

## **International Law FORUM du droit international**

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### **Aims and Scope**

The International Law FORUM covers all aspects of public and private international law with an unmatched interdisciplinary approach. Its authors include both distinguished practitioners and scholars as well as fresh, new voices in international law. The objective editorial policy allows readers to form their own opinions based on the balanced coverage and diversity of news presented.

Each issue contains: *Editorial*, *In the News*, *Recurring Themes*, a *Profile*, *Work in Progress*, *Conference Scene*, and the *Bookshelf* of a distinguished guest. Pocket-sized and affordably priced the FORUM provides an accessible way for academics and practitioners to stay current in the field.

Thought-provoking and controversial, it is also up-to-date and truly international.

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La revue FORUM du droit international privilégie une approche inter-disciplinaire sans précédent pour couvrir tous les aspects du droit international public et privé. Parmi les auteurs qui y contribuent figurent d'éminents praticiens, professeurs et chercheurs ainsi que de nouveaux auteurs en droit international. La politique objective de la rédaction permet aux lecteurs de se forger leur propre opinion basée sur la diversité des informations présentées couvrant de manière équilibrée l'actualité.

Chaque numéro comporte les rubriques suivantes: *Editorial*, *Actualité*, *Thèmes récurrents*, *Profil*, *Travaux en cours*, *Le tour des conférences* et *La bibliothèque* d'un éminent invité. De petite taille et pour un prix raisonnable, le FORUM constitue un outil accessible pour les universitaires et les praticiens qui souhaitent suivre l'actualité du droit international.

C'est une revue à jour et réellement internationale qui pousse à la réflexion et à la discussion.

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## Editorial

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### Volume 1, No. 2

This second issue of the FORUM focuses on dispute prevention and avoidance. The Editorial Board felt that traditional means of international dispute resolution, such as mediation, conciliation, arbitration and judicial settlement tended to receive more attention than mechanisms aimed at preventing potential disputes from becoming litigious in the first place. As lawyers, we wondered whether the legal profession played a role in allowing, and perhaps even causing, disputes to escalate, in part because lawyers may be more comfortable with adversarial means of dispute resolution.

This prompted us to seek several contributions to this issue from non-lawyers, including our guest editor, Richard Hill, an engineer by training, with extensive experience in mediation and arbitration. Pierre Genton provides a general introduction to the Dispute Review Board, while John Gray gives specific examples of the role of an international expert panel in the environmental management of a large-scale Scandinavian project. This is not to say that we have ignored the view from the legal profession; Maas Goote writes about non-compliance procedures in international environmental law, and Clive Seddon introduces the use of “partnering” in the United Kingdom. Ibrahim Shihata’s contribution examines the experience of the World Bank in the avoidance and settlement of disputes arising between public and private parties. It is interesting to note that the Bank’s role in providing financing to governments appears to give it particular weight in rendering good offices and acting as a mediator. At the European level, Robert Badinter introduces the relatively recent OSCE dispute settlement mechanism, which features an innovative system of compulsory conciliation alongside the more traditional arbitration.

Other contributions to this issue include Catherine Kessedjian’s *Profile* of Max van der Stoep, reports on the work of the ILA Committee on the Accountability of International Organizations, and *The Bookshelf* of Professor Mohamed Salah. *In the News* features an update on the “banana case” within the WTO, the second decision of the House of Lords in the Pinochet case, and certain developments at the International Court of Justice. Because the ICJ’s excellent website (<http://www.icj-cij.org>) provides immediate up-to-date access to press releases, judgments and other documentation, our coverage is obviously less timely. Nonetheless, mindful that not all our readers have internet access, we have decided to pursue coverage of the Court’s activity, albeit in a more limited form. This includes, in the current issue, the recent *LaGrand* case. Following less than a year after *Breard* (reported on in the zero issue of this volume), *LaGrand* has prompted renewed criticism of the United States record

of compliance with international law. The editorial board would like to know its readers' views on these allegations of "American unilateralism" and "*hyper-puissance*." Is the United States using its political, cultural, military and economic primacy to pick and choose the international obligations with which it wishes to comply? What, on the other hand, is the responsibility of a federal State in ensuring compliance with international law by its constituent elements? The Editorial Board will consider publishing a brief overview of any comments received.

The Board has decided to devote a major part of its next issue (no. 3) to the issues raised by the Kosovo crisis and by NATO intervention in the Federal Republic of Yugoslavia. We are inspired in part by the provocative discussions found on a student website at the University of Paris I (<http://www.ridi.org/adi>). We would like to give this important debate the wider forum that it deserves, and which this publication is intended to be.

As always, the Board is extremely grateful to all of those who have contributed to FORUM.

## In the News / Actualité

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### Régler l'affaire de la Banane: un défi?

HÉLÈNE RUIZ FABRI\*

#### 1. Présentation générale

L'affaire de la Banane est un contentieux à épisodes, dont deux s'étaient déroulés sous l'empire de l'ancien système du *GATT*. Elle met en cause les régimes préférentiels mis en place par la Communauté européenne au bénéfice de certains pays producteurs de bananes dans le cadre de la quatrième *Convention de Lomé*, pour laquelle elle a obtenu de l'OMC en 1996 le renouvellement d'une dérogation (pour le détail de l'affaire, voir notamment *Focus OMC*, juin 1996, p. 5). Le dernier en date de ces régimes résultait de l'organisation commune du marché de la banane, instituée en 1993, et qui prévoyait l'attribution de contingents d'importation sur la base de l'origine des bananes et l'attribution de certificats d'importation, liés à des quotas déterminés, en fonction des pratiques d'importation des titulaires de licences. Quatre catégories de fournisseurs étaient distinguées et affectées de régimes variables concernant les droits à l'importation. Il s'agissait d'un régime très complexe mais dont l'objectif était clairement de favoriser certains producteurs et de se protéger contre d'autres (les producteurs de "bananes-dollars" par opposition aux bananes ACP dont les prix sont plus élevés, notamment pour des raisons liées aux coûts de main d'oeuvre). Et quelles que soient les évolutions que ce régime avait connues du fait des mises en cause précédentes, il demeurait contesté par un certain nombre de pays d'Amérique centrale et latine producteurs de bananes, ainsi que par les Etats-Unis, qui ne sont eux-mêmes producteurs de bananes que marginalement mais d'où sont originaires les trois plus grandes sociétés multinationales productrices et exportatrices de bananes qui dominent 80% du marché global de la banane et dont on sait qu'elles revendiquent un accès accru au marché européen. Les enjeux de l'affaire transparaissaient notamment dans le nombre de plaignants (5: Equateur, Guatemala, Honduras, Mexique, Etats-Unis) et le nombre d'Etats ayant réservé leurs droits en tant que tierces parties (20).

#### 2. Constatations du groupe spécial et de l'Organe d'appel

Le rapport du groupe spécial du 30 avril 1997 a condamné ce régime préférentiel communautaire et en a prescrit la modification sur le fondement de plusieurs constatations. Il a d'abord considéré que l'attribution des parts de

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contingents communautaires reposait sur un mécanisme discriminatoire, comme tel contraire à l'article XIII:1 du *GATT*, dans la mesure où, dans la catégorie des pays n'ayant pas un intérêt substantiel à approvisionner la Communauté européenne en bananes, certains bénéficiaient de contingents d'importation et d'autres non malgré le caractère semblable de leur situation. Il a en revanche considéré que la dérogation accordée pour la *Convention de Lomé* couvrait un certain nombre de préférences tarifaires malgré leur incompatibilité avec le régime de la nation la plus favorisée (NPF). Mais il a condamné les procédures de licences d'importation de la Communauté européenne, ainsi que le mécanisme d'attribution des "certificats-tempête" (mécanisme spécifique de substitution d'approvisionnement dans l'hypothèse de tempêtes tropicales), qu'il a considérés comme contraires aux obligations NPF et aux obligations relatives au traitement national résultant aussi bien du *GATT* que de l'*Accord général sur le commerce des services (AGCS)*. Il a ainsi notamment rejeté la tentative communautaire de multiplier les catégories et les régimes pour fonder des traitements différents.

L'Organe d'appel a confirmé la plupart des conclusions du groupe spécial mais en a infirmé d'autres, notamment concernant le statut dérogatoire des conventions de Lomé dont il a retenu une approche plus restrictive.

### **3. Mise en oeuvre**

Le Rapport, tel que modifié par l'Organe d'appel, a été adopté le 25 septembre 1997. La Communauté européenne a indiqué d'emblée que l'exécution lui poserait de délicats problèmes vis-à-vis de ses partenaires dans la *Convention de Lomé*. Elle est en effet conduite à démanteler un des régimes qui fondent l'intérêt de participer à ce système et qui contribuent à entretenir des liens privilégiés voulus aussi pour des raisons politiques. Mais, dans le nouveau système de règlement des différends de l'OMC, un Membre ne peut plus, comme la Communauté européenne l'avait fait dans le passé à propos de la même affaire, bloquer l'adoption des rapports de règlement du différend. De plus, conscients que l'un des tests du mécanisme serait également son efficacité au stade de l'exécution, les négociateurs de la Charte de l'OMC ont aménagé un mécanisme de suivi de l'exécution dont l'affaire de la Banane a été l'occasion d'explorer toutes les potentialités. Ce mécanisme permet de faire face aux difficultés relatives tant aux délais d'exécution qu'à ses modalités et aménage en même temps qu'il encadre la possibilité de recourir à des mesures de rétorsion en cas d'inexécution ou de mauvaise exécution.

Concernant les délais d'exécution, faute d'accord entre les parties, les plaignants ont requis le 17 novembre 1997 un arbitrage dont la possibilité est prévue par l'article 21.3.c du *Mémoire d'accord relatif au règlement des différends* pour fixer le délai d'exécution. L'arbitre a, dans un rapport distribué le

7 janvier 1998, établi une période d'exécution raisonnable allant du 25 septembre 1997 au 1er janvier 1999, soit en définitive 15 mois et une semaine.

