres that followed', which was established by the Secretary-General pursuant to SC Res. 1012 (1995) of 28 August 1995, and which published its report (S/1996/682) in 1996.

Pacific Settlement of International Disputes of 1907 remains valid. It reads: ‘The part of the mediator consists in reconciling the opposing claims and appeasing the feelings of resentment which may have arisen between the States at variance.’²³ Good offices are very similar to mediation, and are not even specifically mentioned in Article 33 of the UN Charter. Conciliation differs from mediation only by degrees. Some distinguish these strategies by their state of institutionalization. Others emphasize the more limited mandate of the conciliator, who is in a strict sense not supposed to recommend solutions to the parties. But even if the mediator may be slightly more proactive than a classical conciliator, his proposals are only non-binding recommendations. Thus, importantly, these two strategies share the quality of not having the power to impose solutions, but only to assist the parties in crafting their own. I will therefore use these terms interchangeably.²⁴

In the last 20 years or so, mediation and conciliation (though, in general, not on the international plane) have been explored thoroughly by conflict- and negotiation-theory. The insights gained from these studies, together with growing dissatisfaction with domestic arbitration and litigation in particular sectors, have led to the new discipline of alternative dispute resolution (ADR). The main thrust of ADR literature is that ‘alternative’ means of dispute settlement are more flexible, more constructive, and avoid the typical adjudicatory winner-takes-all solution. It is therefore commonly assumed that in all situations in which the parties want to or have to continue their relationship after the dispute (the prime example in domestic law being divorce proceedings when children are involved), mediation is preferable to adjudication because it is less adversarial and creates more win-win types of solutions.

If this assumption is correct, we have quite a powerful argument for ADR on the international plane because in the age of globalization there are very few transnational relationships within the global fabric that can be completely disrupted in the aftermath of a dispute. Moreover, the mediator’s decision can only be a non-binding proposal, but it is exactly this limited effect that is especially important in international law: it protects sovereignty.

If we now fuse the arguments for mediation and conciliation formulated by ADR theory with the traditional international law concern for sovereignty, international mediation or conciliation appears as the ideal dispute settlement strategy. It shares the advantages of adjudication, namely the issuance of an informed, reasoned, neutral judgment, while at the same time imposing no commitment on the parties to accept the recommended award — thus ‘the niceties of sovereignty are observed’, as Abram and Antonia Chayes put it.²⁵ This is the background to the recent popularity of optional mediation and conciliation rules in international instruments.

However, the expectations of theorists and law-makers have been defeated in

²³ In: Permanent Court of Arbitration, *supra* note 19, at 17 *et seq.*

²⁴ As here, Sander, ‘Alternative Methods of Dispute Resolution: An Overview’, 37 *University of Florida Law Review* (1985) 1, at 4.

²⁵ A. Chayes and A. H. Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (1995), at 24–25.

practice. Conciliation procedures are resorted to only very infrequently. They are neither fully accepted by states,²⁶ nor by private actors in investor-to-state disputes.²⁷ Why is this so? The main reason seems to be that states want to externalize responsibility in order to appear in a better light before their constituencies. They want a binding decision by a tribunal or court in order to be able to say to the people: Look, we have fought hard for our position, now we can't help the result. It is not our fault, we have to abide with the decision of the arbitrators or judges.

B 'Legal' Means

The so-called legal means of dispute settlement are arbitration and adjudication.

1 *The Blurry Distinction between Courts and Arbitration*

The difference between arbitration and adjudication is that, at least in the perception of states, arbitration is more flexible overall because the principle of party autonomy governs the process. Therefore, international arbitration is traditionally considered as more yielding to sovereignty than litigation before an international court.

2 *Arbitration*

International arbitration can be divided into the classical state-state arbitration on the one hand, and state-private party arbitration on the other.

(a) State-state Arbitration

Currently, the most important state-state arbitration is practised by WTO panels and the Appellate Body. A recent example of the institutionalization of state-state arbitration can be seen in the Ethiopian-Eritrean Boundary Commission and a Claims Commission, both created in 2000.²⁸ The establishment of these commissions is significant because two developing countries are involved, and it indicates that the ideological, highly sovereignty-conscious reserved attitude of so-called third world countries towards binding adjudication is most likely diminishing. The financing of these new bodies, however, remains a serious problem.

(b) Mixed Arbitration

The second type of international arbitration concerns disputes between states and private parties, mostly in commercial matters. The expansion of this 'mixed arbitration' is a 'quiet revolution' of international dispute settlement, and perhaps of

²⁶ The most recent textbook example of successful, state-state conciliation is the Jan Mayen Award, given by a conciliation commission in a dispute between Norway and Iceland on the Continental Shelf Area between Iceland and Jan Mayen, 20 ILM (1981), 797 *et seq.*

²⁷ See for the settlement of investor-to-state disputes the Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID Convention) of 18 March 1965, UNTS 575, no. 8359, 159 *et seq.*, 4 ILM (1965), 532 *et seq.* Since the first ICSID case of 1972, 69 disputes have been settled by resort to ICSID rules, and apparently only three by conciliation. Of the currently pending 45 proceedings, all are arbitral proceedings (information from <http://www.worldbank.org/icsid/index.html>), visited 3 February 2003. See on conciliation under the auspices of the International Chamber of Commerce: Schwartz, 'International Conciliation and the ICC', 10 *ICSID Rev.* (1995) 98.

²⁸ Bilateral agreement of 12 December 2000, 40 ILM (2001), at 259. Both bodies are seated in The Hague.

international law in general, as two eminent specialists of dispute settlement, John Collier and Vaughan Lowe, write.²⁹ Mixed arbitration is encouraged in the OECD Guidelines 2000,³⁰ as well as in the Stability Pact for South Eastern Europe of the same year.³¹ Two examples of functioning ‘mixed’ arbitration are the US-Iran Claims Tribunal, which was established after the hostage crisis of 1979 (operating under a modified version of the UNCITRAL Arbitration Rules³²), and, with regard to investment disputes, the ICSID framework.³³

(c) The Internationalization of Cooperational Duties in Arbitration

Both state-state and mixed arbitration are characterized by a continuing internationalization of arbitral procedures. Traditionally, the arbitral process was, absent a special agreement between the parties, governed by the *lex loci arbitri*, the law of the official seat of the tribunal, hence the domestic procedural law of a particular state. But this forum law has become increasingly complemented or even completely substituted by international procedural law, codified in multilateral conventions such as the aforementioned ICSID convention of 1965,³⁴ or in other optional international arbitration rules.³⁵ These sets of rules are, in turn, resorted to in bilateral arbitration clauses or in submission agreements. For instance, the Dayton Peace Accords³⁶ foresee arbitration under UNCITRAL rules;³⁷ the NAFTA Agreement provides for investor versus state arbitration under either ICSID rules or under UNCITRAL rules,³⁸ and so on. This internationalization of procedures of course means an internationalization of cooperational duties as well.

We encounter various specific duties of cooperation not only in arbitration but also in the other types of international dispute settlement just described. However, before

²⁹ J. Collier and V. Lowe, *The Settlement of Disputes in International Law* (1999), at 191.

³⁰ OECD Guidelines of Multinational Enterprises of 27 June 2000, ILM 40 (2000), 237, at 239.

³¹ Stability Pact for South Eastern Europe: South-East Compact for Reform, Investment, Integrity and Growth of 10 February 2000, 39 ILM (2001), 962.

³² Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran of 19 January 1981, 20 ILM (1981), 230, Art. III para. 2, referring to the UNCITRAL Arbitration Rules of 28 April 1976, 15 ILM (1976), 701 *et seq.*

³³ *Supra* note 27.

³⁴ *Ibid.*

³⁵ See, apart from the rules mentioned in the text below, various optional rules formulated by the Permanent Court of Arbitration, for arbitrating disputes between two parties of which only one is a state, for disputes involving international organizations and a state, for arbitration between International Organizations and private parties, and so on. Many of them are reprinted in: Permanent Court of Arbitration (note 19). A recent example for special rules is the Permanent Court’s Optional Rules for Arbitration of Disputes relating to Natural Resources and the Environment of 19 June 2001, repr. in ILM 41 (2002), 202 *et seq.*

³⁶ Art. V (3) of Annex 2 to the Dayton Peace Accords (General Framework Agreement for Peace in Bosnia and Herzegovina) of 14 December 1995, 35 ILM (1996) 75, at 113. See the final award in a dispute over the inter-entity boundary in Brcko (final award of 5 March 1999, 38 ILM (1999) 534, para. 57), applying the UNCITRAL Arbitration Rules.

³⁷ *Supra* note 32.

³⁸ Art. 1120 NAFTA Agreement (*supra* note 21).

looking at their possible legal foundation (good faith, Section 6) and at their contents (Sections 7–9), it seems useful to identify two only seemingly irreconcilable general concepts: the general duty of cooperation on the one hand (Section 3), and the principle of free choice on the other (Section 4).

3 The General Duty to Cooperate in Dispute Settlement

A general obligation to cooperate in the disposal of a given dispute receives specific mention in some international treaties and other documents. A most recent example is the Anti-Personnel Mines Convention of 1997, whose Article 10 paragraph 1 reads: ‘The States Parties shall consult and *cooperate* with each other to settle any dispute that may arise with regard to the application or the interpretation of this Convention.’³⁹ Such cooperation involves action taken over a certain period of time, which may produce various positive results that are not definable *ex ante*. The general obligation to cooperate in that disposal is therefore an obligation of conduct. (In contrast, the obligation to settle disputes is an obligation to reach a particular and measurable outcome: the disposal of the dispute.⁴⁰)

It is submitted here that a contextualized, but still unspecified, duty to cooperate in dispute settlement is not only a matter of conventional law, but shares, by force of necessity, the customary law quality of a general obligation to settle disputes peacefully. While the dispute itself implies disagreement and non-cooperation, some kind of cooperation, in procedure or in substance, between the parties is needed for its resolution. Without cooperation, no settlement. Therefore a general, customary law-based duty of cooperation with a view to a settlement is inherent in the obligation to settle disputes peacefully.

³⁹ UN Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction of 18 September 1997, 36 ILM (1997) 1507. See also Art. 2003 NAFTA Agreement, the leading provision of Ch. 20, Subchap. B. ‘Dispute Settlement’: ‘The Parties shall at all times endeavor to agree on the interpretation and application of this Agreement, and shall make every attempt through *cooperation* and consultations to arrive at a mutually satisfactory resolution of any matter that might affect its operation’, *supra* note 21, *et seq.* (emphasis added). Furthermore, a general duty to cooperate in dispute settlement is mentioned in some CSCE texts ultimately leading to the CSCE Convention on Arbitration and Conciliation of 15 December 1992, 32 ILM (1993) 551, but *not* in that Convention itself. See the Charter of Paris, asking for ‘appropriate mechanisms for the peaceful resolution of any dispute that may arise’, undertaking ‘to seek new forms of *cooperation* in this area, in particular a range of methods for the peaceful settlement of disputes, including mandatory third-party involvement’ (Charter of Paris for a New Europe of 21 November 1990, under the heading ‘Guidelines for the Future — Security’, 30 ILM (1991) 190, at 201 (emphasis added)). See also Sec. IX of the CSCE Valetta Report on Dispute Settlement of 8 February 1991, 30 ILM (1991) 382, at 393.

