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Introductory remarks on the peaceful settlement of disputes

by

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Excellencies,

Mr. Secretary-General,

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Ladies and Gentlemen,

Introduction: problematic and unproblematic disputes

There is a tendency to see disputes between States as a negative phenomenon — something pathological — something that must be prevented and, if they occur, to be quickly resolved and removed.

I am not so sure about that.

Disputes between States are a normal part of international life. Unless humans suddenly become angels, we will always have them.

Indeed, some might even say that they are inherent to the process by which international law is made.

Unless we think that customary international law must remain static, a principal means by which that law evolves and changes is through States taking actions that do not accord with the existing law, in a deliberate attempt to challenge that law and replace it with a new one.





That new law is then crystallized by the States that are driving for change “holding out” — resisting attempts to get them to back down and accept the status quo — until others come around to their way of thinking.

We only need to think of the history of the development of the law relating to exclusive economic zones to realize that this is so.

This makes it difficult for me to think that the international legal system wants all disputes without exception to be resolved.

Some disputes, however, are clearly problematic: in particular, those that, if left unresolved, could deteriorate and eventually put international peace and security at risk.

Whatever kinds of disputes the UN Charter may require Member States to settle, it certainly imposes on them an obligation to settle disputes of that type.

The duty to settle problematic disputes

I want to pause for a moment and consider what that obligation means — what it entails.

In their eagerness to describe the various peaceful means that are available for the settlement of international disputes, international law textbooks generally overlook this important question.

Yet it is a fundamental one, because it shapes how those means of settlement are chosen, which means is chosen and how that means of settlement is then used.

As Article 33 makes clear, the obligation that the UN Charter imposes upon Member States to settle their disputes is not an obligation of result. It is not an obligation to ensure that their dispute is settled.

Rather, it is an obligation of conduct: an obligation to seek a solution, to make positive efforts in good faith towards resolving the dispute between them.

This much, I think, should be obvious.





The principle of the free choice of means

However, what this obligation entails can only be fully understood in the light of another fundamental principle of international law that is reflected in Article 33 of the Charter: the principle of free choice of means.

This principle means, as a general proposition, that States party to a dispute are not required to use any particular method or specific means to resolve their dispute — even negotiations, as both the General Assembly and, most recently, the International Court of Justice have affirmed.

They are free to choose whatever means they like — provided that it is peaceful in nature; provided that it is not of such a nature as to potentially aggravate the situation so as to endanger international peace and security; and provided that its nature is such as to potentially make it more difficult to settle, or impede the settlement of, the dispute between them. They are even free to innovate and invent their own means.

Admittedly, in the Friendly Relations Declaration of 1970 and then in the Manila Declaration of 1982, the General Assembly affirmed that the parties shall agree upon “such peaceful means as may be appropriate to the circumstances and nature of the dispute” in hand.

However, there is little indication in State practice that parties to a dispute understand themselves to be subject to specific, substantive constraints on the means of settlement that they may choose.

Thus, it has sometimes been said that negotiations, with their inherent process of give and take, are not appropriate for the settlement of disputes of a legal nature. Yet how many treaties and conventions require the parties to a dispute regarding its interpretation or application to try to resolve their differences through this means before engaging in other means of settlement?

Again, it has been said that arbitral tribunals and courts are not appropriate means for the resolution of disputes that are of a non-legal nature. But does not the International Court of Justice have the jurisdiction to decide cases *ex aequo et*





bono, if the parties agree; and did not many treaties before the Second World War and after empower tribunals or third persons to decide disputes between the parties *ex aequo et bono* by laying down, with binding effect, the terms of a settlement between them?

I think, then, that we must read the words of both the Friendly Relations Declaration and the Manila Declaration as an injunction to the parties to seek to identify the means that is best suited in all the circumstances to promote the early and effective resolution of the specific dispute between them.