S'agissant des modalités d'exécution, il est prévu que la question de l'exécution est inscrite à l'ordre du jour de l'Organe de règlement des différends (ORD) après six mois suivant l'adoption du rapport, le Membre concerné devant faire un rapport de situation avant chaque réunion mensuelle. La Communauté européenne s'était certes engagée à exécuter dans le délai imparti par l'arbitre mais, le 18 août 1998, les plaignants lui ont demandé des consultations pour résoudre leur désaccord concernant la nature et la consistance des mesures envisagées par elle pour se conformer aux recommandations de l'ORD. Elle a annoncé le 25 novembre 1998 qu'elle avait adopté un nouveau règlement qui serait pleinement opérationnel le 1er janvier 1999 mais les plaignants ont maintenu leurs réserves relatives à la conformité de ce dispositif. Les Etats-Unis ayant annoncé leur intention de mettre en oeuvre des mesures de rétorsion pour ce qu'ils considèrent comme une mauvaise exécution de la part de la Communauté européenne, cette dernière a demandé le 15 décembre 1998 l'établissement d'un groupe spécial au titre de l'article 21:5 du *Mémorandum* pour déterminer que les mesures qu'elle envisageait de mettre en oeuvre devaient être présumées conformes au droit de l'OMC tant qu'elles n'étaient pas mises en cause selon les procédures régulières de règlement des différends. A quoi, certains plaignants initiaux ont répliqué en demandant trois jours plus tard le rétablissement du groupe spécial initial pour examiner si les mesures de mise en oeuvre de la Communauté étaient compatibles avec le droit de l'OMC. L'ORD a donc décidé cette reconvoque le 12 janvier 1998 pour examiner l'ensemble de ces demandes fondées sur l'article 21:5. Cette nouvelle procédure a abouti à deux rapports mis en circulation le 12 avril 1999. Ces deux rapports, qui mettent en lumière un certain nombre de difficultés procédurales, aboutissent à une conclusion d'incompatibilité des mesures de mise en oeuvre communautaires avec les obligations dans le cadre de l'OMC. Ils sont néanmoins encore susceptibles d'appel, ce qui représenterait le dernier rebondissement "juridictionnel" possible de cette affaire, étant entendu qu'une autre étape s'est intercalée entretemps. En effet, les Etats-Unis ont, le 14 janvier 1999, demandé à l'ORD l'autorisation de prendre des mesures de rétorsion à l'encontre de la Communauté européenne, conformément à un régime qui permet de contrôler l'objet et le niveau des rétorsions et donc de canaliser la "justice privée". Selon la possibilité que lui offre l'article 22.6 du *Mémorandum*, la Communauté européenne a alors suscité un arbitrage en contestant le niveau et les modalités de fixation des suspensions envisagées. Cet arbitrage, rendu le 9 avril 1999 par les mêmes personnes qui composaient le groupe spécial initial, a admis les modalités de fixation choisies par les Etats-Unis mais a réduit le niveau des rétorsions envisagé de 520 à 191 millions de dollars. Les arbitres ont au passage tenu à rappeler le caractère normalement temporaire des mesures de rétorsion.

La mise en oeuvre de celles-ci a été autorisée par une décision de l'ORD du 19 avril 1999.

L'affaire n'est donc pas encore à son terme. Elle met en scène de manière particulièrement spectaculaire le problème de cohérence auquel la Communauté européenne doit faire face. En effet, certains observateurs ne manquent pas de remarquer que l'énergie qu'elle déploie pour défendre un régime, dont on sait de longue date qu'il est hautement problématique, pourrait menacer un mécanisme de règlement des différends dont elle est par ailleurs un fervent partisan. Mais peut-être doit-on également interpréter sa résistance comme un gage politique donné à ses partenaires de Lomé de son attachement à des relations privilégiées avec eux, avant une capitulation qui, au moment où elle interviendra, pourra être présentée comme inévitable.

## **Pinochet 2: une timide confirmation de Pinochet 1**

Le 24 mars 1999, une nouvelle formation de la *House of Lords*, par une majorité de 6 contre 1, a dénié l'immunité que demandait le Sénateur Pinochet. Cette décision confirme celle rendue le 25 novembre 1998 qui a été brièvement commentée dans le Numéro 1 de cette Revue,<sup>1</sup> tout en restreignant considérablement, en raison du droit anglais de l'extradition, l'étendue des charges pour lesquelles l'immunité est levée. Nous ne commenterons pas cette partie de la décision, compte tenu de notre absence de compétence à cet égard.

Dans leur grande sagesse, les *Lords* ont confirmé trois principes qui avaient déjà été définis par la décision de 1998:

- 1 Les normes internationales interdisant la torture et autres actes dégradants de la personne humaine ont la nature de jus cogens;
- 2 Il serait contradictoire d'accorder l'immunité aux personnes accusées d'avoir commis ou commandité ou, même permis de tels crimes, fussent-elles chefs d'Etat;
- 3 C'est dans les normes de droit coutumier international que l'on doit puiser le fondement de cette absence d'immunité.

Notons que certains Lords ont recherché dans le statut de la future Cour pénale internationale, les règles constitutives des tribunaux pour l'ex-Yougoslavie et le Rwanda et le projet de code des crimes contre la paix et la sécurité (1996), les motifs nécessaires à leur démonstration juridique.

Malgré certains aspects très restrictifs de cette seconde décision, nous saluons, une fois encore, le travail de pionnier des *Lords*. Grâce à eux, nous ne pouvons plus penser de la même manière la lutte en faveur des droits de la personne humaine.

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<sup>1</sup> Voir *International Law FORUM du droit international*, Vol. 1, No. 1, pages 10 à 12

## **International Court of Justice**

### **Provisional Measures Against the United States in *LaGrand*; No Jurisdiction in Spain-Canada Fisheries Dispute**

#### *LaGrand case – Court orders provisional measures against the United States*

On 2 March 1999, Germany instituted proceedings against the United States of America, alleging violations of the Vienna Convention on Consular Relations of 24 April 1963 with respect to the case of Karl and Walter LaGrand, both of German nationality. Karl LaGrand had been executed in Arizona on 24 February 1999 for a 1982 murder. His brother Walter was scheduled to be executed for the same crime on 3 March 1999 at 3:00 p.m. Arizona time.

Germany's Application maintains that "Karl and Walter LaGrand were tried and sentenced to death without being advised of their rights to consular assistance", as required by the Vienna Convention. It contends that German consular officers did not learn of the German nationality of the brothers until 1992, and were informed of this by the brothers themselves, rather than the authorities of the State of Arizona. Germany argues that "the failure to provide the required notification precluded it from protecting its nationals' interest in the United States at both the trial and the appeal level in the State courts".

The Application asks the Court to adjudge and declare that the United States has violated its international legal obligations under the Vienna Convention, that the criminal liability imposed on Karl and Walter LaGrand in violation of international legal obligations is void and should be recognized as void by the legal authorities of the United States, that the United States should provide reparation in the form of compensation and satisfaction for the execution of Karl LaGrand. Because of the imminently-scheduled execution of Walter LaGrand, Germany requested the Court to adjudge that the United States should restore the status quo ante in that case, by re-establishing the situation that existed before Mr. LaGrand's detention, conviction and sentencing.

Emphasizing the extreme urgency of the situation, Germany's representative asked the Court, on the morning of 3 March 1999, to exercise its right under Article 75, paragraph 1, of its Rules to indicate provisional measures *proprio motu*, without any further proceedings.

On 3 March 1999, the Court issued a unanimous order, calling on the United States to "take all measures at its disposal" to ensure that Walter LaGrand was not executed pending a final decision of the Court in the proceedings instituted by Germany. The Court also requested the Government of the United States to inform it of all measures taken in implementation

thereof, and instructed it to transmit the Order to the Governor of the State of Arizona.

This is the first time the Court has relied on Article 75, paragraph 1, of its Rules in indicating provisional measures *proprio motu*. The Court found that the execution of Mr. LaGrand “would cause irreparable harm to the rights claimed by Germany”. It stated that “the international responsibility of a State is engaged by the action of the competent organs and authorities acting in that State, whatever they may be”, and that consequently “the Governor of Arizona is under the obligation to act in conformity with the international undertakings of the United States”.

The Court emphasized that the issues before it did “not concern the entitlement of the federal states within the United States to resort to the death penalty for the most heinous crimes” and recalled that its function was “to resolve international legal disputes between States . . . and not to act as a court of criminal appeal”.

**Editors’ Note:** Although the Court communicated its Order to the U.S. authorities, the governor of Arizona refused to grant a stay, and Walter LaGrand was executed on 3 March 1999.

#### *Court lacks jurisdiction to hear Spain’s fisheries case against Canada*

In a judgment rendered 4 December 1998, the Court declared that it had no jurisdiction to adjudicate upon a case brought by Spain in 1995, concerning an incident involving the boarding on the high seas by a Canadian patrol boat, on 9 March 1995, of a Spanish fishing boat, in pursuance of the Canadian Coastal Fisheries Protection Act and of its implementing regulations.

Spain asserted that Canada had violated the principles of international law which enshrine freedom of navigation and freedom of fishing on the high seas, and had also infringed the right of exclusive jurisdiction of the flag State over its ships on the high seas. As a basis of the Court’s jurisdiction, Spain relied upon the declarations by which both States accepted that jurisdiction as compulsory (Article 36, paragraph 2, of the Statute of the Court).

Canada took the position that the Court lacked jurisdiction to deal with the case, by virtue of one of the reservations to its declaration of 10 May 1994, expressly removing from the Court’s jurisdiction “disputes arising out of or concerning conservation and management measures taken by Canada with respect to vessels fishing in the [Northwest Atlantic Fisheries Organization] Regulatory Area . . . and the enforcement of such measures”.

Noting that the Parties took different views as to the actual subject of the dispute, the Court found that “the essence of the dispute” was whether the acts

of Canada on the high seas in relation to the pursuit, the arrest and the detention of the Spanish vessel on the basis of certain enactments and regulations adopted by Canada “violated Spain’s rights under international law and require reparation”, and that the reservation contained in Canada’s declaration applied to the dispute as thus characterized.

The Court consequently held that it had no jurisdiction to deal with the merits of the case.

### **Other ICJ News in Brief**

#### *Nigeria’s request for interpretation of the Court’s Judgment of 11 June 1998 declared inadmissible*

As reported in issue no.1 of this volume, Nigeria requested interpretation of the Court’s judgment of 11 June 1998, which found that the Court had jurisdiction to deal with the merits of the land and maritime boundary case brought by Cameroon against Nigeria, and ruled that Cameroon’s claims were admissible. In a judgment dated 25 March 1999, the Court declared Nigeria’s request for interpretation inadmissible. The Court pointed out that Nigeria had already raised a preliminary objection to the admissibility of Cameroon’s submissions, which the Court had rejected in its judgment of 11 June 1998.

#### *Eritrea initiates proceedings against Ethiopia*

In February 1999, Eritrea filed an Application initiating proceedings in a dispute with Ethiopia concerning the alleged violation of the premises and of the staff of Eritrea’s diplomatic mission in Addis Ababa. Eritrea’s Application, which was also accompanied by a request for the indication of provisional measures, indicated that “it does not appear that Ethiopia has at the present time given its consent for the Court to be seised of jurisdiction in this case”.

#### *Guinea exercises diplomatic protection against Congo*

On 28 December 1998, Guinea filed an Application entitled “Application with a view to diplomatic protection”, requesting the Court to “condemn the Democratic Republic of Congo for the grave breaches of international law perpetrated upon the person of a Guinean national”, Mr. Ahmadou Sadio Diallo, a businessman who had been a resident of the Democratic Republic of Congo for 32 years. Guinea bases the Court’s jurisdiction on the declarations by which both governments have accepted the compulsory jurisdiction of the Court.