⁴⁰ Cf. ICJ, *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, 35 ILM (1996) 1345, para. 99: ‘The legal import of that obligation goes *beyond that of a mere obligation of conduct*; the obligation involved here is an obligation to achieve a precise result — nuclear disarmament in all its aspects — by adopting a particular course of conduct, namely the pursuit of negotiations on the matter in good faith’ (emphasis added). Para. 100 speaks of a ‘twofold obligation to pursue and to conclude negotiations’. These statements refer to a contractual obligation to negotiate an agreement independent of the existence of a concrete dispute, but they support the proposition that where concrete and measurable results are desired, obligations to reach this result are conceivable.

The less institutionalized and the more flexible a dispute settlement procedure is, the less it assigns specific, legally fixed procedural duties of cooperation and the more its functioning depends on the general obligation to cooperate.⁴¹ But despite the potential significance of that general obligation, it seems more helpful in practice to identify specific and concrete duties of cooperation whose fulfilment can be readily ascertained and measured and whose non-fulfilment constitutes clearly identifiable unlawful acts. Before turning to such concrete duties, let us look at the apparently anti-cooperative principle of free choice.

4 The Principle of Free Choice

Within the general obligation to settle their disputes peacefully, states are left, absent a specific contractual obligation to resort to a particular means, a wide margin of discretion. The relationship between the various settlement mechanisms is governed by the principle of free choice of means. This principle was designed within a perspective in which states are the primary actors, and ultimately stems from the principle of sovereignty.

A *The Persistence of the Principle*

International legal texts which emphasize the principle of free choice are plentiful. They were mostly adopted during the period of the Cold War, when preference for political means on the one side or for legal dispute settlement procedures on the other corresponded to the ideological split of the world:⁴² see the Pact of Bogotá,⁴³ the Convention on the Law of the Sea,⁴⁴ or, as soft law, the Friendly Relations Declaration.⁴⁵ This tendency is most pronounced in the Manila Declaration of 1982, in which the virtues of negotiation (as opposed to adjudication) are especially highlighted.⁴⁶ But even in the ostensibly New World Order, the idea of free choice persists. This is illustrated, for instance, by the relevant provisions of the Rio Framework Convention on Climate Change of 1992⁴⁷ or the Anti-personnel Mines Convention of 1997.⁴⁸

⁴¹ Cf., for a different context, the two human rights pacts: in the CESCR we find more references to cooperation (Art. 2 para. 1; Art. 11 para. 1) than in the CCPR. Here as well general obligations to cooperate seem to be a correlate of less enforceability or justiciability.

⁴² The impact of ideology is demonstrated by the fact that Art. 28 of the European Convention for the Peaceful Settlement of Disputes of 29 April 1957, *supra* note 17, places significantly less emphasis on free choice and displays a preference for binding adjudication.

⁴³ Art. 3 Pact of Bogotá, *supra* note 17.

⁴⁴ Art. 280 UNCLOS, *supra* note 18.

⁴⁵ Friendly Relations Declaration, *supra* note 4, para. 5 of the Principle of Dispute Settlement.

⁴⁶ See Arts 1, 3, 5, and 10 of GA Res. 37/10 of 15 November 1982, 21 ILM (1982) 449.

⁴⁷ Art. 14 para. 1 of the Rio Framework Convention on Climate Change of 9 May 1992, 31 ILM (1992), 849.

⁴⁸ Art. 10, para. 2, *supra* note 39.

B The Problem of Impasse

Obviously, the still-valid principle of free choice creates the danger of an impasse in dispute settlement, even if both parties act in good faith. If 'free choice' is the governing principle, one party may take the view that only negotiations can bring about a satisfactory solution, while the other party may consider that a court judgment constitutes the only satisfactory mode of settlement.⁴⁹

Two constructions point a way out of this impasse. Firstly, one might argue that the principle of free choice is tempered by the antagonistic principle of cooperation, which might force or at least direct parties to reach an agreement on a single dispute settlement procedure. The second argument against the inevitable impasse is a teleological, *effet utile* type of argument, based on the idea that any legal rule or principle must at least have *some effect*. If we allow for an impasse, then the principle of dispute settlement would be disabled, undermined, empty. This cannot be the intention of the international community which has adopted this principle. If the principle of peaceful settlement of disputes is to mean anything, it must at least mean that the mechanism resorted to is that which is the least intrusive on sovereignty, and that is negotiation. We can therefore say that a duty to negotiate is an intrinsic element of the principle of dispute settlement; otherwise the principle would be devoid of meaning.⁵⁰ Therefore, in the absence of special contractual obligations, no state may, once a concrete dispute has arisen, refuse to negotiate.

5 Exhaustion of Negotiations as a Pre-condition for Resort to Adjudication?

I have just argued that a duty (at least) to negotiate is inherent in the principle of dispute settlement. The ensuing question is whether parties must, as a matter of conventional or customary law, in the event of a dispute, always negotiate *first*.

This question is a very practical one because it is used as a frequent objection to jurisdiction made by respondents, for instance before the International Court of Justice. For example, in the suit instituted by Nicaragua, the United States argued that the Contadora Peace process was pending, and that negotiations had not been exhausted.⁵¹ If such an exhaustion of negotiations were a strict pre-requisite for

⁴⁹ Tomuschat in B. Simma (ed.), *The Charter of the United Nations: A Commentary*, vol. 1 (2nd ed., 2002), Art. 33 UN Charter, para. 20. See H. Thierry et al., *Droit international public* (5th ed., 1986), 588: 'La situation des États peut être comparée à ce sujet à celle d'une personne qui aurait le devoir de se rendre dans un lieu déterminé mais qui aurait la faculté de refuser d'emprunter chacun des chemins qui y conduisent.'

⁵⁰ Cf. ICJ, *North Sea Continental Shelf Cases*, *supra* note 16, at para. 86: The obligation to negotiate an agreement as means of dispute settlement is 'a principle which underlies all international relations'; ICJ, *Fisheries Jurisdiction Case (UK and Northern Ireland v. Iceland)*, ICJ Reports (1974) 3, at 32, para. 74: an obligation to negotiate the extent of disputed preferential fishing rights for a coastal state is 'implicit in the [customary law] concept of preferential rights'.

⁵¹ ICJ, *Case Concerning Military and Paramilitary Activities in and against Nicaragua, Preliminary Objections (Nicaragua v. USA)*, ICJ Reports (1984), at 392, para. 11.

adjudication, non-exhaustion would entail a lack of jurisdiction, and the seized court would have to declare the application inadmissible.

A Negotiation Clauses and the Problem of ‘Exhaustion’

In the early general and multilateral dispute settlement treaties up to the post-World War Two period, negotiations were stipulated as a pre-requisite to adjudication.⁵² Similarly, arbitration clauses (*compromis*) in material treaties frequently provide for consultations as a mandatory first step for dispute settlement.

Requirements of ‘termination’/‘exhaustion’/‘failure’ of negotiations or consultations, such as in Article 286 UNCLOS,⁵³ or in Article 5 paragraph 3 WTO DSU,⁵⁴ pose the problem of determining when this point of exhaustion is reached. The *locus classicus* on this question is, again, the *Mavrommatis Palestine Concessions* case. The PCIJ stated ‘that the question of the importance and chances of success of diplomatic negotiations is essentially a relative one. . . . No general and absolute rule can be laid

⁵² See Art. 38 of the Convention for the Pacific Settlement of International Disputes of 18 October 1907, *supra* note 19: ‘In questions of a legal nature, and especially in the interpretation or application of International Conventions, arbitration is recognized by the Contracting Parties as the most effective, and at the same time, the most equitable means of settling disputes *which diplomacy has failed to settle.*’ *Ibid.*, Art. 41: ‘With the object of facilitating an immediate recourse to arbitration for international differences, *which it has not been possible to settle by diplomacy,* the Contracting Powers undertake to maintain the Permanent Court of Arbitration . . .’ (emphases added). Art. 1 of the General Act (Pacific Settlement of Disputes) of 26 September 1928, *supra* note 17: ‘Disputes of every kind between two or more Parties to the present General Act which it has not been possible to settle by diplomacy shall, . . . be submitted . . . to the procedure of conciliation.’ See, similarly, Art. 1 of the Revised General Act for the Pacific Settlement of International Disputes of 1949, *supra* note 17. Art. 32 of the Pact of Bogotá, *supra* note 17 makes conciliation a prerequisite for unilateral recourse to the ICJ. In the *Mavrommatis Palestine Concessions Case*, *supra* note 13, at 15, the PCIJ interpreted a treaty provision (the Mandate) which makes negotiations a prerequisite for legal action: ‘[B]efore a dispute can be made the subject of an action at law, its subject-matter should have been clearly defined by diplomatic negotiations.’ But see Chap. I, Art. 2 para. 2 of the European Convention for the Peaceful Settlement of Disputes of 29 April 1957, *supra* note 17: ‘The parties to a dispute *may agree* to resort to the procedure of conciliation before that of judicial settlement’ (emphasis added).

⁵³ Art. 286 UNCLOS, *supra* note 18 figures in Part V, Sec. 2, entitled: ‘Compulsory Procedures Entailing Binding Decisions’. The provision runs: ‘Subject to section 3, any dispute concerning the interpretation or application of this Convention shall, *where no settlement has been reached by recourse to section 1* [on consultations and conciliation], be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this section’ (emphasis added). See also Art. 4 Pact of Bogotá, *supra* note 17. ‘Once any pacific procedure has been initiated, whether by agreement between the parties or in fulfilment of the present Treaty or a previous pact, no other procedure may be commenced until that procedure is *concluded*’ (emphasis added).

⁵⁴ Under Art. 5 paras 3 and 4 WTO DSU, *supra* note 18, the establishment of a panel may be requested by the complaining party after diplomatic procedures are ‘terminated’, but not before 60 days have elapsed after the complainant’s request for diplomatic procedures. The 60-day interim period is supposed to encourage conciliation.

down in this respect.⁵⁵ I think that this is indeed the most precise answer we can give. The PCIJ's resolution of the concrete issue was a very modern one: It found that the extensive, but 'private' negotiations conducted between the investor Mavrommatis himself and the Palestine authorities had been perfectly sufficient to fulfil the negotiation requirement. It was *not* necessary that the Greek government reopen or repeat the discussion on behalf of its national.⁵⁶

Recent awards, for instance, under the Montreal Convention⁵⁷ or under the ICSID Convention,⁵⁸ have confirmed this flexible interpretation of negotiation clauses, oriented towards the concrete circumstances of the case, and governed by the principle of good faith. In the *Southern Bluefin Tuna* dispute (Australia and New Zealand v. Japan), the political-exhaustion clauses of Article 16 para. 1 of the Bluefin Tuna Convention and of Articles 283 and 286 UNCLOS were pertinent. Australia and New Zealand had formally requested urgent consultations and negotiations with regard to Japan's unilateral 'experimental fishing program'. They were conducted for over a year, partly within the Commission for the Conservation of the Southern Bluefin Tuna, but led to no accord. Japan then commenced unilateral fishing, which was considered by the applicants as a termination of the negotiations and thus as an authorization to begin compulsory dispute settlement under Part XV, Sec. 2 UNCLOS. Japan, in turn, replied that it had no intention of terminating the negotiations. In an order indicating provisional measures, the International Tribunal for the Law of the Sea (ITLOS) left it entirely to the claimants to conclude unilaterally that the possibilities of diplomatic settlement had been exhausted and dismissed the respondent's contention to the contrary.⁵⁹ An arbitral tribunal, constituted under Article 287 para. 1 lit. (c) UNCLOS and competent to decide on the main issue then looked more closely at the concrete circumstances of the case and held:

⁵⁵ PCIJ, Ser. A (1924), No. 2, *supra* note 13, at 13. The Court went on: 'Negotiations do not of necessity always presuppose a more or less lengthy series of notes and dispatches; it may suffice that a discussion should have been commenced, and this discussion may have been very short; this will be the case if a dead lock is reached, or if finally a point is reached at which one of the Parties definitely declares himself unable, or refuses, to give way, and there can therefore be no doubt that the dispute cannot be settled by diplomatic negotiation.' Relying on Mavrommatis: ICJ, *South West Africa Case* (Ethiopia and Liberia v. South Africa) ICJ Reports (1962) 319, at 344–345.