The principle of consent

What the obligation to settle a dispute entails must also be understood in the light of another, second, and even more fundamental principle — a principle that is not expressly articulated in Chapter VI of the Charter, perhaps because it is so fundamental that it goes without saying, but which most certainly underlies it. I refer to the principle of consent.

A State cannot be required as a matter of law to use a particular means of settlement, say, mediation or conciliation. It is free to agree to the use of it or not.

It is only otherwise if it has already given its legally binding agreement to the use of that means — which is, of course, itself a reflection of the principle of consent.

The duty to try to agree upon a means

How does this fit with the fact that States are under an obligation, in the words of the Friendly Relations Declaration, to “seek early and just settlement of their international disputes” — or, in the more elaborate and revealing language of the Manila Declaration, to “seek in good faith and in a spirit of co-operation an early and equitable settlement”?

Well, if the principle of the peaceful settlement of disputes requires States to make positive efforts to resolve their disputes . . .





. . . then, when it is read with the principle of the free choice of means and the principle of consent, it must necessarily entail that they must make positive efforts in good faith and in a spirit of co-operation to reach agreement with each other on the means of settlement that they are to use.

Again, this is an obligation of conduct and not of result. States are not under an obligation to agree on a means, but to try to do so.

(It is an interesting question whether, if a State has a means available to it that it can require the other State to use, it must do so. But we can leave that for another day.)

As I have previously mentioned, States are not under any obligation to have resort to negotiations as a means for the settlement of their disputes.

But, having seen what we have seen, I would think it would be difficult to resist the conclusion that, here, there is a duty to negotiate — a duty to negotiate with a view to reaching agreement on the means of settlement to be used.

They may discuss whether to enlist the assistance of a third party to assist them in that task — a good officer or a mediator. But the fundamental duty to negotiate will always be there.

Good faith in negotiations

This being so, if not for its own sake, it would certainly be useful to spell out what the principle of good faith entails in the conduct of negotiations.

The learning on this point has developed where negotiations have been chosen by the parties as the means that they are to use to attempt to resolve their dispute, or where they have agreed on some means that is designed to assist them in the conduct of their negotiations, in particular, good offices or mediation.

But I would think that that learning should be transferable to where the parties conduct negotiations to agree upon a means of settlement, whatever that means might be.





What the principle of good-faith-in-negotiations requires has been the subject of elaboration both by the General Assembly of the United Nations and by international courts and tribunals.

The United Nations Secretary-General has also elaborated upon the requirements of good faith in the context of UN-mediated processes — in particular in the “ground rules” or “codes of conduct” that he or his envoys have developed to guide the conduct of negotiations, where he has been asked to mediate or lend his good offices to the resolution of a dispute.

For this reason, too, I think it is useful that I say something about this subject.

These requirements of good faith can be divided into positive and negative ones: obligations to do and obligations to refrain from doing.

Thus, by way of positive obligations, I think it can be said that parties to negotiations must:

- exert their utmost efforts to resolve the dispute in an entirely peaceful and amicable manner
- negotiate constructively and in good faith with the objective of arriving at a full and early agreement for the solution of the dispute
- conduct negotiations in a continuing, sustained and result-oriented manner, avoiding any delay
- negotiate in a spirit of cooperation and mutual respect and understanding
- seek to understand each other’s positions, views and interests
- give serious consideration in good faith and without delay to proposals or suggestions made by the other party
- and be prepared to re-examine their own positions and consider the possibility of modifying or abandoning them and compromising in order to accommodate the interests of the other party.

In terms of negative obligations, parties to negotiations must:





- refrain from any action or statement that might aggravate or widen the dispute or that might make more difficult or impede its early resolution
- and exercise caution and restraint in the treatment of all matters relating to the negotiating process, so as to enable the negotiations to take place in a favourable atmosphere that is most conducive to their success.