## Recurring Themes / Thèmes récurrents

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### La prévention des différends, un besoin réel de la pratique ou une invention de juristes?

Introduction par RICHARD HILL\* et CATHERINE KESSEDIAN

En décidant de consacrer la rubrique “Thèmes récurrents” de ce numéro du FORUM à la prévention des différends (*Dispute Avoidance*), les lecteurs du FORUM vont penser que le Comité de rédaction a cédé à la mode. Certes, la prévention des différends est devenu l’un des sujets les plus ressassés de ces dernières années. Un exemple suffira à s’en convaincre si besoin en est. La deuxième édition du *Directory of Conflict Prevention Organisations* contient 475 organismes qui s’occupent de prévention des conflits, lorsque la première édition, publiée en 1996, n’en contenait que 170. Lorsque l’on sait, de surcroît, que la plupart de ces organismes ne s’occupent que de conflits de nature publique et non de litiges de nature privée, on peut avoir une meilleure conscience de l’ampleur du phénomène.

Pourtant, les conflits se sont multipliés. Selon l’*European Platform for Conflict Prevention and Transformation*<sup>1</sup>, depuis 1945, plus de 200 guerres ont vu le jour dans le monde. Un très grand nombre d’entre elles ont été des guerres internes, mais leur impact sur les pays voisins n’a pas été encore totalement étudié. On peut dire, sans beaucoup se tromper, que ces guerres bien qu’internes, concernent tous les êtres humains qui ne peuvent demeurer indifférents devant les quelques 22 millions de morts qui en ont été victimes<sup>2</sup>.

C’est la raison essentielle pour laquelle, le Comité de rédaction du FORUM a souhaité évaluer le phénomène de la prévention des différends dans les relations internationales. Fidèle à sa vocation, et bien que partant des conflits de nature publique (conflits entre Etats), le FORUM a souhaité voir aussi comment la prévention des différends se fait dans les relations privées. Or, dans ce domaine aussi, il n’est plus suffisant de parler de modes alternatifs de règlement des différends (ADR), mais il convient désormais de parler de prévention si l’on veut être pris au sérieux. En procédant à cette évaluation, nous avons cherché à donner des exemples pris dans des expériences concrètes. Le choix n’a pas été facile. Mais le résultat montre la diversité des mécanismes mis en place. Un trait commun semble aussi se dessiner: chaque mécanisme décrit montre qu’il est

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<sup>1</sup> Voir, <http://www.euconflict.org>.

<sup>2</sup> Ces chiffres étaient donnés par le site internet euconflict.org en avril 1998.

encadré avec précision par des règles relativement détaillées, laissant pourtant une assez large flexibilité aux personnes appelées à mettre en oeuvre ces mécanismes.

La première constatation à laquelle nous sommes parvenus a trait à une donnée sociologique. Depuis que les hommes vivent en société, des litiges ou conflits potentiels sont en germe entre eux. Toutes les sociétés ont développé des modes de règlement de ces litiges. Les sociétés premières avaient recours aux sages qui, du fait de la confiance que leurs concitoyens leur accordaient, pouvaient régler la plupart des conflits à un stade très précoce. Partant, les litiges, dans leur plus grand nombre, ne se cristallisaient pas de manière aussi agressive et complexe qu'au sein des sociétés actuelles. On retrouve cette notion de confiance dans certains des mécanismes décrits ci-après. Les personnes auxquelles sont confiés les processus de prévention des conflits, au moins dans le domaine privé, sont généralement des experts, techniciens et non pas des juristes. Les parties qui s'opposent verront donc leurs intérêts concrets pris en considération plus que leurs droits, au sens strict et juridique de ce terme, sans que ces derniers soient pour autant complètement absents du débat. Sinon, on aboutirait évidemment à une parodie de justice.

Une seconde donnée nous a paru également aller de soi: la prévention est toujours préférable à la guérison. En matière de litiges, l'interdépendance grandissante des personnes, entités, peuples ou communautés exacerbe les litiges. Il en résulte un coût, notamment humain, qui dépasse très vite les enjeux. De plus, la continuité des relations s'avère indispensable car tous les protagonistes auraient trop à perdre s'ils devaient cesser d'agir ensemble.

Or, les modes de règlement des différends traditionnels ont vécu une évolution ascendante puis descendante en termes de judiciarisation. C'est, en effet, l'extrême complexité et agressivité des procédures judiciaires, entraînant l'insatisfaction des justiciables qui a incité ces derniers, lorsqu'ils le pouvaient (c'est-à-dire souvent lorsque l'Etat les y autorise) à avoir recours à des modes alternatifs de règlement des différends parmi lesquels on peut citer l'arbitrage, la médiation et la conciliation. Mais, l'histoire a montré que ces méthodes, à leur tour, devenaient de plus en plus encadrées, procédurales et perdaient ainsi leur nature initiale informelle.

On peut donc penser que, au moins dans la sphère privée, l'arrivée en force de la prévention des litiges, contractualisant le règlement des différends à un stade très précoce où il ne se trouve encore qu'à titre de potentialité, est dû encore une fois à une nécessité d'éviter la complexité, et donc le coût, du contentieux traditionnel.

Force est de reconnaître, cependant, que l'image est moins nette qu'elle ne semblait l'être de prime abord. En effet, si certains des mécanismes décrits par les auteurs qui ont accepté d'écrire pour le FORUM montrent que la prévention fonctionne bien, certaines contributions peuvent faire douter de leur succès.

Ainsi, la prévention ne serait qu'un premier stade dans le règlement des différends, n'empêchant pas le recours ultérieur à l'arbitrage ou, même, rendant celui-ci encore plus nécessaire et inévitable.

De surcroît, les mécanismes de *Dispute Review Board* ou de *Partnering* sont devenus d'une telle sophistication que l'on peut se demander si, inventés par des non-juristes à l'origine, ils n'ont pas été "annexés" par les juristes qui se voyaient ainsi évincés d'une partie de leur travail. Certes, cette présentation est un peu caricaturale. Mais elle a le mérite de demander aux juristes de faire preuve d'un peu de retenue pour ne pas transformer des phénomènes a-juridictionnels, nécessaires dans toute société, en une simili justice insatisfaisante car ne présentant pas les mêmes garanties que la "vraie justice".

Est aussi décevante l'image que donne la prévention des conflits entre Etats. Un auteur à qui nous demandions d'écrire sur le sujet, nous a déclaré qu'il n'y croyait pas sans souhaiter être nommément cité. En revanche, l'arbitrage, dit-il, a des chances de remplir une véritable fonction de justice. Quant à l'exemple du Kosovo, l'interview de Monsieur Max van der Stoel, nous donne un début d'explication sur l'échec manifeste de toute prévention. On peut même se demander si, dans ce cas, les mesures nécessaires ont été réellement tentées pour prévenir ce conflit.

Chaque lecteur dira pour lui-même, après avoir lu les contributions qui suivent, si la prévention des différends est une nécessité ou une de ces inventions<sup>3</sup> dont on se passerait fort bien. Nous pouvons révéler un secret inhérent aux deux auteurs de ces lignes: l'un en est un fervent partisan, l'autre, sans nier son utilité dans son acception première, souhaiterait ne pas la voir institutionnaliser.

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<sup>3</sup> Nous utilisons le mot "invention" au sens de découverte de quelque chose de préexistant mais qui était demeuré caché, comme on invente un trésor. En effet, comme nous l'avons dit, la prévention des différends existe de tous les temps, mais elle a été récemment re-découverte et portée au pinacle.

## The Dispute Review Board – Wishful Thinking or Reality? <sup>1</sup>

PIERRE M. GENTON\*

### The DRB: A Complementary Requirement to Litigation

Dispute Review Boards (DRBs) are very appropriate means for solving disputes in the course of the project development. They have been mainly used in long-term contracts but could also be of interest on smaller projects having a shorter life duration. This method of solving disputes is not time consuming, remains flexible (if used properly), is efficient for solving disputes at an early stage, protects the commercial relationship and the image of the parties, and is cost-effective. The success rate of the DRB all around the world is impressive.

The DRB concept is a flexible approach which entirely fits in with ADR techniques and other types of legal proceedings. It has been developed for large long-term contracts, but can also find its application for smaller contracts. The idea of a mini-DRB with a single panel member is another alternative for small and local projects.<sup>3</sup>

The use of the DRB concept means that the parties will have to deal in good faith and should be ready to reconsider their positions in the light of the DRB's recommendations if problems arise during the performance of the contract. Such positive attitudes by parties are not always present, but more and more organizations should be able to see their own interests in following the requirements of the World Bank, the Asian Development Bank, and the FIDIC, which all favor the use of DRBs.

A DRB should never be considered as an alternative to arbitration, although it is true that the DRB is a procedure which limits the number of disputes referred to legal proceedings. Every efficient and fair lawyer who protects the legitimate interests of his client will try to limit costly and lengthy legal proceedings, and the DRB can help to achieve this goal.

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<sup>2</sup> A more complete exposition of the ideas presented here was given in a paper titled "The Role of the DRB in Long Term Contracts", presented at The International Bar Association in Düsseldorf on 13 November 1998.

<sup>3</sup> Dan T. Pyle & Jack R. Jamey, "The Mini DRB", *DRB Foundation Forum*, July 1998.

### Life Without a DRB

One way to start analyzing the role of DRBs in long-term contracts is to have a quick look at the development of such projects without a DRB. Over the past years, the profit and risk margin included in the pricing of large international projects has often drastically decreased for the contractors (decrease of profit, increase of risks) and, more and more frequently, the losses have become severe. If, in the past, contractors were able to have a more flexible or even a more “generous” approach, today it becomes very difficult – if not impossible – for both the contractor and the employer to apportion fairly the unpredictable variations and unavoidable discrepancies of the contract by direct negotiations during the course of the project. As a consequence, the parties often find themselves tied up in endless negotiations throughout the project and are finally compelled to refer a huge case to the competent court or other mechanism. Several reasons explain these negative developments: the market has become more competitive; projects have become larger and more complex; the financing environment is less stable and more sophisticated; the contractual framework can be very complicated (turnkey, design & build, BOT<sup>4</sup> versus BOQ<sup>5</sup> contracts); and increasing uncertainties of a technical, administrative and political nature.