⁵⁶ PCIJ, Ser. A (1924), no. 2 (*supra* note 13), at 15.

⁵⁷ ICJ, *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention* (*supra* note 13), para. 20: The dispute could not be settled by negotiation, because the Respondent had denied the existence of a dispute; hence the requirement of Art. 14 of the Montreal Convention (Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation of 23 September 1971, 10 ILM (1971) 1151, 1155) was fulfilled.

⁵⁸ *Tradex Hellas S.A. (Greece) v. Republic of Albania*, decision on jurisdiction in the Arbitration ARB/94/2 of the ICSID of 24 December 1996, 14 ICSID Rev. (1999) 161, at 182–184. The Tribunal found five letters of complaint addressed by the investor to the Albanian Ministry of Agriculture 'to be a sufficient good faith effort to reach an amicable settlement' within the meaning of the pertinent negotiation clause of the relevant Albanian law.

⁵⁹ ITLOS, provisional order of 27 August 1999, 38 ILM (1999), 1624, paras 56–60. Under Art. 290 para. 5 UNCLOS, *supra* note 18, jurisdiction for provisional orders is concentrated at ITLOS, independent of the choice of procedure for the main issue.

It is true that every means listed in [the negotiation clause] has not been tried; indeed, the Applicants have not accepted proposals of Japan for mediation and for arbitration under the [Convention], essentially, it seems, because Japan was unwilling to suspend pursuance of its unilateral Experimental Fishing Program during the pendency of such recourse. . . . [I]n the view of the Tribunal, this provision does not require the Parties to negotiate indefinitely while denying a Party the option of concluding, for purposes of both Articles 281(1) and 283 [UNCLOS], that no settlement has been reached. To read art. 16 [of the Bluefin Tuna Convention] otherwise would be unreasonable.⁶⁰

Because of the impossibility of laying down a general rule on the exhaustion of negotiations, it seems reasonable to complement the ‘negotiation clause’ with simple time limits. For instance, the Energy Charter Treaty of 1994 speaks of a ‘reasonable period of time’ to be given for diplomatic settlement.⁶¹ Other important international agreements are more precise. The most prominent examples are the World Trade Organization’s Dispute Settlement Understanding (DSU) and the NAFTA Agreement. Under the WTO DSU, consultations must be entered into within no more than 30 days. If consultations are not entered into, the complaining party must wait 30 more days, and then (after 60 days in total) may request a panel.⁶²

B No Customary-law Stepladder of Settlement Procedures

Absent specific stipulations, there is, I submit, contrary to a traditional assumption, no customary-law stepladder of dispute settlement procedures, ranging from the most sovereignty-conscious, least offensive means to the more intrusive ones; in other words, a general ‘political-exhaustion doctrine’ does not exist. The old assumption of a general, customary law-based stepladder feeds on the premise that sovereignty is a ‘fundamental right’, to be preserved as far as possible, from which any international duty must be wrought as a kind of concession.

But this theory is, firstly, not reconcilable with the idea of free choice (which works in both directions), and, secondly, it is contradicted by the fact that states consider it necessary to insert specific reservations in that sense in their agreements. It is therefore laudable that the ICJ has, in recent case law, especially in the 1998 *Case concerning the Land and Maritime Boundary between Cameroon and Nigeria* (Cameroon v. Nigeria), decision, unequivocally rejected the stepladder theory and the limitation of access to courts going with it: ‘Neither in the Charter nor otherwise in international

⁶⁰ Para. 55 of the tribunal’s award on jurisdiction and admissibility of 4 August 2000, 39 ILM (2000) 1359, at 1389.

⁶¹ Treaty of 17 December 1994, 34 ILM (1995) 360, at 381, Art. 27 para. 1: ‘Contracting Parties shall endeavor to settle disputes concerning the application or interpretation of this treaty through diplomatic channels.’ Para. 2: ‘If a dispute has not been settled in accordance with para. (1) within a reasonable period of time, either party may . . . [resort to an ad hoc tribunal].’

⁶² Art. 4 para. 4 WTO DSU (*supra* note 18). The provision’s wording covers only the case that the other Member ‘does not respond’ or ‘does not enter into consultations’. But the time limits seem to apply also (absent a mutual agreement on another period) in those situations where consultations are entered into, but fail. Anyway, the consultations period is in most cases extended by mutual agreement. Art. 5 para. 4 DSU clarifies that even if within the 60-day period, the other side suggests third-party diplomatic settlement (good offices, conciliation, mediation), the complaining party may still (after 60 days) request the panel.

law is any general rule to be found to the effect that the exhaustion of diplomatic negotiations constitutes a precondition for a matter to be referred to the Court.⁶³ We here witness an important development in the case law, which refuses to focus on sovereignty as a starting-point for the determination of procedural duties in dispute settlement. This does not deny that, in the event of a dispute, it is most natural to talk first, and to define the conflict by formulating the positions, and this is what is normally done. However, respondent states can, as a general rule, not rely on pending negotiations as a bar to jurisdiction and thereby block adjudication. But this rule is, in turn, moderated by the principle of good faith: if negotiations or conciliation proceedings are ongoing and are meaningfully conducted by both sides, then the seizure of a court may appear as an abuse of the court procedure. Under such circumstances, a court may be obliged to decline jurisdiction in order to encourage a diplomatic settlement.

6 The Principle of Good Faith is a Source of Duties to Cooperate

We have just seen that the idea of good faith helps to determine when the complaining party may go to court. The principle of good faith has been acknowledged by the International Court to be an intrinsic element of international cooperation in general.⁶⁴ In the context of dispute settlement, the principle of good faith is referred to in various treaties⁶⁵ and other international documents.⁶⁶

Concrete consequences, some of which I have already mentioned, are:

1. The parties must embark with sincerity on one dispute settlement procedure.

⁶³ *Case Concerning Land and Maritime Boundary between Cameroon and Nigeria* (Cameroon v. Nigeria), ICJ Reports (1998) 275, at 303, para. 56. In contrast, ICJ, *South West Africa Case*, *supra* note 55, at 344–346, still had implicitly held the failure of negotiations (even without a contractual provision in that sense) to be a precondition of ICJ jurisdiction. The first case to break with this assumption was ICJ, *Aegean Sea Continental Shelf Case* (Greece v. Turkey), ICJ Reports (1978) 3, at 12, para. 29; see also *United States Diplomatic and Consular Staff in Tehran* (USA v. Iran), ICJ Reports (1980) 3, at 23, para. 43; *Case Concerning Military and Paramilitary Activities in and against Nicaragua, Preliminary Objections*, *supra* note 51, paras 106, 108.

⁶⁴ ICJ, *Nuclear Tests Case* (Australia v. France), ICJ Reports (1974) 253, at 268, para. 46: ‘One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international cooperation, in particular in an age when this cooperation in many fields is becoming increasingly essential’ (emphasis added).

⁶⁵ Under Art. 2 para. 2 of the UN Charter, all Members ‘shall fulfill in good faith the obligations assumed by them in accordance with the . . . Charter’, and the principle to settle disputes in a peaceful manner is, under Art. 33, an obligation stemming from the Charter. See also Art. 34 para. 1 ICSID Convention, *supra* note 27: cooperation in good faith with Conciliation Commission; Art. 3 para. 10 WTO DSU, *supra* note 18.

⁶⁶ Ch. I, paras 1 and 5 of the Manila Declaration, *supra* note 46; Art. 11 of the Permanent Court of Arbitration Optional Conciliation Rules (1996) in: <http://www.pca-cpa.org/BD/conciliationenglish.htm> (visited on 8 May 2001).

2. In particular, states must negotiate *meaningfully*, so as to reach an agreement.⁶⁷
3. This also means that one party may not prematurely abandon the chosen procedure, for instance negotiations. In particular, parties must not abuse the court procedure.
4. Correspondingly, in the event of an objective failure of one strategy, the principle of good faith obliges the parties to continue to strive for settlement with a new means.⁶⁸
5. Next, the principle of good faith requires complete cooperation of states with international criminal tribunals.⁶⁹ I will come back to this in Section 9.
6. Finally, good faith is required in the implementation of awards, especially, but not only, when those awards are non-binding.⁷⁰

In sum, good faith relates to all stages of the settlement procedure, and obviously becomes more important the more flexible the procedures and the less concrete the parties' respective duties of cooperation are. Fortunately, concrete duties of cooperation do exist. The following sections offer examples in the field of adjudication, including arbitration and criminal justice.

⁶⁷ ICJ, *North Sea Continental Shelf Cases* (*supra* note 16), para. 85: '[T]he parties are under an obligation to enter into negotiations with a view to arriving at an agreement, and not merely to go through a formal process of negotiation . . . ; they are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it'. See already PCIJ, *Railway Traffic between Lithuania and Poland*, PCIJ Ser. A/B, no. 42 (1931), at 116: Where the parties are under an obligation to negotiate [*in casu* under a Resolution of the Council of the League of Nations], they are under an obligation 'not only to enter into negotiations, but also to pursue them as far as possible with a view to concluding agreements. . . . But an obligation to negotiate does not imply an obligation to reach an agreement.' See also the Manila Declaration (*supra* note 46), Ch. I, para. 10.

⁶⁸ Friendly Relations Declaration of 24 October (*supra* note 4), para. 3 of the Principle of Dispute Settlement: 'The parties to a dispute have the duty, in the event of failure to reach a solution by any of the . . . peaceful means, to continue to seek a settlement of the dispute by other peaceful means agreed upon them'. See also Art. 16 para. 2 of the Southern Bluefin Tuna Convention of 10 May 1993 in: <http://sedac.ciesin.org/entri/texts/acrc/Bluefin.txt.html> (visited on 27 August 2001): '[F]ailure to reach agreement on reference to the ICJ or to arbitration shall not absolve the parties to the dispute from the responsibility of continuing to seek to resolve it by any of the various peaceful means referred to in para. 1 above'.

⁶⁹ Art. 86 of the Statute of the International Criminal Court (ICC Statute) of 17 July 1998, 37 ILM (1998), at 999 *et seq.*, holds: 'States Parties shall, in accordance with the provisions of this Statute, cooperate *fully* with the Court in the investigation and prosecution of crimes within the jurisdiction of the Court' (emphasis added). 'Fully' alludes to the principle of good faith (Kreß, *et al.*, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observer's Notes, Art. by Art.* (1999), Art. 86, para. 9).