This second, negative obligation has frequently been further articulated along the following lines, with both negative and positive facets. Thus, it has been said that each party must:

- avoid public accusations against, and the public attribution of hostile motives to, the other party
- moderate the language and tone of its written communications and public pronouncements about the other party in connection with the subject of the dispute
- make every effort to secure the concurrence of political parties and interest groups in its country that they, too, will not contribute to a heightening of tensions through inflammatory public statements of their own
- and, in the specific context of the negotiations, behave and express themselves at all times with courtesy, moderation and mutual respect, avoiding abusive or offensive language and behaviour.

All this may sound rather vague and numinous; but, to give further content and meaning to these various requirements, it might be useful to note that courts and tribunals have treated the following actions as consistent with the duty to demonstrate good faith in the conduct of negotiations:

- to enter on negotiations without giving up one's own legal standpoints
- to object to the other party's proposals, provided that this is done in good faith





- to refuse to reach an agreement that is unsatisfactory to oneself, provided that this is not done in bad faith
- to cause delays in the negotiations which are a result of normal political contingencies.

Perhaps more interestingly, courts and tribunals have treated the following actions as inconsistent with the duty to show good faith in negotiations:

- to systematically refuse to give consideration to the proposals or the interests of the other party
- to simply adhere to one's own position without contemplating any modification of it
- to cause abnormal delays in the negotiations
- to unjustifiably break off negotiations
- to act in disregard of the procedures that have been agreed for the conduct of the negotiations.

In at least one case, an arbitral tribunal has held that a State has conducted itself in a manner inconsistent with these requirements.

Means of settlement

Let me turn now to the various means that are available to States for the settlement of their disputes.

Article 33 of the UN Charter lists these: negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, and “other peaceful means” of the parties’ choice.

I have already said a lot about negotiations and about what they do and do not entail; so I will not say any more on that score.





As for the other means of settlement, I will, as you may expect, look at these from a UN standpoint and concentrate on those where the UN has historically played the greatest role: good offices and mediation.

I could of course also mention judicial settlement and the role of the International Court of Justice; but I think that will already be well known to all in this room and so not need any further elaboration.

Good offices

Good offices is not expressly mentioned in Article 33 of the UN Charter; but, in recapitulating the peaceful means of settlement that are available to States, the General Assembly added it, in its 1982 Manila Declaration, to the list set out in Article 33 of the Charter.

This means of settlement is intimately connected nowadays to the UN Secretary-General. As UN Legal Counsel, I think that, for this very reason, I should focus on this means of settlement.

There is some lack of clarity about what “good offices” involve as a means of dispute-settlement.

It may be helpful in this regard to make a distinction between a narrow and a broad sense of the expression.

As for the narrow sense, the essential idea is of a courier, who carries messages between two sides that find it difficult for legal or political reasons to talk to each other directly.

As such, the good officer does not contribute anything of substance to the interactions between the parties. He or she “only” — in quotation marks — enables them to talk to each other.

The situation is different when it comes to the broader sense of good offices. Here, the good officer does make a substantive contribution to the negotiations.





We can distinguish two ways in which he or she may do this. In some cases, a good officer's role is limited to the first; in other cases, it embraces the second.

The first is by helping the parties to understand each other — and even themselves — and so assists them in their efforts to find a settlement.

Here, the good officer helps the parties to identify their interests and formulate proposals and to understand the positions, proposals and interests of the other side, in a back-and-forth process, either with the parties in the same room or apart — perhaps even in their own capitals.

Thus, the Personal Representative of the Secretary-General on the Border Controversy between Guyana and Venezuela shuttled back and forth between Georgetown and Caracas in a process of this kind for several months during the first half of 2017, before bringing the parties together later in the year at Greentree, New York.

The second type of substantive contribution that the good officer may make to the negotiations is a “stronger” one: not only helping the parties to make their own proposals and understand and appreciate those of the other side, but actually making his or her own proposals for the resolution of the dispute in hand.

In this last case, good offices are very much a synonym for mediation.