The legal proceedings that the parties are forced to turn to in the end are usually lengthy and expensive. The direct and indirect losses (such as loss of productivity, destruction of commercial ties, loss of image, excessive time consumption of their own employees who cannot perform on other projects) have induced Anglo-Saxon employers and contractors accustomed to litigation to limit the “snowball effect” of claims and to search for efficient and amicable ways to settle disputes in the course of the project (as is often the case, the Americans and the English were the first to innovate in this area). The idea of a panel of independent experts who, on a continuous and regular basis, follow the progress of the project and assist the parties in an early settlement of their dispute, was initiated in the United States on international projects in the 1990s. The US term “Dispute Review Board” was later supplemented in the UK by “Dispute Adjudication Board”<sup>6</sup> (DAB), perhaps because the word “adjudication” implies a more binding effect than “review”. In the following text, no distinction will be made and the term DRB will be used for both systems.

The DRB system is an amicable procedure. It applies not only to long-term

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<sup>4</sup> The term BOT (Build-Operate-Transfer) includes all types of alternatives such as BOOT (Build-Operate- Own-Transfer), BLOT (Build-Lease-Operate-Transfer), BOTT (Build-Operate-Train-Transfer).

<sup>5</sup> Bill of Quantities Contracts.

<sup>6</sup> The NEC contract and the FIDIC Red Book (Test Edition 1998 September 1998).

contracts but also to medium and even small-size projects. The DRB procedure should not be understood as an alternative to arbitration, but rather as a complement to arbitration.<sup>7</sup> It is, however, indisputable that the purpose of the DRB is to limit the number of cases ultimately referred to arbitration.

Quite a number of DRBs have been implemented over the past years and most of them have been successful. This success was perhaps not always due to the parties being convinced and/or satisfied by the recommendations of the DRB, but because they felt that the DRB had helped them to avoid long and costly legal proceedings, and/or had taken over a difficult decision which they themselves would perhaps have been unable to make (for example, because of lack of the necessary competence).

It is also a fact that an increasing number of financing institutions, such as the World Bank and the Asian Development Bank, recommend or even impose the DRB system, even if some governments, courts and arbitration institutions still show some reluctance and describe the DRB as merely an alternative to the excessively costly legal proceedings in the United States. The recent initiative of the FIDIC<sup>8</sup> to include a Dispute Adjudication Board (DAB) in the main text of their General Conditions and to reduce the influence of the engineer is a significant sign of the importance gained by the DRB in international long-term contracts.

### **The Various Approaches of a DRB**

A single definition of the role of a DRB would be inaccurate, as there are various forms of the DRB. It is a continuous, regular and efficient method for solving problems arising mainly during project implementation: “continuous” because the DRB usually follows the project from the beginning to the end; “regular” because the DRB visits the site at least every four months (witnessing the progress of works, discussing potential disputes, hearing claims, preparing recommendations in the course of the project); “efficient” because of the attractive cost/time ratio (in comparison with other dispute resolution systems) and its success rate. At the same time, the DRB may help to maintain a normal relationship between the parties.

The importance for the parties is to select the appropriate DRB system. The following three categories of DRB may be considered:

*A. The DRB as a flexible and informal advisory panel:* The parties have a preliminary opportunity to refer a potential dispute to the DRB and to seek general advice on matters of principle. The requesting party will submit a short

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<sup>7</sup> Pierre M. Genton, “The DRB/DAB – A True Complement to Arbitration”, *DRB Foundation Forum*, April 1998.

<sup>8</sup> FIDIC: Fédération internationale des ingénieurs-conseils.

presentation/summary of the case (1-2 pages) and the DRB will discuss the matter with the parties during a site visit. The DRB will not issue a written note and will not be bound by any oral statements made during these discussions. In a second step, the same DRB process as indicated under item B will take place and the recommendation issued by the DRB would still not be binding.

*B. The DRB as a formal advisory panel:* The recommendation of the DRB is not binding, but helps the parties in their decision making process. It can even be considered a kind of “scarecrow” if future arbitration proceedings are envisaged. If a party is dissatisfied with the recommendation, it is compelled to notify the other party within an agreed period that it refuses to comply with the recommendation. It is then up to the dissatisfied party to decide whether the case should be referred to legal proceedings.

*C. The DRB as a pre-arbitration and deciding panel:* The decision of the DRB is binding until it is overturned by a court decision and has to be implemented without delay. Usually the dissatisfied party has to notify its disagreement within a defined period and, in some cases, is even compelled to start arbitration proceedings within a prescribed time. This type of DRB cannot be considered a friendly way of settling disputes, but it still remains more friendly (less adversarial) than formal legal proceedings or arbitration.

Usually it is advisable to start by asking the DRB for a recommendation on matters of principle only, leaving the assessment of the quantum to the parties. The parties are often better equipped for carrying out the calculations, they can perform them faster and at lower cost, and they are given the opportunity to re-discuss and renegotiate this step. If substantial differences subsist on the assessment of the quantum, the most diligent party may either request a punctual assistance or a written recommendation from the DRB in accordance with the contract.

The most convenient time for deciding to put into place a DRB procedure is, without any doubt, before signing the contract. Such a procedure may already be included in the tender documents or mandated by the financing authorities. The parties should consider this issue as an important part in the negotiation of the contract. It is of utmost importance that the DRB be appointed at the contract signature and mentioned *explicitly* in the contract, so that the DRB is immediately operational and available to sort out the first differences that may arise.

### **DRB Versus Arbitration or other ADR Techniques**

It is customary to include the DRB in the rubric “alternative dispute resolution techniques” and to compare the DRB to arbitration. The DRB is actually a complement to arbitration. It should be mandated to issue either a non-binding recommendation or a decision subject to appeal by arbitration.

In the course of the project, the parties, in direct negotiations, may feel compelled to reject a compromise when considering the amounts to be paid. The recommendation issued by the DRB as a neutral third party can be a convenient escape route for the management: it may help to protect an appropriate relationship between employer and contractor, as well as act as a warning for both parties of what might be the outcome in any legal proceedings.

Compared to other ADR techniques, such as mediation, mini-trial, med-arb, etc., the DRB system has the great advantage of following the project step by step, from the very beginning, so it is available to the parties at any moment from an early stage of the dispute. That is, the DRB can take on an advisory role.

The advisory role can be required at an early stage already. The Parties often overestimate their ability to solve a dispute in a negotiation process. Sometimes the responsible manager may need to justify his own case and his behavior in front of senior management, and an opinion issued by the DRB can be helpful in this respect.

Even later on in the course of the project, the DRB can be asked to act at first like an advisory board, for example by discussing some principles of a potential dispute. In the case of a referral, the DRB may be asked to issue just a recommendation on principles, leaving the parties to define the “quantum” and to settle the core of the dispute. This is different from the more formal approach, where the DRB is in the position of a pre-arbitration tribunal as the penultimate means of solving a dispute.

The referral to a DRB near the end or even after project completion may not always be the most appropriate way of solving disputes. Why not use the agreed DRB system at an early stage, why spend money on an inactive DRB? If the project has been developed without the use of a DRB system and the dispute arises at the end of a project, it may be preferable to use a mediation process to resolve the dispute.

In the case of long-term projects with large and complex claims related, for instance, to delays, acceleration of the works, or loss of productivity, the parties may wish – before referring the case to long and costly arbitration proceedings – to have an additional opinion and/or to be sure that all opportunities for an amicable settlement have been exhausted. It is therefore possible to introduce in the contract, instead of a two-step procedure such as DRB and arbitration, a three-step procedure which includes a DRB, mediation, and finally, if necessary, arbitration.

DRB is one of the ADR techniques. It can be integrated into a comprehensive dispute avoidance and settlement system with other ADR techniques. It remains a true complement to arbitration.

## Partnering: The UK Experience

CLIVE SEDDON\*

Partnering or partnership sourcing is a fashionable way of trying to inject some more traditional concepts of straight dealing and good faith into modern commercial relationships. There is some debate over the precise origins of partnering. Most commentators refer to the use made of the technique by the United States Corps of Engineers in a number of public works projects in the late 1980s in an attempt to reduce the number of claims made by construction contractors. Others say its true roots lie in processes used by Japanese business.

In the United Kingdom partnering or alliancing was first employed successfully by the North Sea oil and gas industry due to the need to reduce costs arising out of a drop in the oil price. Due to pressure from major employers, it has been widely adopted by the UK construction industry in an attempt to avoid disputes and thereby build long-term relationships, allowing contractors to improve their margins over time. At the current time, it is being promoted by several Government departments; leading UK and US companies across many industry sectors and by industry bodies, including the Confederation of British Industry, as being a way of re-introducing trust into long-term strategic relationships, ventures and alliances. This has coincided with a trend for longer term commercial relationships such as outsourcing of Information, Communications and Technology (ICT) services and public/private sector partnerships under the Government's Private Finance Initiative.

### A Definition

The concept and definitions of partnering vary from the bland and meaningless, to cosy sales speak, to more helpful descriptions which identify the three key elements of a partnering relationship, such as:

Partnering is a structural management approach to facilitate team-working across contractual boundaries. Its fundamental components are (1) formalised mutual objectives, (2) agreed problem resolution methods and (3) an active search for continuous measurable improvements.

A distinction is sometimes drawn between longer-term strategic partnering arrangements, where the benefits of partnering can be better realised, and project partnering.

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It is not a concept which either stands alone or exists in a form of vacuum. It can be ingrained into and enhance good project management methodologies and preferred supplier arrangements. In terms of successful projects, its manifestations are seen

- at the preparation stage, prior to contract award, where both parties indicate a willingness to partner and this is confirmed at senior management level;
- during an initial workshop which sets the parameters for subsequent workshops, introduces the project team members to one another and most importantly, leads to the identification, and possible agreement of critical success factors. It is generally at this stage that a partnership charter or pledge is drawn up and signed by senior management and project team members. Several other agreed documents are produced concerning, for example, agreed dispute escalation and resolution processes;
- in the evaluation and follow up by both parties as the project and the relationship develops. This stage is often ignored as initial enthusiasm is tempered and milestones loom.

An external facilitator can be used to assist with these processes, particularly where the parties are inexperienced. Although an additional cost, inexperienced parties who have agreed to partner run considerable risks if they do not agree at the outset how the partnering agreement is to manifest itself during the course of the project. Facilitators can be invaluable in educating the parties and laying the foundations for a successful project.

### **Sharing of Risk and Reward**

I have always held the view that the distinction between a genuine partnering arrangement and statements that parties intend to partner in a particular venture, is whether there is a sharing by the parties of risk, combined with rewards if the project is a success, or a sharing of the cost overrun if the perceived risks turn out to be greater than originally anticipated. Without a commercial incentive upon both parties to achieve certain agreed measurable objectives, the partnering relationship will rely upon the good intentions expressed at the beginning of the project set out in the partnering charter, and if problems occur which affect the commercial viability of the project, one of the parties is less likely to work hard for a solution.