⁷⁰ See Art. 37 para. 2 of the Convention for the Pacific Settlement of International Disputes of 18 October 1907, *supra* note 19: 'Recourse to arbitration implies an engagement to submit in good faith to the award.' Under Art. 11 para. 5 of the Vienna Ozone Layer Convention of 22 March 1985 (26 ILM (1987), 1529), a mandatory conciliation commission 'shall render a final and recommendatory award, which the parties shall consider in good faith.'

7 Cooperation in Adjudication

A Submission to Jurisdiction

Because adjudicatory bodies issue binding awards which must be implemented by the defeated party, the traditional concept of sovereignty requires that both parties have consented at some earlier point to submit their dispute to the institution. In other words, when it comes to issuing legally *binding* awards, we have no compulsory jurisdiction in international law.⁷¹ We only have moderations of the consensus requirement. Consent to adjudication remains the crucial act of cooperation in the field of legal dispute settlement.

1 Ex-Post Submission to Adjudication

The highest barrier to adjudication is raised when no adjudication is provided for prior to the outbreak of a specific dispute, but when, *after* its outbreak, both parties must agree to submit the dispute to a court or arbitration. The possibility of such specific *ex-post* agreements is, for example, mentioned in the 1993 C-Weapons Treaty.⁷²

2 Ex Ante Optional Submission

The parties bind themselves more tightly, if they abide to adjudication *before* the outbreak of a specific dispute, for all future disputes arising from a treaty, or for certain categories of disputes, under the condition of reciprocity. Such voluntary general submission to adjudication is encouraged by conventions or clauses dealing specifically with dispute settlement, the most prominent one being the optional clause of Article 36 paragraph 2 of the ICJ Statute. However, to date, only some 60 states (i.e., less than one third of the entire international community), have recognized as compulsory the jurisdiction of the ICJ. These declarations are, in proportion to the increased number of states entitled to make them, even less numerous than during the time of the PCIJ. Moreover, ample reservations 'often make more symbolic than real the obligation assumed by States making them'.⁷³ Finally, powerful states such as the United States and France have withdrawn their declarations after defeat in litigation.⁷⁴

More recently designed optional clauses have fared no better. Take as an example

⁷¹ Only recently, the ICJ recalled that its jurisdiction 'only exists within the limits within which it has been accepted' (*Case Concerning the Aerial Incident of 10 August 1999* (Pakistan v. India), judgment on jurisdiction of the Court of 21 June 2000, 39 ILM (2000), 1116, para. 36). In that case, the Court denied jurisdiction because of India's Commonwealth reservation.

⁷² Art. VI, para. 2 of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (C-Weapons Treaty) of 13 January 1993; G. Fahl (ed.), *International Law of Arms Control: Material and Comment*, vol. 2 (2000), Text E/14.2.

⁷³ Treves, 'Recent Trends in the Settlement of International Disputes', in *Cursos Euromediterráneos Bancaja de Derecho Internacional*, vol. I (1997) 397, at 403.

⁷⁴ France in the Nuclear Tests Proceeding in 1974; The USA in the Nicaragua proceeding in 1985. See for the USA: Department of State Letter and Statement Concerning Termination of Acceptance of ICJ Compulsory Jurisdiction, 24 ILM (1985) 1742.

for a multilateral instrument on dispute settlement the 1992 Convention on Conciliation and Arbitration within the OSCE, which foresees reciprocal declarations on *ex ante* submission to an arbitral tribunal.⁷⁵ Thirty-two states have ratified the Convention, but only five of them have declared that they recognize as compulsory, *ipso facto* and without special agreement the jurisdiction of such a tribunal.⁷⁶

3 *Ex ante Submission qua Membership to a Material Treaty Regime*

Because states are extremely reluctant to give an isolated blanket permission to adjudication, the alternative means of establishing a ‘compulsory’ jurisdiction is to link it directly to the *material treaty*. This path has been chosen in important recent conventions. They do not contain optional clauses, but make adjudication compulsory. States wanting to become a party to the club must simultaneously accept jurisdiction of a court or tribunal.

(a) Examples

An important example is the World Trade Organization. The 1994 WTO Agreement contains as an integral part the Understanding on Dispute Settlement, which grants parties a ‘right to a panel’, and thus a right to a rule-oriented, arbitration-like procedure ending in binding reports of the panel and the Appellate Body.⁷⁷ This system reclaims primacy and exclusiveness for all WTO-related disputes.⁷⁸ However, the compulsory character of the dispute settlement mechanism is mitigated by the fact that the dispute settlement institution’s recommendations are not centrally enforced and that compliance is currently the weak spot of the system. Arguably, the Member States’ veto power has simply been shifted to the enforcement stage (cf. Art. 22 para. 6 WTO DSU).⁷⁹ Other conventions coupled with compulsory jurisdiction are the 1994 Energy Charter Treaty,⁸⁰ and the Danube River Convention of the same year.⁸¹ In the cases concerning questions of interpretation and application of the 1971 Montreal Convention arising from the aerial incident at Lockerbie, the ICJ held that the

⁷⁵ Convention on Conciliation and Arbitration within the OSCE (former CSCE) of 5 December 1992, 32 ILM (1992), at 551 *et seq.*, Art. 26 para. 2.

⁷⁶ Status of 9 November 2001 in: <http://www.osce.org/cca/documents/ratification.pdf> (visited on 3 February 2003).

⁷⁷ Art. II.2 of the Agreement Establishing the WTO (WTO Agreement), 33 ILM (1994), 1140, 1144; Art. 6 para. 1 WTO DSU, *supra* note 18.

⁷⁸ Art. 23 WTO DSU, *supra* note 18. See also Art. 12 of the ICC Statute, *supra* note 69, under which every state party accepts the jurisdiction of the Court. To *exercise* jurisdiction, acceptance of jurisdiction by either the state of nationality or by the state in which the crime has been committed, is needed. So nationals of non-state parties may be tried without consent of the home state.

⁷⁹ Hauser, ‘Die WTO Streitschlichtung aus einer Law and Economics Perspektive’, in H. Berg (ed.), *Theorie der Wirtschaftspolitik* (2001) 79, at 106.

⁸⁰ Treaty of 17 December 1994, *supra* note 61, Art. 27: Unilateral resort to an ad hoc tribunal.

⁸¹ Art. 24 of the Convention on Cooperation for the Protection and Sustainable Use of the Danube River of 29 June 1994, in: <http://ksh.fgg.uni-lj.si/danube/envconv/> (visited on 27 August 2001). If the parties to the dispute are not able to settle the dispute in accordance with paragraph 1 (i.e., negotiation or any other means) within no more than 12 months, the dispute *shall* be submitted for compulsory decision to the ICJ or to arbitration in accordance with Annex V.

requirements of that Convention's jurisdictional clause⁸² were fulfilled, notwithstanding the pertinent decisions of the Security Council in this highly politicized matter. Given the failure of negotiations and the failure to agree on arbitration, the ICJ has compulsory jurisdiction under Article 14 of the Montreal Convention.⁸³

Another important, but debatable example of compulsory adjudication *qua* membership is the 1982 Convention on the Law of the Sea. At first sight the Convention appears to foresee binding arbitration as a last resort.⁸⁴ But resort to compulsory arbitration under Article 281 UNCLOS is conditioned on the absence of an agreement to the contrary. This provision was interpreted in the recent Bluefin Tuna Arbitral Award as requiring only an *implicit* agreement to eclipse compulsory UNCLOS arbitration, in that case the Bluefin Tuna Convention of 1993.⁸⁵ The Arbitral Tribunal opined 'that UNCLOS falls significantly short of establishing a truly comprehensive regime of compulsory jurisdiction entailing binding decisions'.⁸⁶ The Tribunal concluded that, under the terms of UNCLOS itself, it needed *consensual* jurisdiction, which was absent due to the Japanese refusal, and that therefore the Tribunal could not reach the merits of the dispute.⁸⁷ This award may undermine compulsory jurisdiction in a largely decentralized international legal system. Its sovereignty-deferent argument that any agreement of the parties to exclude otherwise binding compulsory jurisdiction may be inferred implies a presumption against compulsory jurisdiction. It might in the future be used to block compulsory jurisdiction clauses elsewhere.⁸⁸

A contrary approach was taken by the Inter-American Court of Human Rights. In 1999, when Peru attempted to withdraw unilaterally from the jurisdiction of the Court, it even construed as binding the Member State's initially *optional* acceptance of the Court's jurisdiction under Article 62 of the Inter-American Convention of Human

⁸² Art. 14 para. 1 of the Montreal Convention of 1971 (*supra* note 57): compulsory arbitration, or, if no agreement on the organization of the arbitration, unilateral referral to the ICJ.

⁸³ *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie — Preliminary Objections* (Libyan Arab Jamahiriya v. United Kingdom and v. USA), judgments of 27 February 1998, para. 39 and para. 38 respectively. See for Libya v. United Kingdom in: <http://www.icj-cij.org/icjwww/idecisions/isummaries/iluksummary19980227.html> (visited on 31 August 2001); for Libya v. USA see *supra* note 13.

⁸⁴ Art. 286, Art. 287 para. 5 UNCLOS (*supra* note 18).

⁸⁵ The intent of Art. 16 of the Bluefin Tuna Convention (*supra* note 68) is to remove proceedings under that Article from the reach of the compulsory procedures of Section 2 of Part XV of UNCLOS (*supra* note 18). The arbitration contemplated by Art. 16 is not compulsory, but autonomous and consensual arbitration provided for in the Tuna Convention Annex (see Arbitral Tribunal (*supra* note 60), paras 57–59).

⁸⁶ *Ibid.*, paras 57 and 62.

⁸⁷ *Ibid.*, paras 52–65. See on that case Devine, 'Compulsory Dispute Settlement in UNCLOS Undermined?', 25 *South Afr. YB Int'l L* (2000) 97; Oxman, 'Complementary Agreements and Compulsory Jurisdiction', 95 *AJIL* (2001) 277.

⁸⁸ Oxman, *supra* note 87, 278 and 297. Note that as early as 1939, the PCIJ had, in a similar constellation, reasoned more pro-compulsory jurisdiction: a subsequent treaty between the parties for submission of a dispute to the Court did *not* supersede or qualify the Court's jurisdiction under the optional clause. The Court saw 'no justification for holding that [the parties] intended to weaken the obligations which they had previously entered into ...' (i.e. declaring acceptance of PCIJ's compulsory jurisdiction) (PCIJ, *Electricity Co. of Sofia and Bulgaria* (preliminary objection), PCIJ Ser. A/B, No. 77, 60, at 76).

Rights. Notwithstanding the fact that submission to jurisdiction was not compulsory, the jurisdiction of the Tribunal — once accepted by a state party to the Human Rights Convention — forms an integral part of the Convention. This function precludes any right to unilateral modification on the part of the Member States. Therefore, withdrawal from submission to jurisdiction is only possible by denouncing the treaty as a whole. The Inter-American Court thereby transformed the optional clause into a quasi-compulsory one. It justified this move with the specific, ‘objective’ and ‘law-making’ character of human rights treaties and emphasized the difference between human rights cases and interstate litigation.⁸⁹ However, treaties that are not human rights-related may seek to protect ‘higher common values’,⁹⁰ and the essential and indispensable function of the respective tribunal’s compulsory jurisdiction is obvious when submission is made *ab initio* compulsory for the states parties to such a Convention.