Interesting in this regard is the announcement by the Secretary-General of the appointment in 2017 of his fourth Personal Representative on the Border Controversy between Guyana and Venezuela, Mr. Dag Nylander, whom he described as conducting good offices “with a strengthened mandate of mediation”.

A good officer may be limited in his or her tasking to making the first of these two kinds of contribution — helping the parties to help themselves. Or, as this announcement shows, his or her tasking may be broad enough to encompass both.

In truth, it is difficult to draw a hard-and-fast line between these two kinds of contribution.

It can readily be appreciated how the first can contain elements of the second — how a process of helping one party to understand its own interests and those of the





other party and to formulate and present its proposals can come to have characteristics of the good officer “helping” the parties to reach the solution that he or she thinks best suited to accommodating the interests of both.

It can also readily be appreciated how a good officer may make different kinds of contributions at different times.

It will typically only be where he or she has fully earned the trust of the parties that he or she will feel comfortable enough to make his or her own proposals for solution of the dispute in hand; either that or when it comes to a “last throw of the dice”.

I should say one other thing about the nature of good offices.

The method can be employed as a means to help the parties either to start or to resume negotiations, the good officer dropping out of the picture once the parties have started to talk. The American Treaty on Pacific Settlement of 1948 — the “Pact of Bogota” — uses the expression in this sense. In similar vein, it can be employed as a means of helping the parties to agree on a method of dispute settlement.

Alternatively, it can be employed as a means of dispute settlement itself, the good officer facilitating the substantive negotiations towards a settlement.

It is in the second of these two ways that we most often come across the expression “good offices” in UN practice.

Finally, I should say a few words about how the UN Secretary-General’s good offices can be triggered.

An intergovernmental organ — the General Assembly or the Security Council — may task the Secretary-General to lend his or her good offices for the resolution of a particular dispute.

But he or she may also lend his or her good offices on his or her own authority, in the exercise of the powers that are conferred on the Secretary-General under Chapter XV of the UN Charter.





Of course, it follows from what I have said earlier that the Secretary-General cannot force himself or herself on the parties. They both have to consent to him or her playing such a role.

The important thing to note, though, is that, as a matter of the UN's internal law, the Secretary-General can offer his or her good offices to the parties to a dispute. So, at the request of one party, he or she can approach the other to see if it will agree to him or her playing such a role. And, what was once highly contentious, but now is settled law: the Secretary-General can offer his or her good offices to the two parties, unbidden by either.

Mediation

I think that what I have said about good offices makes it unnecessary to say much more about mediation at the UN.

I would only remark that we find mediation being analysed rather like the broader sense of good offices that I have just described.

Thus, it is said that the mediator facilitates negotiations between the parties by helping them to identify their interests and present proposals and to understand the proposals, positions and interests of the other side; and that, in this way, as well as through his or her procedural suggestions, he or she makes it easier for the parties to reconcile their contending claims.

But it is said that the mediator may also do this by making his or her own proposals for a settlement.

The extent to which a mediator moves from one to the other of these roles will be largely dictated by circumstances: that is, when he or she judges it either possible, appropriate or necessary to do this.

I suppose that the distinctive thing about mediation, which distinguishes it from good offices, is that it always includes this second role — or, perhaps more accurately, that it potentially does, depending on whether the mediator finds that he or she needs to move on from the first role and to play the second.





Conclusion

I am aware that I have said quite a lot today.

I have described what I think that the obligation to settle disputes by peaceful means entails.

As a necessary adjunct to that, I have described what the principle of good faith requires in the context of negotiations — concentrating on where negotiations are used as a means of settlement but noting the relevance of that to what is required of the parties when they need to agree upon a means of settlement.

And I have outlined what two peaceful means of settlement that are particularly important in UN practice involve — good offices and mediation.

I will now leave the floor for Professor Yakushiji to talk about some examples of the peaceful settlement of disputes in Asia and Africa and an overview of some trends in the field.

Thank you.