The risk-sharing approach depends primarily upon the agreement of costs and targets at the beginning of the project and consequently upon open book pricing by the supplier. Open book pricing is frequently seen in the service level agreement as part of an outsourcing project, with credits being granted to the customer if the supplier fails to meet certain targets. These contracts which are

being concluded for substantial terms, sometimes up to 10 years, are a good example of long-term strategic partnering, where the dependence by each party upon the other is invariably of a business critical nature. As these projects progress there is regular monitoring and evaluation against agreed benchmarks, which can then lead to contractual variations to reflect required changes.

### Legal Implications

One of the fundamental reasons why partnering is increasingly popular is the wish of commercial men and women to avoid disputes which lead to a formalisation of each party's position where a flexible and fluid commercial relationship has previously existed. Where commercial disputes cannot be quickly disposed of, both parties' lawyers are instructed and the contract is then diligently scrutinised for alleged breaches of the agreement.

In the minds of many, lawyers, contracts and disputes are inextricably linked. There is a widely held belief by the many advocates of partnering that it has nothing whatsoever to do with the parties' formal legal relationship. For this reason, side letters are often produced incorporating the partnering agreement, with the terms of the contract remaining unaffected.

Even in industry sectors such as the UK construction industry, where partnering has been employed successfully for some time, appropriate amendments have not been produced for the standard form contracts used by the industry, although it is widely anticipated this will occur in the near future.

The relevance of the debate as to whether, and the extent to which, a partnering arrangement is reflected in a contract crystallises when the parties fall out.<sup>9</sup> If the parties are partnering, it is likely that they will have agreed detailed project management, problem management and dispute escalation provisions as part of their contract. If these fail or extraneous commercial factors make the continuance of the strategic partnership untenable, then a complex dispute can

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<sup>9</sup> The case of *Birse Construction Limited v. St David Limited* (1999) CILL 1494-1498, 12 February 1999 illustrates the effect which the signature of a partnering charter might have upon the contractual relationship between customer and supplier. The judge commented that, although the terms of the partnering charter were not binding (they had not been referred to in the contract nor were they binding in law in their own right), they were relevant as

- “they were clearly intended to provide the standards by which the parties were to conduct themselves and against which their conduct and attitudes were to be measured”
- it could be expected that they would lead to a sympathetic approach to questions of extension of time and of deduction of damages for delay
- an arbitrator or judge would undoubtedly take such adherence to the charter into account in exercising the wide discretion to open up, review and revise which is given under the particular contract in issue.

arise. In common law jurisdictions, the most difficult issue in these circumstances is whether an express or implied duty of good faith exists, or existed, between the parties during the course of the project. As yet this has not been tested by the Courts in the context of a partnering arrangement, which in itself is a testament to the success of many such ventures. The danger for suppliers or contractors where such a duty is found to exist, however, is that they will have to open up every commercial and financial aspect of the project for inspection by the customer and ultimately the Court. In civil jurisdictions where obligations of good faith are implicit in commercial relationships and where the Courts are more ready and able to look outside the contract for extraneous circumstances which shed light upon the parties' true intentions at the time of contracting, this is not of such concern.

I consider that the current debate concerning the legal implications of partnering arrangements will soon be resolved for two reasons. First, most substantial companies regularly review their procurement processes and the basis upon which they contract to take account of changes in the law and practice, and of poor commercial experiences suffered by the company in the past. As partnering becomes more widespread, clients in particular will seek to incorporate certain elements into the contract to reduce the possibility of supplier claims. In the UK and international construction industry, for example there exist many standard form contracts which are regularly updated to take account of industry and business process developments.

Secondly, even the most watertight of contracts and the most smooth running of projects can come to grief in a world of rapid technological change where contracted solutions can become redundant overnight due, for example to a merger or acquisition or where a cheaper alternative solution suddenly becomes available. When this occurs, pressure is placed on many projects and disputes can often arise.

Ultimately a dispute will arise concerning a long-term partnering agreement which will fall to be considered by the Courts. It is at this stage that the current debate concerning the legal implications of partnering arrangements is likely to be determined.

## **The Role of the International Expert Panel in the Environmental Management of the Øresund Fixed Link**

JOHN S. GRAY\*

In Scandinavia the environment has a much higher priority than in most other regions of the world. This is due to having relatively undisturbed nature, a low population density and a high living standard where people are prepared to spend money on protecting the environment. Thus any major construction activities affecting the environment have a high political profile. This was the case with the Øresund Link. On 23 March 1991 the Governments of Denmark and Sweden signed an agreement to build a fixed link, across the Sound (Øresund) connecting the metropolitan areas of Copenhagen and Malmö by a 4-lane motorway and a 2-lane railway link. This agreement was ratified by the Governments 24 August 1991. In making this agreement, the Governments made conditions. Firstly, that the Link should lead to unchanged water flow in the Øresund, (the body of sea between Denmark and Sweden through which water flows to and from the North and Baltic Seas). Secondly, that there should be unchanged oxygen and salt supply to the Baltic Sea, a so-called “zero” solution. If these conditions were met then there would be little chance of there being negative effects on the biological systems of the Øresund or the Baltic Sea. Thus a precautionary approach was envisaged. The construction of the link was a political “hot potato” since there were loud protests from the Green movements who highlighted the possible negative effects on both the Øresund and more importantly on the Baltic Sea. The Baltic is particularly vulnerable in that it is atidal with limited water exchange with the North Sea and has shown increased signs of eutrophication with large areas of the deep basins lacking oxygen. In addition, the important cod fisheries in the Baltic Sea are dependent on salty water entering from the North Sea.

In October 1992, the two Governments appointed an International Expert Panel to evaluate the environmental consequences of such a link. The members appointed were all scientists and came from Germany (4 members), Finland (2 members), Poland (1 member), Estonia (1 member), UK (2 members) and I was appointed as chairman. Thus no members were appointed from either Denmark or Sweden. From 1992 until 1995, the Panel reported directly to the two Ministers and not to institutions within each country. In November 1995, the

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mandate of the Panel was changed to that of an advisory function to the environmental authorities within Denmark and Sweden.

During the first period, the Panel operated by preparing written reports which were released to the press and public at the end of each meeting. These reports were then used by the environmental authorities and led to incorporation of the Panel's recommendations into legislation. NGOs were not involved directly in the work of the Panel but were invited to submit reports and to comment on the reports produced by the Panel.

The Panel began work by having its first meeting 22-26 February 1993. We were concerned with ensuring the environmental goals of a zero solution for salt and water flow and minimising environmental damage in the Øresund area by the construction. At this first meeting, we considered the placement of the link. The starting point for the link on the Danish side is near Kastrup airport, which precluded a bridge for safety reasons. The link starts with a tunnel of 2.5 to 3 km length and then emerges onto an artificial island of 2.5 km in length where the link becomes a bridge for the remaining 8 km to the Swedish coast. The artificial island was originally placed so that the tunnel was as short as possible due to the high building costs. This resulted in it protruding into a major channel and we felt this would severely affect water flow. Thus our first recommendation was to move the artificial island 1950 m towards Sweden in the lee of an existing island where it would not impede water flow. The increased cost of doing this was estimated at DKK 1,000 million. Our recommendation was immediately accepted by both Governments and incorporated into law (see below). Thus costs were not the primary issue and the environment received precedence.

A second meeting of the Panel was held in April 1993, where we considered the water flow problems and how to ascertain how the "zero solution" could be met. This is a tricky problem because the alterations in water and salt flow caused by the bridge and artificial island were predicted to be smaller than day-to-day variations in water and salt flow. The solution was to develop a mathematical model, which mimicked the flows and against which dredging could be done to compensate for reductions in flow and so achieve the "zero solution". The Panel accepted the idea of a zero solution but reported that the models were inadequate for the task and recommended that two independent models be constructed which were three-dimensional. Again the recommendation was accepted and over time two models have been developed which are used to ensure that the zero solution is achieved. This is a costly solution but ensures that the environment is at the forefront of considerations and not costs.

The requirements for the approval of the environmental aspects were very different in the two countries. The Danish Public Works Act of March 1991 required the Minister of Transport to approve quality objectives as well as a monitoring and control programme for the link. During the reading of the Bill

it was decided to hold a public hearing prior to such approval. The Danish public hearing on the detailed design of the link and the environmental quality objectives was held in 1993 and in December 1993 the two ministries drew up a general report and submitted proposals in respect to the proposed environmental quality objectives, monitoring and control programme and design of the alignment. In July 1994, the Danish Ministry of Transport approved the overall design and alignment on the condition of unchanged water flow in the Øresund and oxygen and salt supply to the Baltic Sea, the so-called "zero" solution. Finally, on 28 March 1995, the Danish Government approved the quality objectives and the monitoring and control programme in a report, which included the Panel's recommendations, issued by the Danish Ministries of Transport and Environment and Energy.

In Sweden, the environmental requirements had to be considered by the Water Court and the Licensing Board for Environmental Protection, followed by application for a concession in accordance with the Water Rights Act, Act of Management of Natural Resources and the Environment Protection Act. The final approval in Sweden came on 30 June 1995 in judgment No. 100-260-92 of the Licensing Board for Environmental Protection and the Swedish Water Courts Judgment No. DVA 37/95 Case No. DVA 45/92 in Växjö on 13 July 1995. The Panel's recommendations were included in the law that applied to construction of the link. Thus there was a time lag of over two years from approval of the link to defining the environmental criteria.

The other major recommendation made at the Panel's second meeting was that the most serious environmental concern for the biological systems was the amount of sediment spilt into the water during dredging operations. The shallow Øresund contains extensive eel grass and mussel beds, which are used as food by birds, notably ducks, and geese, which use the island of Saltholm. Saltholm is a protected area for birds and of international significance, defined as containing over 1% of the European population of a given species. The Panel considered carefully the advice given by the consultants and constructors and recommended that a spillage limit of 5% over the whole project be used. We felt that if such a limit could be achieved there would be no measurable effects on the biological systems. The spill limit was much below that which the constructors were used to of 25%. When the Danish and Swedish Governments eventually agreed on the environmental conditions in 1995, the spill limit again was a legal requirement with which the Øresund Konsortium had to comply. The setting of this limit reflects a precautionary approach. The dredging industry was seeking a 25% limit. From the baseline survey, predictions of spillage rates and modelled dispersion made by the environmental consultants, the Panel believed that a 10% spillage would lead to increased turbidity, reductions of light in the water and damage to eelgrass beds and mussels. Thus, taking a precautionary approach, we recommended a 5% spillage rate. Such a

low spillage rate had never been applied before to any large construction activity in the coastal environment.

Such a tight environmental requirement required a complex system of monitoring to ensure that the conditions were upheld, and equally importantly tight control of the dredging operations. The Panel recommended that acoustic monitoring of spillage be used and this was taken up and incorporated in the monitoring programme. In addition, the Panel recommended that the artificial island be constructed by first building retaining walls to contain spillage. The Øresund Konsortium drew up tight controls over the dredging operations, which required dredgers to report on the type of sediment being dredged and amounts of spillage on a daily basis. One measure of the success of the Panel's recommendations can be given by the winter of 1996, when most dredging was being done. This winter was severe with much ice. The dredgers included the then largest dredger in the world, which could easily break through the ice and continue operations. It was not allowed to do this for a 10-day period, since the control programme measuring the actual spillage could not be done. Since the dredger was costing approximately \$50,000 a day, measuring compliance with the environmental conditions was not a trivial exercise.