(b) The Inadmissibility of Reservations to Compulsory Dispute Settlement Clauses

With regard to material agreements foreseeing adjudication *qua* membership, the question arises whether states may opt out of adjudication by ratifying with a *reservation* to the respective dispute settlement clause. This is what Yugoslavia attempted in April 2001 with regard to the Genocide Convention.⁹¹ The ICJ had, in 1996, on the application of Bosnia and Herzegovina, issued a judgment confirming its jurisdiction on the basis of Article IX of the Genocide Convention.⁹² Yugoslavia requested a revision of that judgment under Article 61 of the Statute of the Court. It argued that its admission to the United Nations as a new member in 2000 constituted a ‘new fact’ which makes clear that Yugoslavia did not continue the international legal personality of the Socialist Federal Republic of Yugoslavia, and was therefore not party to the Genocide Convention.⁹³ Leaving apart the problems of state continuity in this case and assuming, *arguendo*, that Yugoslavia could re-accede to the Genocide Convention, our question is whether a reservation to Article IX, added to its request for re-accession of March 2001, would have been admissible.

I submit that it is not because a compulsory dispute settlement clause of this type, which is not an optional clause, precisely intends to rule out the necessity of a separate consent to adjudication beyond ratification of the material treaty. This object would be

⁸⁹ *Caso no. 54, Ivcher Bronstein — Competencia*, paras 32–55; *Case no. 55, Caso del Tribunal Constitucional*, paras 31–54; both judgments of 24 September 1999 in: http://www.nu.or.cr/ci/PUBLICAC/SERIE_C/C_54 and C_55 respectively_ESP.HTM (visited on 31 August 2001); see also Sokol, *Case Note*, 95 *AJIL* (2001) 178.

⁹⁰ *Bronstein Case*, *supra* note 89, at para. 42.

⁹¹ Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, UNTS 78, no. 1021, 277.

⁹² *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Yugoslavia), judgment on preliminary objections of 11 July 1996, ICJ Reports (1996), at 595.

⁹³ Application for revision by Yugoslavia of 24 April 2001, available at <http://www.icj-cij.org/icjwww/idoctet/iybh/iybhframe.htm> (visited on 3 September 2001).

nullified if reservations could be made. Because binding adjudication forms an indispensable part of the whole package, such a reservation would be incompatible with the object and purpose of the treaty (Article 19 lit. c) Vienna Convention on the Law of Treaties).⁹⁴ Admittedly, numerous states *have* lodged reservations to Article IX of the Genocide Convention — but most of the states appertaining to the former Communist Bloc withdrew that reservation after 1989.⁹⁵ Moreover, several other States Parties objected to them precisely with the argument of incompatibility.⁹⁶ Yugoslavia was therefore well advised to drop its reservation upon accession on 12 March 2001. A different, and hotly disputed, question is what legal consequences arise from that incompatibility. Current state practice and case law indicates that even an ‘objectively’ incompatible reservation will be valid and will modify the Treaty in relation to the non-objecting parties. For example, in the *Case concerning the Legality of the Use of Force*, the Court found that the reservations by Spain and the USA (previously unobjected by the claimant Yugoslavia) had the effect of excluding Article IX from the provisions of the Convention in force between the parties and therefore could not constitute a basis of jurisdiction, not even *prima facie*.⁹⁷ However, this ruling does not answer the question of what happens in relation to the *objecting* contracting parties. A ‘constitutionalist’ answer is that an objection lodged in timely fashion may have the effect of upholding and protecting the jurisdiction of the Court against reservations attempting to circumvent compulsory jurisdiction.

4 Moderations of the Consent Requirement

My conclusion on the cooperational act of consent is that consent to adjudication is, throughout the evolution of treaty law, given in a continuously earlier stage. The *sooner* that consent must be given and the more *general* it must be, the less foreseeable will be the outcomes of an eventual particular litigation and the greater the risk that the party will be forced by a later (unforeseeable) binding award into a specific behaviour. However, there is of course still no customary law obligation to consent to binding adjudication.

⁹⁴ See for the CCPR, Human Rights Committee General Comment 24/52 of 2 November 1994 (UN Doc. CCPR/C/21/Rev. 1/Add. 6), HRLJ 15 (1994), at 464 *et seq.*, para. 11. See for the ECHR, Explanatory Report to Protocol No. 11 of 11 May 1994 (establishing compulsory jurisdiction of a permanent court for state and individual applications): ‘This Protocol does not contain any provisions on reservations. By its very nature, this amending Protocol excludes the making of reservations.’ (33 ILM (1994), 958, para. 115).

⁹⁵ Reservations to Art. IX Genocide Convention were made by 27 states upon ratification, but currently only 16 are upheld, *inter alia* by China, India, Spain and the USA. Tables and texts of reservations in: <http://www.preventgenocide.org/law/convention/reservations/> (visited on 3 February 2003).

⁹⁶ Objections explicitly in these terms by Brazil, China, Mexico, the Netherlands, the United Kingdom and Croatia. See generally Sychold, ‘Ratification of the Genocide Convention: The Legal Effects in Light of Reservations and Objections’, 8 *SZIER* (1998) 533; ICJ, Application for Revision of the Judgment of 11 July 1996 in the Case concerning the Application of the Convention on the Crime of Genocide, Preliminary Objections (Yugoslavia v. Bosnia and Hercegovina), judgment of 3 February 2003, paras 52–53.

⁹⁷ ICJ, orders of 2 June 1999, *Case Concerning the Legality of the Use of Force* (Yugoslavia v. Spain), 38 ILM (1999), 1149 *et seq.*, paras 32–33; Yugoslavia v. USA, *ibid.*, 1188 *et seq.*, paras 24–25.

B Cooperation to Resolve Conflicts of Jurisdiction

Another problem of cooperation in adjudication arises from the proliferation of courts, which entails conflicts of jurisdiction.⁹⁸ A recent clash arose in the swordfish dispute between Chile and the European Community.⁹⁹ Here Chile claimed that the EC failed to cooperate with the coastal state to ensure the conservation of the highly migratory species, in violation of UNCLOS. The EC claimed that the Chilean domestic law prohibition was inconsistent with the GATT 1994 provisions on freedom of transit.¹⁰⁰ At the end of 2000, the EC therefore requested the establishment of a WTO panel against Chile,¹⁰¹ whereas Chile initiated action under the dispute settlement provisions of Part XV UNCLOS.¹⁰² Currently, this conflict of jurisdiction is in a state of postponement or has perhaps even been resolved by an amicable settlement, operative since March 2001, which effectively suspends proceedings in both fora.¹⁰³ We have here an example of the resolution of a jurisdictional conflict through cooperation.

8 The Doctrine of Non-frustration of Adjudication

The doctrine of non-frustration of adjudication is an important *corollary* to obligations to cooperate. Non-frustration means that judicial or arbitral proceedings will not be thwarted by one party's lack of cooperation.

A Non-appearance of a Party to a Dispute

The first application of the principle of non-frustration can be seen in the rules on non-appearance of one party, mostly of the defendant. Non-appearance occurs in all stages of proceedings before international adjudicatory bodies. I will limit myself to the

⁹⁸ Cf. in this context Article 2005 NAFTA Agreement, *supra* note 21: Para. 1: Disputes regarding any matter arising both in the NAFTA Agreement and the GATT or any successor agreement 'may be settled in either forum at the discretion of the complaining Party'.

⁹⁹ See for an overview Neumann, 'Die materielle und prozessuale Koordination völkerrechtlicher Ordnungen: die Problematik paralleler Streitbeilegungsverfahren am Beispiel des Schwertfisch-Falles', 61 *ZaöRV* (2001) 529.

¹⁰⁰ Art. V. 3: Freedom of transit of goods through the territory of each contracting party on their way to or from other contracting parties. The EC also relied on Art. XI (prohibiting quantitative restrictions on imports or exports). Under GATT, Chile could try to defend itself by relying on Art. XX(g), which allows contracting parties to adopt and enforce measures relating to the conservation of natural resources.

¹⁰¹ European Request of 8 December 2000 in: <http://docsonline.wto.org/> under WT/DSB/W/151 (visited on 31 August 2001).

¹⁰² In December 2000, Chile and the EC agreed to submit to a special chamber of the ITLOS to be formed in accordance with Art. 15 para. 2 of the Statute of the Tribunal (order of ITLOS of 20 December 2000 on the constitution of a chamber, 40 *ILM* (2001) 475).

¹⁰³ Provisional agreement of 25 January 2001, which became operational in March 2001. It rests on a pilot phase in which the parties undertake to resume bilateral cooperation. If this provisional arrangement fails, proceedings will resume. For the arrangement see <http://docsonline.wto.org/> at WT/DS193/3 of 6 April 2001, visited 3 February 2003.

ICJ.¹⁰⁴ Here, there have been at least five instances of defendants not appearing, mostly because they contested the jurisdiction of the Court. They might have feared that their appearance would be interpreted as a consent to jurisdiction (under the doctrine of *forum prorogatum*), but they certainly also sought to exercise pressure on the Court. The last case of this type was the *Nicaragua* proceeding of 1986, in which, after the Court had indicated provisional measures and found jurisdiction, the United States refused to participate further.¹⁰⁵ Article 53 of the Statute of the ICJ deals with this situation. Paragraph 1 of that provision reads: 'Whenever one of the parties does not appear before the Court, or fails to defend its case, the other party may call upon the Court to decide in favour of its claim.' To begin with, this paragraph implies that there is *no legal obligation to appear*. Nor does such an obligation figure elsewhere in the Statute or in the Rules of the Court. This also means that there is *no direct procedural sanction* for non-appearance. The absence of an obligation and of sanctions may be due to sovereignty concerns. However, the provision at least protects the Court and the other party to the dispute from obstruction by the non-appearing party: non-appearance does not terminate the proceeding. It is impossible for one state to paralyse the Court. Put differently: once a state has given its consent to ICJ jurisdiction, its unilateral decision to withdraw this consent in the course of an already pending proceeding is devoid of legal effects. This rule is an important manifestation of the idea of non-frustration.

However, the element of sanction that is embodied in the threat of a continuing proceeding is tempered by paragraph 2 of Article 53. Here it says: 'The Court must, before [deciding], satisfy itself, not only that it has jurisdiction . . . , but also that the claim is well founded in fact and in law.' This provision precludes a judgment in default in a technical sense with the court relying on the facts as presented by the plaintiff. Article 53 forces the Court to make a full, in-depth, not merely summary, factual and legal assessment of the case. It may not, as in most municipal civil procedures, base its judgment on the plaintiff's factual allegations.¹⁰⁶ In this way, the procedural disadvantage suffered by the non-appearing party is minimized. The non-appearing state is thus protected, more than ordinary non-appearing parties in domestic proceedings under the laws of civil procedure of most states. The reason for this protection of the absent state again goes back to concerns of sovereign equality. As the ICJ formulated in the *Nicaragua* case: '[T]he equality of the parties must remain

¹⁰⁴ See in the literature Fitzmaurice, 'The Problem of the "Non-Appearing" Defendant Government', 51 *BYbIL* (1980) 89; J. B. Elkind, *Non-Appearance before the International Court of Justice* (1984); H. W. A. Thirlway, *Non-Appearance before the International Court of Justice* (1985); Arangio-Ruiz, 'Non-Appearance before the International Court of Justice, Final Report', 64 *YB Inst. of Int'l Law* (1991) 280; Alexandrov, 'Non-Appearance before the International Court of Justice', 33 *Columbia J. Transnational Law* (1995) 41.