The Panel has made recommendations on feedback monitoring where effects measured on biological systems led to immediate changes in the dredging routines. These have not needed to be put into effect because the spillage rates, with 95% of the dredging completed, have been around 4%. Surveys of the biological conditions have shown no measurable effects outside the immediate areas where the link is being built. Thus this has been one of the most environment-friendly large-scale constructions done anywhere in the world.

Whether or not the zero-solution has been achieved cannot be finally tested until all the bridge piers are in place. The measurements and models will be used to calculate the final amounts of compensation dredging needed. The zero-solution will certainly be achieved.

The lessons from this study are that an independent panel of experts can achieve environmentally friendly construction on one of the largest construction projects ever done in coastal areas of Europe. The Panel, because of its independence from the two national political systems could make truly independent recommendations. Yet the key aspect is that the Panel's recommendations were taken to the respective legislative assemblies by the environmental authorities in Denmark and Sweden. These recommendations were made into legal requirements for the constructor to follow (the Danish Ministry of Transport requirements and the Swedish Licensing Board for Environmental Protection and the Swedish Water Court's Judgment). Likewise, without the willingness of the Øresund Konsortium to loyally follow-up the recommendations and put into place an environmental management system again the success would not have been achieved. Another key aspect is that cost was not brought in as a hindrance to ensuring an environmentally friendly construction. This is

unusual but reflects the public awareness of environmental issues in Scandinavia and the willingness of the two Governments to back up the scientific opinions of experts to ensure that a precautionary approach was taken throughout the project.

At the beginning of the process, at the end of the Panel's first meeting, there were 51 journalists and four television teams at the press conference. Following the last few Panel meetings there have not even been reports in the press. Since there are no negative environmental effects of the link, it is no longer of interest to the press.

## **Non-Compliance Procedures in International Environmental Law: The Middle Way between Diplomacy and Law**

MAAS M. GOOTE\*

### **1. Introduction**

Each treaty in force is binding upon the parties to it and must be performed by them in good faith. The rule of *pacta sunt servanda*, codified in Article 26 of the Vienna Convention on the Law of Treaties, is one of the undisputed fundamentals of international law. If allegations that treaty provisions are violated result in a dispute, the parties to it are obliged to settle the controversy through peaceful procedures. International law provides a wide array of such procedures. For instance, the UN Charter, in Article 33, refers to well-known diplomatic and legal methods such as negotiation, enquiry, mediation, conciliation, arbitration and judicial settlement. It is especially within the latter two legal methods of dispute settlement that the concept of State responsibility is applied. Though often complex in its application, the basic principles of State responsibility are clear. There is an internationally wrongful act of a State when conduct consisting of an action or omission is attributable to the State, and that conduct constitutes a breach of an international obligation of the State. In turn, every internationally wrongful act of a State entails the international responsibility of that State.

Multilateral environmental treaties also dutifully incorporate many of the procedures for dispute settlement referred to above. However, in practice, States seldom make use of these procedures. Arguably, the reason for this situation is that the traditional procedures for dispute settlement and the concept of State responsibility are ill-suited to deal with cases in which States do not meet the obligations that they have accepted under international environmental treaties. The response has been the incorporation of so-called non-compliance procedures in international environmental treaties. This essay will outline the reasons why and the manner in which non-compliance procedures have developed.

### **2. The Gap between Theory and Practice**

There is a significant gap between the theory of law and the treaty practice of

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international environmental cooperation. Put simply, State responsibility (and the legal methods for dispute settlement through which it may be realized) and international environmental law are not the best of friends. This animosity is the result of different circumstances. It falls beyond the scope of this contribution to discuss these circumstances in detail. Brief mention of five such circumstances will have to suffice.

First of all, States are generally reluctant to take recourse to an international tribunal and to engage in a legal confrontation, and this may be especially true where environmental issues are concerned. Most (alleged) occurrences of non-compliance are simply not considered to be grave enough to warrant such a step. Put differently, recourse to an international tribunal may be considered disproportionate to the violation. This has resulted in a situation in which there is little inter-State jurisprudence available. Where in national, and in European law, the courts fulfill an essential task by reviewing and interpreting acts of government, the role of international courts in the practice of international law is relatively modest.

Secondly, it is often difficult to establish the necessary causal link between a specific act or omission, and environmental damage.

A third circumstance relates to the characteristic of international environmental obligations. Many environmental treaties regulate issues of common interest. State responsibility and dispute settlement procedures on the other hand take a bilateral perspective. Recently, Vice-President Weeramantry of the International Court of Justice addressed this lacuna in his separate opinion in the case concerning the Gabčíkovo-Nagymaros project:

We have entered an era of international law in which international law not only serves the interests of individual States, but looks beyond them and their parochial concerns to the greater interests of humanity and planetary welfare. In addressing such problems, which transcend the individual rights and obligations of the litigating States, international law will need to look beyond procedural rules fashioned purely inter partes litigation. (...) International environmental law will need to proceed beyond weighing the rights and obligations of parties within a closed compartment of individual State self-interest, unrelated to the global concerns of humanity as a whole.

Related to the above is the consideration that a large number of environmental treaty obligations are not reciprocal. Traditionally, a treaty provision creates reciprocal rights and obligations between parties. In general, this implies that when party A does not comply with an obligation vis-à-vis party B, the latter is no longer bound by that obligation vis-à-vis party A. Most international environmental obligations, however, are of a different nature. Non-compliance by one party to a treaty can not be taken to imply that another party to that same treaty is relieved of its duty to comply. Almost all contemporary

environmental treaties contain non-reciprocal obligations.

Fourth, the issue of responsibility in most cases arises after environmental damage has occurred. While it may at that point be useful to settle claims or deal with monetary compensation, the preventive and precautionary objectives of contemporary environmental treaties also require other approaches.

Finally, numerous environmental treaty obligations are formulated in unclear or ambiguous terms or merely set general policy objectives. As a result, they lack a clear normative content. This deficit makes it hard to use these obligations as a standard against which to test and review State conduct. Several circumstances lie at the root of these vague or ambiguous provisions, including (i) the adoption of treaty texts or decisions by Conferences of the Parties on the basis of consensus; (ii) the use of framework treaties that require further normative development through additional protocols; (iii) the restricted, but ever shifting, knowledge base of science that translates into necessarily open-ended or flexible provisions; and (iv) the unclear character, both qua substance and qua legal status, of the products of the (subsidiary) bodies created by the convention.

### **3. The Dilemma**

The developments described above shape the dilemma of environmental treaties and their parties. On the one hand, State responsibility and the methods for dispute settlement are not considered to be the appropriate “tools” for securing compliance with treaty obligations in the context of international environmental cooperation. On the other hand, States increasingly realize that a system of compliance control will contribute significantly to the success of a treaty. How then can multilateral environmental treaties deal with the issue of compliance now that the “traditional” tools provided by international law do not provide an appropriate answer?

Several conditions for such a system of compliance are clear. It should be able to work with rules that are open to different interpretations. It should be able to operate in a dynamic regime that is in a continuous stage of development. Compliance control should not be ad hoc, but should be an on-going process. It should be sensitive to often conflicting political and economic interests. Though these interests should be taken into account, a compliance system should, at the same time, have a certain level of predictability and procedural transparency to be considered legitimate and fair. In short, a system of compliance control should always have two seemingly contradictory objectives: flexibility and stability.

### **4. Non-Compliance Procedures**

Several multilateral environmental agreements have put in place, or are contemplating the establishment of, a system of compliance that tries to accommodate the conditions described above. These so-called *non-compliance*

*procedures* do indeed try to find a compromise between flexibility and stability. The diplomatic and non-confrontational aspects of these procedures provide for the required flexibility. The procedural rules and safeguards incorporated in these non-compliance procedures try to provide for stability. The non-compliance procedure thus holds a compromise between diplomacy and law.

Examples of treaties in which a non-compliance procedure is in operation, or under preparation, are the Montreal Protocol on Substances that Deplete the Ozone Layer, the ECE Convention on Long-Range Transboundary Air Pollution, the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, and the United Nations Framework Convention on Climate Change and its Kyoto Protocol.

The non-compliance procedures under these conventions are not identical. It is, however, possible to outline some general characteristics, based to a large extent on the Montreal Protocol, under which a non-compliance procedure has been in operation for several years.

#### *4.1 The Implementation Committee*

The non-compliance procedure is executed by a small, standing committee, often called the implementation committee. The committee under the Montreal Protocol has ten seats, which are designated to parties through a system of rotation. Members are not elected in their personal capacity, but represent their governments. The mandate of such a committee is to consider (alleged) situations of non-compliance, with a view to find an amicable, non-confrontational solution. Measures proposed by the implementation committee have to be sanctioned by the Conference of the Parties, and are not legally binding upon the party (or parties) concerned.

From an analytical perspective, each individual case before the committee may run through three different stages. Each of these will be briefly discussed in the next subparagraphs. Subsequent paragraphs will discuss how the procedure may be initiated. The final paragraph will raise a number of legal questions that arise as a result of the operation of non-compliance procedures.

##### *4.1.1 The First Phase*

In the first phase, the committee reviews the national reports of parties. Especially when a committee is new and trying to establish its legitimacy, it will focus primarily on the procedural aspects of reporting requirements. These procedural aspects can be reviewed in a fairly objective way, since it is evident which national reports are not submitted, or submitted too late. Moreover, when templates or clear formats for national reports are in place, omissions or lacunae in individual reports are relatively easy to identify. But there are other reasons why review of national reports is important to the work of a non-compliance committee. Though some mandates of non-compliance committees include the possibility to undertake information gathering in the territory of

parties – and often only upon the invitation of the party concerned – in practice the committee's work is completely dependent on written information. The bulk of that information is provided by the parties themselves, through their national reports. Scrutinising these reports, critically and objectively, is therefore fundamental to the work of a compliance committee. This approach will also enable the committee to identify impracticalities or gaps in the treaty rules on reporting, and to propose improvements in this regard.

#### 4.1.2 The Second Phase

When a national report is not submitted, or does not comply with the rules on reporting, the committee will raise the issue with the party in question. These communications or requests for clarification form the second phase. In first instance, these requests relate to the reporting requirements as such, but often irregularities in reporting signal difficulties with regard to the implementation of other treaty commitments. When the work of the committee lays bare these problems, it enters more directly into the issue of compliance with primary obligations of the convention. When the committee finds that a State is in non-compliance with a treaty obligation, conclusions in this regard are often made in a rather subdued, matter-of-fact manner. The main objective of the committee in this phase of the procedure is to identify and address the reasons for non-compliance. It does so by holding consultations with government representatives and with representatives of the appropriate international funding institutions, implementing agencies and development organizations. The committee may, for instance, inquire whether a national plan is in place, or whether funds or technical capabilities are lacking. With these consultations the committee informs itself as to the factual situation or problems within the State whose compliance is at issue. Based on its findings, the committee will make proposals that aim to improve national implementation and correct non-complying behaviour. Such supporting measures may for instance include assistance for the collection and reporting of data, technical or financial assistance, or technology transfer. Since the country in question is often given a period of time to implement these proposals, the case will remain on the docket of the committee for future review.

#### 4.1.3 The Third Phase

In a possible third phase, the committee's work will have a less supportive character. The committee will contemplate harsher measures when no tangible improvements are made, despite, for instance, the assistance offered by international agencies, when a State is reluctant to co-operate with the committee, or when no bona fide efforts are undertaken to implement the previously proposed measures. The content of these harsher measures depends on the mandate of the committee. These measures may, for instance, include issuing cautions, or suspension of specific rights and privileges under the treaty in question.

#### *4.2 Initiating the Procedure*

Taking the Montreal Protocol as an example, both the Secretariat and the Parties can initiate the procedure. Parties can do so with regard to their own compliance, but also with regard to compliance of another party. There are thus three scenarios in which compliance problems can be brought to the attention of the implementation committee.

With respect to the mandate of the Secretariat, the non-compliance procedure under the Montreal Protocol provides the following:

Where the Secretariat, during the course of preparing its report, becomes aware of possible non-compliance by any Party with its obligations under the Protocol, it may request the Party concerned to furnish necessary information about the matter. If there is no response from the Party concerned within three months or such longer period as the circumstances of the matter may require or the matter is not resolved through administrative action or through diplomatic contacts, the Secretariat shall include the matter in its report to the Meeting of the Parties ... and inform the implementation committee accordingly.

The Secretariat receives the national reports and is closest to the information relevant to the committee. Practice so far has shown that the committee bases almost all its work on the Secretariat's synthesis of the national reports. All cases that have been before the implementation committee of the Montreal Protocol have found their roots in the Secretariat's reports. That makes the Secretariat the most important actor within the non-compliance procedure, next to the committee itself. As a result, the task of the Secretariat has gone beyond that of mere administrative support, and now includes active involvement in the system of compliance control. It is also interesting to note that the non-compliance procedure does not impose a procedural constraint as to the source of information on which the Secretariat bases its concerns regarding possible non-compliance of a party. Thus, its sources of information are not restricted to national reports and may include information brought to its attention by, for example, non-governmental organizations.

Parties can also initiate the non-compliance procedure. In relation a Party's own compliance problems, the non-compliance procedure under the Montreal Protocol provides:

Where a Party concludes that, despite having made its best, bona fide efforts, it is unable to comply fully with its obligations under the Protocol, it may address to the Secretariat a submission in writing, explaining, in particular, the specific circumstances that it considers to be the cause of its non-compliance. The Secretariat shall transmit such submission to the Implementation Committee, which shall consider it as soon as practicable.

Finally, Parties can submit “reservations” regarding another Party’s implementation. These concerns are in first instance communicated to the Secretariat. The Secretariat will inform the party whose implementation is at issue, the latter being given a three months period, or longer when the circumstances so require, to react. The Secretariat will then hand over the correspondence to the Implementation Committee.

### **5. Some Observations and Legal Questions**

There is still too little practice available to draw general conclusions as to the role of non-compliance procedures in international environmental treaty law. The signals from the Montreal Protocol, however, are hopeful. It is no longer considered taboo to single out individual parties and to address their non-compliance. Where the traditional settlement mechanisms incorporated in environmental agreements have been dormant, non-compliance is now dealt with on a continuous basis. This also enables parties to deal with incidents of non-compliance that had previously been considered not serious or grave enough, for political reasons or otherwise, to warrant recourse to third-party settlement. Moreover, with an implementation committee, a standing forum is established with the potential to clarify and interpret treaty norms. In addition, the non-compliance procedure circumvents legally complex issues, such as, for instance, who is the “injured State”, and provides an avenue to go beyond individual rights and bilateralism. In a sense, the implementation committee establishes a forum in which the common interests of the community of parties to the treaty can be addressed. Moreover, the non-compliance procedure fits into the approach of on-going and “hands-on” management, that increasingly governs the way States deal with the implementation and development of environmental treaties. In this approach, parties consider it more opportune to correct occurrences of non-compliance and improve the treaty regime, than to make legal claims and counter-claims against each other.

At the same time, many legal questions remain. An important question concerns the relationship between the traditional dispute settlement mechanisms and the non-compliance procedure. All non-compliance procedures clearly state that they shall apply without prejudice to the operation of the dispute settlement procedures laid down in the treaty under which the procedure operates. How does this affect the concepts on which treaty law is based, such as, for instance, State responsibility? Put differently, what is the status of a statement from an implementation committee that a party is in non-compliance? Can such a conclusion be brought forward as an argument, or as “evidence”, in traditional procedures, such as international arbitration or judicial settlement? Can a party, engaged in these traditional procedures, use the non-compliance procedure as a ground for justification in case it has brought its own non-compliance to the

attention of the implementation committee? Similar questions arise with regard to the relationship between the non-compliance procedure and settlement mechanisms in other treaties or organizations. For example, to what extent can a conclusion of non-compliance reached by an implementation committee, and the arrangements made between the committee and that party, play a role in the dispute settlement procedure under the WTO?

Another aspect of the relationship between non-compliance procedures and traditional dispute settlement mechanisms relates to the issue of standing. In the non-compliance procedure, one of the "parties" is almost always the Conference of the Parties as a whole. It is conceivable that a party, found to be in non-compliance and confronted with certain measures which it finds unacceptable or even illegal, might wish to pursue the case before an arbitral tribunal or international court. Who in that case will be the other party, or parties, in such proceedings?

Regardless of the answers to these questions, it is clear that the non-compliance procedure provides solutions to non-compliance problems, compatible with contemporary practice of environmental cooperation. Given the disuse of the more traditional methods of dispute settlement, non-compliance procedures provide a welcome innovation in international environmental treaty law.

## Avoidance and Settlement of Disputes – the World Bank’s Approach and Experience

IBRAHIM F. I. SHIHATA\*

### I. Disputes in the Application of the Bank’s Charter

The World Bank<sup>10</sup> has a built-in system for resolving disputes among its member countries, or between any of them and the Bank, that arise out of the application of its constituent charter, the Articles of Agreement (“Articles”). According to these Articles, any question of interpretation of their provisions shall be submitted for the decision of the Bank’s own Board of Executive Directors (initially consisting of twelve, but now including twenty-four members). This decision is taken by simple majority and is subject only to possible appeal before the Bank’s Board of Governors by any member country.<sup>11</sup> In the event of an appeal, the Bank may, if it deems it necessary, act on the basis of the decision of the Executive Directors until the appeal is decided upon.<sup>12</sup> Decisions by the Board of Governors, where every member country has a seat, are also taken in this respect by simple majority. They, as well as decisions of the Executive Directors that have not been appealed, are final and binding on the Bank and its members. In practice, no appeal has ever taken place from a decision of the Executive Directors on the interpretation of the Articles; on the one occasion when an appeal was threatened, it did not materialize.<sup>13</sup>

Opting for a high-level internal mechanism where all members are represented by their appointed or elected Executive Directors<sup>14</sup> was intentionally preferred over the typical method adopted for non-financial UN agencies (where resort to

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<sup>10</sup> The term “World Bank” as used here covers the International Bank for Reconstruction and Development (IBRD), established in 1946 and the International Development Association (IDA), established in 1960. References are made to the Articles of Agreement of the IBRD which are identical in this respect to those of IDA.

<sup>11</sup> IBRD Articles of Agreement, Article IX, Sections 1 and 2.

<sup>12</sup> *Id.*, Section 2.

<sup>13</sup> After the Board of Executive Directors reached its decision in 1986 on the standard of value of the IBRD capital, one Executive Director indicated that his authorities would appeal that decision before the Board of Governors but no further action was taken.

<sup>14</sup> Five Executive Directors are appointed by the five largest shareholders. Other Executive Directors are elected by the other Governors through constituencies which include at present in three cases constituencies of one country each.

the International Court of Justice for advisory opinions is common).<sup>15</sup>

The framers of the Articles did not want the decision to be left to a court of law applying only strict legal principles. Not only do Executive Directors have a specialized knowledge of Bank's operations and needs; they are also expected to reach pragmatic solutions negotiated among themselves, in light of the Articles' requirements and recommendations by Bank Management. (As such a solution cannot reasonably apply to disputes arising between the Bank and a former member country and cannot apply at all during the permanent suspension of the Bank, the Articles require submission of these latter disputes to international arbitration.)

Settlement of disputes through the Bank's Board of Executive Directors provides a pragmatic approach where the underlying interests can be reconciled in a cost-effective way by a resident Board that benefits from extensive support by the Executive Directors' offices as well as by the Bank's General Counsel and the Bank staff as a whole. This method risks, however, great delays if the Executive Directors become unable to reach a decision, especially as their decisions are taken in practice by consensus and rarely by voting.

The issue of choosing a *numéraire* and standard of value for the Bank's capital after the demise of the gold dollar provides an illustration. While a similar issue was resolved at the International Monetary Fund through an amendment of its Articles, which replaced the gold dollar by the SDR, in the Bank, due mainly to the objection of the US to any amendment or interpretation to the same effect, the issue remained unresolved until the gap created by the disappearance of the gold dollar was filled through "interpretation" some twelve years later.<sup>16</sup> In other words, leaving a matter to the Executive Directors to resolve risks subjecting it to the varied interests of member countries, if not to their conflicting political objectives.<sup>17</sup> The practice of the Bank has evolved in this matter. Initially, the Board took interpretation of the Articles as a main function to the point of appointing in its first term (1946-48) a standing Committee on Interpretation. This committee did not survive the first two-year term of the Executive

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<sup>15</sup> See Proceedings and Documents of the United Nations Monetary and Financial Conference at Bretton Woods, New Hampshire, July 1-22, 1944, Vol. I, 428, 588 (1948) (reporting that the drafters of the IMF Articles of Agreement which were later adapted for Bank purposes regarding the issue of interpretation of the IMF Articles wished, by adopting the provision providing for the Executive Directors' powers to interpret the Articles, to keep disputes on interpretation within the setup of the IMF itself).

<sup>16</sup> For details, see Shihata, "The Standard of Value of the Bank's Capital After the Demise of the Gold Dollar", in *The World Bank in a Changing World*, Vol. II, at 71-126 (1995).