¹⁰⁵ *Case Concerning Military and Paramilitary Activities in and against Nicaragua — Merits*, *supra* note 12, paras 26–28. Previous instances of non-appearance before the court in chronological order are: *Nuclear Tests Case* (*supra* note 64), para. 15; *Aegean Sea Continental Shelf Case*, *supra* note 63, at 3, 7 para. 15; *Case Concerning United States Diplomatic and Consular Staff in Tehran*, *supra* note 63.

¹⁰⁶ See for a comparative overview of default in municipal law, Elkind, *supra* note 104, 1–30.

the basic principle . . . The intention of Article 53 was that in a case of non-appearance neither party should be placed at a disadvantage.¹⁰⁷

To conclude, we must admit that the ICJ statute's response to non-appearance oscillates between sovereignty-consciousness and the idea of non-frustration. It depends on the *Vorverständnis* of the observer which of the competing and antagonistic elements he or she ranks in the foreground.

Summing up: The principle of non-frustration becomes more important as obligations for cooperation become less specific and less enforceable. If there is no enforceable duty of cooperation and if there are no direct procedural sanctions for non-cooperation, then we have at least one 'sanction' in a larger sense: the proceedings will continue and a fully binding judgment or award will be issued. And because a non-pleading defendant cannot raise defences, this judgment is normally not in favour of the uncooperative party.¹⁰⁸

B Truncated Tribunals

Another type of non-cooperation, relevant only in arbitral proceedings, is the failure to appoint the national arbitrator by one of the parties to the dispute, or to withdraw him under some pretext in the course of the proceeding. Such actions belong to the usual repertoire of tricks for delaying arbitration. For instance, during the work of the Iran-US Claims Tribunal, Iran very frequently forced its arbitrators to resign.¹⁰⁹ Obstruction of this type leads to what is called a truncated tribunal. It has long been debated whether such a truncated tribunal has the authority to render a binding award. Nowadays, it is generally acknowledged that truncated tribunals may, as a rule, continue to hear a case and to render an award even in the absence of the party-appointed arbitrator.¹¹⁰ This rule stems, first, from an effectiveness-oriented (*effet utile*) reading of the respective parties' arbitration clauses or agreements. It is to be assumed that parties providing for arbitration do not intend that either of the parties could unilaterally frustrate arbitration by withdrawing its arbitrator.¹¹¹

The second justification is the principle of non-frustration of the arbitral process, which is an indispensable element of the modern, i.e. post-World War II, philosophy of arbitration. When arbitration was regarded as a diplomatic, conciliation-like process, the agreement of the parties was an essential condition in every stage of the proceedings. But when, as today, arbitration has a quasi-judicial function, it is an intrinsic element of this conception that one party may not render nugatory the

¹⁰⁷ ICJ, *Case Concerning Military and Paramilitary Activities in and against Nicaragua — Merits*, *supra* note 12, at para. 31.

¹⁰⁸ As non-appearance is indirectly 'sanctioned' by forfeiture of procedural rights, we might construe the duty to appear as a 'soft' duty (in German law on civil procedure called '*Obliegenheit*').

¹⁰⁹ See G. H. Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal* (1996), at 9–43, 458–463.

¹¹⁰ The most detailed analysis is S. M. Schwebel, *International Arbitration: Three Salient Problems* (1987), at 144–296; see succinctly also Collier and Lowe, *supra* note 29, 225–227.

¹¹¹ Schwebel, *supra* note 110, at 214–215.

undertaking.¹¹² Consequently, modern rules on truncated tribunals, such as in the NAFTA Agreement or in the 1998 International Chamber of Commerce Rules on Arbitration, are effectively designed to overcome a blocking of the arbitral process, either by empowering an authority to appoint arbitrators or by allowing for binding awards despite non-participation of individual arbitrators.¹¹³

9 Duties of Cooperation in International Criminal Justice¹¹⁴

The ICTY, the Rwanda Tribunal and the International Criminal Court are neither explicitly nor implicitly endowed with enforcement functions. Yet, both indispensable evidence and suspect persons are usually located in territories under sovereign authority of states. All criminal courts are therefore dependent on the cooperation of states.¹¹⁵ The drafters of the respective statutes took this into account and imposed on all states the obligation to lend cooperation and judicial assistance to the courts.

A Cooperation with the ICTY

The obligation to cooperate with the ICTY is laid down in Article 29 of the Tribunal's Statute. Article 29 paragraph 1 runs: 'States shall cooperate with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of humanitarian law.' The binding force of this obligation derives from the provisions of Chapter VII and Article 25 of the UN Charter and from the

¹¹² *Ibid.*, at 150; clearly Collier and Lowe, *supra* note 29, at 226. See the Report of the International Law Commission covering the work of its fourth session of 4 June–8 August 1952, GA OR 7th Sess., Supp. no. 9 (A/2163), 2 *et seq.* on the principle of effectiveness of the process of arbitration (esp. para. 19, at 3).

¹¹³ Art. 38 of the ICSID Convention, *supra* note 27: If the Tribunal is not constituted within 90 days, the Chairman shall appoint the arbitrator or arbitrators not yet appointed, but not nationals of one party. Arts 6 and 7 of the UNCITRAL Arbitration Rules (15 ILM (1976), 701) confer authority to the Secretary-General of the Permanent Court of Arbitration. Art. 13 para. 3 of the Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two States, in: Permanent Court of Arbitration, *supra* note 19, at 53: 'If an arbitrator on a three- or five-person tribunal fails to participate in the arbitration, the other arbitrators shall, unless the parties agree otherwise, have the power in their sole discretion to continue the arbitration and to make any decisions, ruling or award, notwithstanding the failure of one arbitrator to participate.' Art. 1124 of the NAFTA Agreement, *supra* note 21: 'Constitution of Tribunal When a Party Fails to Appoint an Arbitrator or the Disputing Parties Are Unable to Agree on a Presiding Arbitrator', provides that in investor-to-state arbitration, the Secretary-General of the ICSID shall appoint the arbitrators. Art. 25 para. 1 of the ICC Rules of Arbitration, in force as from 1 January, 1998: 'if there be no majority, the Award shall be made by the chairman of the Arbitral Tribunal alone', 36 ILM (1997), 1604 *et seq.*

¹¹⁴ See on cooperation with the ICTY and the ICTR Sluiter, 'To Cooperate or Not to Cooperate? The Case of the Failed Transfer of Ntakirutimana to the Rwanda Tribunal', 11 *J Int'l Law* (1998) 383; Bank, 'Cooperation with the ICTY in the Production of Evidence', 4 *Max Planck YB UN* (2000) 233; Bothe, 'International Humanitarian Law and War Crimes Tribunals, Recent Developments and Perspectives', in *International Law: Theory and Practice, Essays in Honor of Eric Suy* (1998) 581. See on cooperation with the ICC the commentary on Part 9 ICC Statute in Triffler, *supra* note 69.

¹¹⁵ Cassese, 'Reflections on International Criminal Justice', 61 *MLR* (1998) 1, at 10. See also *Case no. IT-95-14-T, Prosecutor v. Tihomir Blaskic*, Judgment of 29 October 1997, <http://www.un.org/icty/ind-e.htm> (visited on 4 October 2001) see there: *Blaskic IT-95-14* ('Lasva Valley') Trial Chamber, Decisions & Orders 29 October 1997, para. 26.

Security Council Resolution¹¹⁶ adopted pursuant to those provisions and establishing the Tribunal.¹¹⁷ A request by the Tribunal for cooperation is an application of an enforcement measure under Chapter VII and therefore binding.¹¹⁸

1 Evidence

An important type of cooperation is the production of evidence (Article 29 para. 2 lit. (a) of the ICTY Statute). The landmark decision on evidence is the *Blaskic* Subpoena judgment of the Appeals Chamber of 1997.¹¹⁹ Here the Appeals Chamber held that, by virtue of Article 29 of the Statute and Chapter VII of the UN Charter, states must comply with requests for evidence.¹²⁰

In the *Todorovic* decision of 2000¹²¹ the obligation to cooperate under Article 29 was extended to international organizations. Here, Trial Chamber III ordered that the NATO-led Stabilization Force in Bosnia and Herzegovina, the ‘SFOR and its responsible authority, the North Atlantic Council’ as well as all 33 ‘States participating in SFOR [...] disclose to the Defence’ various documents, items and material ‘relating to the apprehension of the accused’. The Trial Chamber justified this request with a ‘purposive construction’ of Article 29. Although the provision is on its face confined to states, its purpose to secure investigation and prosecution of serious violations of international humanitarian law supports its application to collective enterprises undertaken by states, in the framework of international organizations.

¹¹⁶ SC Res. 827 (1993) of 25 May 1993, para. 4: Here the Security Council decided ‘that all States shall cooperate fully with the International Tribunal and its organs in accordance with the present resolution and the Statute of the International Tribunal and that consequently all States shall take any measure necessary under their domestic law to implement the provisions of the present resolution and the Statute, including the obligation of States to comply with requests for assistance or orders issued by a Trial Chamber under Article 29 of the Statute’ (32 ILM (1993), 1203 *et seq.*, emphasis added).

¹¹⁷ *Blaskic* judgment, *supra* note 115, at para. 26.

¹¹⁸ Report of the Secretary-General pursuant to para. 2 of SC Res. 808 (1993) [on the establishment of an International Tribunal], 32 ILM (1993), 1163 *et seq.*, 1188, paras 125–127: ‘[T]he establishment of the International Tribunal creates a binding obligation on all States to take whatever steps are required to implement the decision. In practical terms, this means that all States would be under an obligation to cooperate with the International Tribunal... an order by a Trial Chamber for the surrender or transfer of persons to the custody of the International Tribunal shall be considered to be the application of an enforcement measure under Chapter VII of the Charter of the United Nations.’

¹¹⁹ *Supra* note 115. See in scholarship on this judgment Wedgwood, ‘International Criminal Tribunals and State Sources of Proof: The Case of Tihomir Blaskic’, 11 *LJIL* (1998) 635; Sarooshi, ‘The Powers of the United Nations International Criminal Tribunal’, 2 *Max Planck YB UN* (1998) 141. The *Blaskic* principles were applied in *Prosecutor v. Kordic*, Trial Chamber, order of 4 February 1999, in which the Trial Chamber ordered the Republic of Croatia to disclose to the Prosecution specific documents listed in a confidential annex in: <http://www.un.org/icty/ind-e.htm> (visited 4 October 2001), see there: *Kordic and Cerkez*, IT-95-14/2 (‘Lasva Valley’) Trial Chamber, Order of 4 February 1999.

¹²⁰ A court order for evidence must satisfy the following conditions to be binding: It must identify specific documents and not broad categories, it must set out succinctly the reasons why such documents are deemed relevant, it must not be unduly onerous, and it must give the requested state sufficient time for compliance, *Blaskic* judgment *supra* note 115, para. 31).

¹²¹ Decision on Motion for Judicial Assistance to be provided by SFOR and Others of 18 October 2000, Trial Chamber III (*Prosecutor v. B. Simic, M. Simic, Tadic, Todorovic, Zaric, Case no. IT-95-9-PT*), in: <http://www.un.org/icty/ind-e.htm> (visited on 5 September 2001) see there: *Simic et al.*, IT-95-9, ‘Bosanski Samac’, Trial Chamber, Judgment of 18 October 2000.

‘Article 29 of the Statute should therefore be read as conferring on the Tribunal a power to require an international organization or its competent organ such as SFOR to cooperate with it’, according to the Trial Chamber.¹²²

In a 1999 decision in the *Simic* proceedings, a Trial Chamber ruled on an important *exemption* from the duty to cooperate with the ICTY.¹²³ The question here was whether a former employee of the International Committee of the Red Cross, the ICRC, may be called to give evidence of facts that he came to know by virtue of his employment. The Trial Chamber found that the ICRC’s operating principles of neutrality and impartiality creates a relevant and genuine confidentiality interest of the ICRC.¹²⁴ Cooperation in the form of testimony before the Court might be perceived by one or other of the parties to a conflict as taking a stand against them and might, as a consequence, have detrimental effects on present and future humanitarian operations of the Red Cross. Therefore the ICRC has an absolute and unqualified customary law right of non-disclosure of information. No balancing against the interests of justice is possible. The ICTY is definitely barred from admitting information obtained from a person while performing official ICRC functions and relating to that work.¹²⁵

2 Surrender

Article 29 para. 2 lit. e) of the ICTY Statute explicitly obliges states to ‘comply without undue delay with any request for . . . *surrender* or the transfer of the accused to the International Tribunal’ (emphasis added). This of course applies to former Yugoslav President Slobodan Milosevic, who had been indicted already in May 1999 by the ICTY Prosecutor for crimes against humanity and violation of humanitarian law.¹²⁶ In 2001, the United States and the European Community exercised political pressure on the new government in Yugoslavia in order to compel surrender. An American list with demands contained, *inter alia*, very detailed elements of a draft law on cooperation with the Tribunal. Milosevic was arrested by the Yugoslav police in April 2001 and was transferred to the custody of the Tribunal one month later. Most likely, the FRY was less impressed by the frequent reminders by the UN Secretary-General, the Tribunal’s President and the Prosecutor that the FRY was legally obliged to cooperate with the Tribunal than by the American threat to cut off humanitarian aid

¹²² *Ibid.*

¹²³ *Simic et al.*, Decision on the Persecution on Motion under Rule 73 for a Ruling concerning the Testimony of a witness of 27 July 1999, <http://www.un.org/icty/ind-e.htm> (visited on 4 October 2001) see there *Simic et al.* (IT-95-9-PT) ‘Bosanski Samac’, Trial Chamber, Decision of 27 July 1999. See on this decision Jeannot, ‘Testimony of ICRC Delegates before the International Criminal Court’, 82 ICCR (2000) 993.

¹²⁴ *Simic*, *supra* note 123, at paras 45, 55.

¹²⁵ *Ibid.*, at para. 76. Confirmed in *The Prosecutor v. Simic et al.*, No. IT-95-9-PT, in a Trial Chamber III ‘Decision Denying Request for Assistance in Securing Documents and Witnesses from the International Committee of the Red Cross’, of 7 June 2000, <http://www.un.org/icty/ind-e.htm> (visited on 30 October 2001) see there: *Simic et al.* (IT-95-9-PT) ‘Bosanski Samac’, Trial Chamber, Decision of 7 June 2000.

¹²⁶ Because of the ‘renewed’ UN membership of the Federal Republic of Yugoslavia on 1 November 2000, the warrants of arrest and orders for surrender were re-issued and once more delivered personally to FRY authorities.

and to vote against loans for Yugoslavia in the World Bank and the IMF in the event of non-cooperation.

B Cooperation with the International Criminal Court

The legal basis for the obligation to cooperate with the ICC is Part 9 of the Rome Statute of 1998,¹²⁷ entitled 'International Cooperation and Judicial Assistance'. Its first clause, Article 86, is a general obligation to cooperate: 'States Parties shall, in accordance with the provisions of this Statute, *cooperate fully* with the Court in the investigation and prosecution of crimes within the jurisdiction of the Court.'¹²⁸ Court orders requesting cooperation under Part 9 will derive their binding force from the simple fact that they activate binding, *contractual* obligations of the states parties to the Statute. Court orders will therefore be binding 'secondary treaty law'.¹²⁹

The ICC cooperation regime contains some innovative elements departing from the traditional 'horizontal' regime of inter-state cooperation in criminal matters. First of all, new terms, such as 'surrender' to the Court, as opposed to 'extradition', manifest the novel, 'vertical' approach to cooperation. According to Article 91 para. 2 lit. c) of the Rome Statute, states responding to requests for arrest and surrender should take into account 'the distinct nature of the Court'. Strict grounds for refusal of cooperation, as they exist in almost every inter-state cooperation regime, are virtually absent. Under Article 99 para. 4, the Court has limited, but significant power to conduct on-site investigations.

On the other hand, the more traditional elements of form and procedure are: states parties surrender persons and render other forms of cooperation 'under procedures of national law'.¹³⁰ In substance, traditional solutions have not been radically abandoned. There still are grounds for refusal to cooperate, as in the inter-state 'horizontal' setting, but they are more flexible. For instance, mere postponement is envisaged (see, e.g., Article 93, para. 5).

The failure of a state party to cooperate with the Court will be addressed by an official finding of the Court and a referral of the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council (Article 87, para. 7 ICC Statute). The Security Council may then act under Chapter VII and oblige all UN Member States to cooperate with the Court.¹³¹

¹²⁷ ICC Statute, *supra* note 69, at 999.

¹²⁸ Emphasis added. Unlike Art. 29 Statute of the ICTY of 25 May 1993 (32 ILM (1993) 1163, 1203), this is no free-standing obligation to cooperate. Art. 86 serves as a guideline for the interpretation of the specific obligations laid down in Part 9.

¹²⁹ Kreß and Prost, in Triffterer, *supra* note 69, Art. 87, para. 32.

¹³⁰ Art. 93, para. 1; similarly Art. 89, para. 1. One of the most critical issues in the negotiations of Part 9 was whether or not there should be a reference to the national provisions. The ultimately agreed text reflects the compromise.

¹³¹ An interesting question is whether we here have a self-contained regime, i.e. an exhaustive set of rules concerning the international wrongfulness of non-cooperation. On the one hand, the carefully balanced grounds for refusal to cooperate may be undermined by relying on a circumstance precluding wrongfulness under general customary law, such as a state of necessity (cf. Art. 26 of the ILC Draft Articles on State Responsibility (2000)), adopted by the Drafting Committee on second reading on 11

States *not* parties to the Rome Statute might be obliged to cooperate with the ICC by virtue of Article 1 of the Geneva Conventions and corresponding customary law.¹³² The said provision requires states to ‘ensure’ respect of international humanitarian law. This means that states parties to the Geneva Conventions must react appropriately to any violation of international humanitarian standards, even if the underlying act is not attributable to that state. It is conceivable that in a given case some form of cooperation with the Court constitutes the only way for non-states parties to the Rome Statute to discharge this obligation,¹³³ at least as far as war crimes are concerned, perhaps even with regard to other crimes within the jurisdiction of the Court.

10 Evaluation and Outlook

A *The Foreground: Summary of Cooperational Duties*

The main findings of the preceding parts may be summed up as follows: a general (but context-bound) duty to cooperate with a view to a settlement is inherent in the customary law obligation to settle disputes peacefully, because resolution of a dispute would otherwise be impossible. This general obligation comprises the duty at least to negotiate, as it would otherwise be meaningless. On the other hand, there is no customary law obligation to negotiate first, if the other party is willing to resort to another means of settlement, in particular to adjudication. Good faith relates to all stages of the settlement procedure, and it obviously becomes more important as the procedures become more flexible and the parties’ respective duties of cooperation become less concrete.

In diplomatic third-party-based settlement, we find some, albeit weak, *specific* obligations of cooperation. First of all, an offer of mediation (or good offices, or conciliation) gives rise to at least one *negative* obligation of the parties to the dispute: they may not regard the offer as an unfriendly act.¹³⁴ When conciliation is made compulsory, as in many recent treaties, we have a procedural obligation to go through the procedure. In the absence of an award which binds the parties *per se*, cooperation becomes crucial in the phase of implementation of a mediator’s or conciliator’s recommendation.¹³⁵ The most important act of cooperation of the parties

August 2000, A/CN.4/L.600 in: <http://www.law.cam.ac.uk/rcil/ILCSR/Statresp.htm> (visited on 5 September 2001). On the other hand, it seems hardly justifiable to radically preclude resort to general grounds for refusal such as *force majeure* (see Kreß and Prost, in Triffterer, *supra* note 69, Art. 87, para. 33).

¹³² See in detail on the duty to ensure respect of humanitarian law B. Kessler, *Die Durchsetzung der Genfer Abkommen von 1949 in nicht internationalen bewaffneten Konflikten auf Grundlage ihres gemeinsamen Art. 1* (2001).

¹³³ Kreß and Prost, in Triffterer, *supra* note 69, Art. 87 ICC Statute, *supra* note 69, para. 20.

¹³⁴ Art. 3 of the Hague Convention of 1907, *supra* note 19.

¹³⁵ This is why for instance the CSCE Valetta Report on Dispute Settlement of 1991 (*supra* note 39) contains the following provision: ‘The parties will consider in good faith and in the *spirit of cooperation* any comment or advice of the [Dispute Settlement] Mechanism’ (Sec. IX, first sentence, emphasis added).

is to agree on a material resolution of the dispute, but there clearly is no obligation to do so.

In legal dispute settlement, too, the primary act of cooperation is consent, but in a different phase. Here we need consent to jurisdiction of a court or tribunal. This consent is formal and procedural, not — as in a successful political dispute settlement — a consent in substance. Here as there, we have no customary law obligation to consent. However, throughout the evolution of treaty law, we see a tendency to require consent in increasingly early stages. In particular, the instrument of compulsory adjudication *qua* membership to a material treaty, to which no reservations are possible, constitutes an important strengthening of adjudication.

In third-party dispute settlement, obligations, such as a contractual obligation to exhaust previous negotiations as a pre-requisite of jurisdiction, may at first sight exist only *vis-à-vis* the dispute settlement body, but they protect the other party to the dispute as well.

In highly institutionalized dispute settlement systems, obligations to cooperate even seem to be ‘obligations *erga omnes partes*’, which means that they are incumbent on every member state of the system *vis-à-vis* all other member states and posit a community interest in their observance.¹³⁶ They protect not only the other party to the dispute, but all other parties to the system. The reason is that cooperation in this instance is not only called for in order to resolve a specific dispute, but with a view to the good and sustainable functioning of the entire settlement system.

The failure to fulfil a concrete obligation to cooperate is normally a breach of an international obligation and triggers the state’s international responsibility.¹³⁷ If, as in the case of the ICTY and the ICC, the court is entitled to make a judicial finding on a failure to cooperate, this is the formal establishment of an internationally wrongful act.¹³⁸ In sum, we can safely speak of an international law of cooperation in dispute settlement.

B The Background: Two Antagonistic Trends in Dispute Settlement

The cooperational duties just summarized must be seen against the background of two antagonistic trends in dispute settlement.

1 On the One Hand: Rise of Adjudication

On the one hand, we witness a rise of adjudication. The ideological battle between (mostly) Western partisans of binding adjudication¹³⁹ and (mostly) socialist/third-world proponents of non-binding, diplomatic dispute settlement, which essentially hinged on sovereignty, is over. Since 1989, reluctance to accept binding adjudication has somewhat decreased.

The rise of adjudication is manifest in the creation of new courts, which I have

¹³⁶ *Blaskic* judgment, *supra* note 115, para. 26.

¹³⁷ *Ibid.*, at para. 35.

¹³⁸ Kreß and Prost, in Triffterer, *supra* note 69, Art. 87 ICC Statute, *supra* note 69, para. 35.

¹³⁹ The opposing camps of course reflected only roughly the East-West split. For instance, France and the USA both withdrew from the optional clause and the USA was never a party to the PCIJ.

already mentioned. It is also illustrated by the fact that new actors participate in the process of adjudication. Although states are certainly still the primary actors — think of access to the ICJ or to the WTO Dispute Settlement Body — this primacy of states is eroding. Some of the most interesting duties of cooperation involve private-law corporations or individuals. I have mentioned the international criminal courts trying individuals, and the ‘innovative and sweeping’¹⁴⁰ obligations of cooperation with those courts incumbent on the states parties. I have also mentioned the growing importance of mixed arbitration, and in this context the doctrine of non-frustration of arbitration functions as an incentive to cooperation in the arbitral process.

Finally, NGOs are engaged in international adjudication.¹⁴¹ For example, international (and national) trade unions may sue states under Part IV D of the Revised European Social Charter of 1996.¹⁴² In situations where NGOs do not themselves have standing, they may render assistance to the parties, e.g., by submitting *amicus curiae* briefs.¹⁴³

The ‘privatization’ of international disputes effected by the integration of non-state actors has the positive effects of avoiding inter-state conflicts and of improving the protection of material rights because the states’ discretion (and reluctance) to exercise diplomatic protection is foreclosed. It also increases the effectiveness of adjudication because the strong self-interests of the private stakeholders contribute to promoting legal security.¹⁴⁴

2 On the Other Hand: New and Varied ‘Political’ Mechanisms

On the other hand, actual resort to manifold new provisions for arbitral or judicial settlement is still comparatively rare in the state-state context.¹⁴⁵ Moreover, support for non-binding strategies comes from a totally new camp: from domestic alternative dispute resolution theory, as explained in the beginning. A preference for ‘new’ or ‘alternative’ means is visible in the trend to straddle or combine the traditional

¹⁴⁰ *Blaskic* judgment, *supra* note 115, at para. 64.

¹⁴¹ See generally Shelton, ‘The Participation of NGOs in International Judicial Proceedings’, 88 *AJIL* (1994) 611.

¹⁴² ETS no. 163; incorporating the Additional Protocol to the European Social Charter Providing for a System of Collective Complaint of 9 November 1995, ETS no. 158.

¹⁴³ The WTO Appellate Body considered *amicus curiae* briefs from NGOs attached to the submission of either appellant or appellee to be ‘at least *prima facie* an integral part of that participant’s submission’ (WTO Appellate Body Report in: *United States — Import Prohibition of Shrimp* (WT/DS58/AB/R) of 12 October 1998, 38 *ILM* (1999), 121 *et seq.*, paras 79–91). As regards additional information furnished, e.g., by NGOs independent from the submissions of the participants, a panel has the discretionary authority either to accept and consider or to reject it, whether requested by a panel or not (*ibid.*, at paras 99–110). The ICTY took note of the *amicus* briefs to the *Blaskic* case, see frequent quotes in the judgment (*supra* note 115).

¹⁴⁴ Petersmann, ‘Proposals for Strengthening the UN Dispute Settlement System’, 3 *Max Planck YB UN* (1999) 105, at 144.

¹⁴⁵ This is not equally true for the private business-state context, e.g. under the ICSID Convention.

methods,¹⁴⁶ as well as in the trend to entrust a designated body of an organization or, under a multilateral convention, a conference or meeting of the states parties with compliance management in a non-adversarial context. A most recent example is the Cartagena Protocol on Biosafety of 2000.¹⁴⁷ Another revitalization of political means lies in the new tool of compulsory or directed conciliation, which can be found in numerous multilateral conventions of the 1980s and 1990s.¹⁴⁸ All in all, it may well be that non-binding mechanisms will continue to dominate dispute settlement, albeit with the help of a new set of arguments and in novel forms.

C The Whole Picture: A Network of Cooperational Duties

The international law of dispute settlement, which is becoming increasingly institutionalized, may be imagined as a *network of obligations*. The network idea builds on, and intensifies, the concept of cooperation. While inter-state cooperation still presupposes horizontal relationships between sovereign actors, the network idea allows for hierarchy in the international legal system. A network is, as pointed out in the Introduction to this paper, something between anarchy and hierarchy. It is a mixture of vertical and horizontal relationships, a criss-cross of relationships. It is

¹⁴⁶ An example is the UN Compensation Commission, which was set up on the basis of Security Council Resolutions and which settles claims against Iraq related to its unlawful invasion of Kuwait in 1990 and awards damages out of a compensation fund constituted by a 30% levy on the proceeds of Iraqi oil sales. The Commission is a subsidiary body of the Security Council and an extraordinary and as yet unique hybrid political-judicial body. Report of the UN Secretary-General of 2 May 1991, UN Doc. S/22559, in M. Weller (ed.), *Iraq and Kuwait: The Hostilities and Their Aftermath* (1993) 537, at 539. It is, however, doubtful, whether this particular blend will serve as a model for future dispute settlement because it owes its existence to the very specific situation after the Gulf War and the unequivocal and complete condemnation of Iraq by the United Nations.

¹⁴⁷ Art. 34 of the Cartagena Protocol on Biosafety to the Convention on Biological Diversity of 29 January 2000, 39 ILM (2000) 1027, at 1042. See also Art. VI para. 4 of the Comprehensive Nuclear Test Ban Treaty (CTBT) of 10 September 1996 (in Fahl, *supra* note 72, Text E/18.2); Conference of the States Parties; Art. 17 of the Kyoto Protocol of 12 December 1997 to the framework Convention on Climate Change, 37 ILM (1998), 32; Conference of the Parties serving as the Meeting of the Parties to the protocol; Art. 10 para. 1 of the Anti-Personnel Mines Convention (*supra* note 39); Meeting of the States Parties; Art. 10(n) of the Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean of 4 September 2000 (40 ILM (2001), 278) on the tasks of the Commission for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, empowering a Commission to 'promote the peaceful settlement of disputes'.

¹⁴⁸ See the Vienna Ozone Layer Convention (*supra* note 70) Art. 11, paras 4 and 5; Mandatory submission to a conciliation commission that must, in the absence of an agreement, render a final and recommendatory award, which the parties shall consider in good faith. Another example is the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 21 March, 1986, 25 ILM (1986), at 543 *et seq.*: With respect to a dispute concerning the application of any of the Articles in Part V (invalidity, termination, and suspension of the operation of treaties), other than those regarding *jus cogens*, any of the parties may set in motion a conciliation procedure specified in the Annex to the Convention (Art. 66 para. 4). See also Art. 14, para. 5 of the Rio Framework Convention on Climate Change (*supra* note 47) and Art. 20 of the Convention on Conciliation and Arbitration within the OSCE (*supra* note 39). Under Art. 5, para. 3 of the WTO DSU (*supra* note 18), '[g]ood offices, conciliation or mediation may be requested at any time by any party to a dispute'. On the other hand, Art. 5, para. 1 says that '[g]ood offices, conciliation and mediation are procedures that are undertaken voluntarily if the parties to the dispute so agree'.

partly rigid, partly flexible. The network embodies not only different types of cooperational duties, but also duties with different degrees of bindingness, depending, *inter alia*, on the different actors involved.

Within this network, the duties to cooperate between the parties form the ‘horizontal’ threads, whereas the duties of the parties *vis-à-vis* the dispute settlement institution or mediator may be figuratively depicted as ‘vertical’ ones. Such a criss-cross is more and more acknowledged in international judicial reasoning: With regard to the ICTY and the International Criminal Court, it was debated whether the obligations to cooperate with the courts are ‘horizontal’ duties similar to those in state-state relations or ‘vertical’ obligations. The ‘horizontal’ approach to cooperation has sovereignty as its starting-point, favours references to domestic law and rigid grounds for refusals to cooperate. The ‘vertical’ approach presupposes a hierarchical relationship between the international courts and the states, attaches greater weight to community interests in international criminal prosecution and consequently refuses to give states a final say on their cooperation. The Appeals Chamber in the *Blaskic* case opined that ‘[c]learly, a “vertical” relationship was ... established’ between the ICTY and the UN Member States.¹⁴⁹ Referring to universal criminal jurisdiction, ICJ Justices recently held that states asserting universal jurisdiction ‘invoke the concept of acting as “agents for the international community”’. This vertical notion of the authority of action is significantly different from the horizontal system of international law envisaged in the *Lotus* case.¹⁵⁰

The hierarchical strand of the network is dominant where we have compulsory jurisdiction. The rise of adjudication, as just described, contributes to that strand. This phenomenon may be interpreted as a strengthening of constitutionalist, rule-of-law-conscious elements of the international legal order.¹⁵¹ Audacious decisions such as the Inter-American Court’s *Bronstein* judgment place emphasis on the constitutional features of some dispute settlement instruments.

On the other hand, Westphalian elements persist in the form of mere horizontal, inter-state cooperation in political dispute settlement. The Bluefin Tuna awards represent the Westphalian approach in which nothing goes without consent. Moreover, partisans of the Westphalian model can argue that almost all of the cooperational duties I have mentioned are *contractual* ones to which the states have ‘voluntarily’ adhered by signature and ratification. Relying on a *formal* notion of sovereignty and focusing on a state’s free will to enter into contractual obligations or not permits the conclusion that sovereignty is of course not impaired by these rules. If, in contrast, we adopt a *material* view of sovereignty, it is not decisive that contractual obligations were entered into ‘freely’ or ‘voluntarily’. What counts is that states have

¹⁴⁹ *Ibid.*, at para. 47.

¹⁵⁰ See ICJ, *Case concerning the Arrest Warrant of 11 April 2000* (Democratic Republic of the Congo v. Belgium), judgment of 14 February 2002, joint separate opinion of Judges Higgins, Koojmans and Buergenthal, para. 51. See http://www.icj-cij.org/icjwww/idocket/icobe/icobejudgment/icobe_ijudgment_20020214.pdf.

¹⁵¹ See Peters, ‘There is Nothing More Practical than a Good Theory: An Overview over Contemporary Approaches to International Law’, 44 *German Yearbook of International Law* (2001) 25, at 35–36.

a substantially smaller manoeuvring space because of binding, even if only contractual, obligations to cooperate. The latter view is the one I prefer because adopting the formal perspective bears the risk of talking of sovereignty even when only an empty husk of sovereignty is left. In this perspective, the growing network of contractual obligations to cooperate in dispute settlement does modify sovereignty, and with it the Westphalian system.

Generally speaking, the international legal system is currently a system in transition,¹⁵² in which the traditional guiding principle of state sovereignty is only in part being substituted by the guiding principle of the rule of law. As far as dispute settlement is concerned, we have seen that horizontal coordination has not only been complemented by a thick layer of cooperational duties, but that these layers are in part even replaced by hierarchies. The network image is supposed to visualize this transitional phase.

¹⁵² Oxman, *supra* note 87, at 312.