<sup>17</sup> Although, as an organ of the Bank, the Board of Executive Directors should not take non-economic considerations in their decisions into account, the Board does not question the motives behind any position taken by an Executive Director.

Directors, during which six interpretations were issued. Since that time, formal interpretations issued by the Board became rare: two in 1948, two in 1950, one in 1951, one in 1964 and one in 1986. The last interpretation was not a clarification of the meaning of the Articles' text, but a filling of the gap resulting from the demise of the US gold dollar. In the case of the IDA, only one formal "interpretation" was issued by the IDA Board on the same issue in 1987. All other conflicts regarding the application of the Articles have been resolved in practice through opinions issued by the Bank's General Counsel and endorsed by the Board. While the General Counsel naturally pays great attention to the legal requirements and methods of interpretation, he is also bound, as a practical matter, to take into account the need for an acceptable outcome under the circumstances of the dispute.

The opinions issued by this writer over 15 years as the Bank's General Counsel have been based on a teleological, rather than literal or subjective, construction of the Articles. They have typically facilitated the emergence of a consensus among Executive Directors in matters that had seemed otherwise difficult to resolve through deliberations, in view, in particular, of the underlying differences in the interests of borrowing and non-borrowing members.

## **II. Disputes under Loan Agreements**

Bank loan agreements contain a standard provision according to which disputes between the Bank and the borrower that cannot be resolved by agreement, i.e., through negotiation, shall be settled by international arbitration.<sup>18</sup> The same applies, where the borrower is an entity other than a member country, to disputes between the Bank and the country where the project is located which is required in such cases to act as guarantor. In all cases, however, such disputes have been resolved in practice through negotiations. Bank borrowing members and other Bank borrowers realize, as much as the Bank does, the value of working together in a cooperative manner towards a fair solution to whatever conflict that may arise in the application of loan agreements.

The fact that Bank lending is a "going concern," and not a single, once-and-for-all transaction, tempers attempts that may otherwise be made to prolong the dispute or to resolve it through adversarial methods. Moreover, the General Conditions applicable to Bank loans are clear in stating that "[t]he rights and obligations of the Bank, the borrower and the guarantor if any under the Loan Agreement and the Guarantee Agreement shall be valid and enforceable in

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<sup>18</sup> See Article X, Section 10.04 of the General Conditions Applicable to IBRD Loan and Guarantee Agreements (Article X, Section 10.03 in the case of IDA) dated 30 May 1995. These conditions are incorporated by reference in every Bank loan agreement with minor modifications if necessary.

accordance with their terms notwithstanding the law of any state or political subdivisions thereof to the contrary.”<sup>19</sup> Against this clear position, the Bank is prohibited from asserting “any claim that any provision of [the] General Conditions or of the Loan Agreement or the Guarantee Agreement is invalid or unenforceable because of any provisions of the Articles of Agreement of the Bank”.<sup>20</sup> Thus, the Bank’s agreements with its borrowers provides the law governing their relationship which prevails over any conflicting text in the borrower’s domestic law or the Bank’s Articles. This facilitates the avoidance and resolution of disputes between these two parties. They have one single instrument to look at for a solution, complemented of course by their strong desire to reach agreement, and the borrower’s realization that it is not in its interest to have a prolonged dispute with the Bank. It is not surprising that the arbitration provisions have never been invoked in practice. All disputes, including the most difficult ones, such as the partition of the outstanding debt of former Yugoslavia among its successor states<sup>21</sup>, and the insistence of Romania, before its transition, on the prepayment of its outstanding Bank loans without paying the required penalty, were resolved through negotiation over a short period of time.

### **III. Disputes Among Member Countries or Between Them and Foreign Investors**

One of the major objectives of the IBRD, as stated in its Articles, is “to promote private foreign investment.” Although the provision indicates that this will be done “by means of guarantees and participations in loans and other investments made by private investors,” the Bank has not limited its promotion of private foreign investment to these types of action. The Bank or its President have occasionally been involved in the mediation of certain disputes (and, in the case of its President, in conciliation efforts as well). Such interventions took place in cases which were either relevant to specific Bank operations or could otherwise

<sup>19</sup> Article X, Section 10.01. This treatment of loan agreements concluded between two subjects of international law as treaties which prevail over the national law of the borrower is an approach that has been followed by the Bank since its inception. The earliest loan agreements of the Bank also referred to the law of New York as a standard for the interpretation of the agreements. This feature of the agreements was soon dropped as some members of the Bank understood it as subjecting the agreements themselves to New York law. See Broches, “International Legal Aspects of the Operations of the World Bank”, in Selected Essays: *World Bank, ICSID, and Other Subjects of Public and Private International Law* 3, 42 (1995).

<sup>20</sup> General Conditions, Article X, Section 10.01.

<sup>21</sup> See Shihata, “Matters of the State Succession in the Practice of the World Bank”, 12 *Development and International Cooperation* 7 (1996).

slow the pace of development in a borrowing country or disrupt its relationship with financial markets. The Bank has also attempted in a number of ways to create a hospitable environment for private business, including foreign investment, in borrowing countries, and to help avoid conflicts between foreign investors and their host government. In addition, the Bank has prepared Guidelines on the Treatment of Foreign Direct Investment for the purpose of proposing rules of the game and a system for the settlement of disputes between foreign investors and their host countries. The Bank furthermore helped to establish the International Centre for Settlement of Investment Disputes (ICSID) and the Multilateral Investment Guarantee Agency (MIGA), by preparing their constituent Conventions and persuading its member countries to join these agencies as members. The Bank has supported ICSID, administratively and financially, since its establishment. Each of these steps is briefly elaborated on below.

*i) The Bank's direct mediation and conciliation efforts*

On a number of occasions, particularly in its earlier history, the Bank took an active role in the settlement of disputes between its member countries (or the subdivisions or agencies of their governments) and foreign investors. During 1951-52, for example, the Bank attempted to provide a basis for the settlement of the dispute over the nationalisation by Iran of the Anglo-Iranian Oil Company's assets.<sup>22</sup> Following Egypt's nationalisation of the Suez Canal Company in 1956, the Bank successfully mediated the settlement of claims by the Company's shareholders against the Egyptian Government.<sup>23</sup> Later, in 1985, the Bank agreed to provide technical advice to help the Argentine State gas company and a Dutch company settle their differences.

The President of the Bank, in his personal capacity, has also been willing to assist in the settlement of investment disputes. In 1958, the City of Tokyo and certain holders of bonds issued by that city entered into a conciliation agreement which requested the President of the Bank to propose a plan to settle the parties' long-standing dispute. Pursuant to this request, the President delivered a plan to the parties in 1960 which led to a resolution of the controversy.<sup>24</sup> In 1959, the President of the Bank assisted in the settlement of claims arising from the nationalisation and sequestration of British assets after the British military intervention in Egypt in 1956.<sup>25</sup> In 1965, the President of the Bank also agreed

<sup>22</sup> See Mason & Asher, *The World Bank Since Bretton Woods* (1973), at 595-610.

<sup>23</sup> Mason & Asher, *supra* note 13, at 641.

<sup>24</sup> See World Bank, FIFTEENTH ANNUAL REPORT, 1959-1960, 26 (1960). See also World Bank, PRESS RELEASE, 4 April 1960.

<sup>25</sup> See World Bank, THIRTEENTH ANNUAL REPORT, 1957-1958, 6 (1958). See also Mason & Asher, *supra* note 1 at 641. The settlement included payment by Egypt of a

to act as a conciliator between the parties with regard to certain private claims resulting from Tunisia's nationalisation of electric power properties in the late 1950s. Finally, in 1968, the President lent his good offices to the amicable settlement of a dispute arising from the nationalisation of certain foreign mining interests by the Democratic Republic of the Congo (formerly Zaire).<sup>26</sup>

The Bank has also lent its good offices to the settlement of economic disputes between its member governments. A notable example is the Bank's mediation of the dispute between India and Pakistan regarding the utilization of the waters of the Indus River system. The efforts of the Bank culminated in the conclusion of the Indus Water Treaty (19 September 1960).<sup>27</sup> In another type of intervention, the Bank in 1977 assisted the partner States of the Eastern African Community in appointing a mediator to settle their differences.<sup>28</sup> The mediation resulted in the assignment of the loans among the three countries, along with new IDA credits to support the institutions involved.

When the President of the Bank has intervened in dispute resolution, he has done so either as a mediator or as a conciliator who submits a report, including specific proposals for a settlement. He has not been prepared to act as an arbitrator rendering a binding decision on the merits of the dispute. In the smaller number of cases where the Bank as an institution has intervened, it has acted neither as an arbitrator nor a conciliator. Instead, the Bank has provided good offices or advice to assist the parties in reaching agreement on a practical and effective solution to the problems involved. Resort to the Bank or to its President has proved to be a cost-effective and highly-efficient means of settling investment disputes. Compared with the typically high costs of international arbitration, the expenses involved for the parties have been minimal. Through this procedure, parties have benefited from the vast experience available at the Bank and the diversity of its staff, both of which have facilitated the reaching of a satisfactory settlement in a relatively short time.

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lump-sum compensation for nationalised property and receipt by it of a fee for administering sequestered properties.

<sup>26</sup> Compare 1969 Annual Meetings of the Boards of Governors of the International Bank for Reconstruction and Development, the International Finance Corporation, and the International Development Association, SUMMARY PROCEEDINGS 67 (1969).

<sup>27</sup> See 419 U.N.T.S. 126 and Mason & Asher, *The World Bank Since Bretton Woods*, at 610-27, (1973). See also Fischer, "La Banque internationale pour la reconstruction et le développement et l'utilisation des eaux du Bassin de l'Indus", 6 *Annuaire Français de Droit International* 667 (1960).

<sup>28</sup> See World Bank, ANNUAL REPORT 1978 at 38, an effort that eventually led to agreement on the apportionment of the communities' debt to the IDA among the three countries.

*ii) Avoidance of disputes between borrowing countries and private business, including foreign investment*

The Bank has long realized that its position as a financial intermediary between capital markets and its own borrowers gives it an institutional interest in promoting the avoidance and settlement of investment disputes. It has also recognized that the establishment of a stable and predictable legal framework in a borrowing country not only adds to the attractiveness of its investment climate, but also helps the avoidance and settlement of disputes between investors and government or between them and third parties, ultimately to the benefit of the Bank. Since the Bank started in 1990 its “adjustment lending” (providing loans to finance imports and more recently to support a country’s budget in the context of implementation by the borrowing country of policy reforms), its typical conditionality required reduction of regulations, streamlining and rationalisation of legislation, and liberalization of trade and investment regimes. Subsequently, loans have been specifically made to help reform the legal and/or judicial systems. These efforts are likely to reduce opportunities of conflicts and ensure that when conflicts arise a more efficient way of handling them would be available through national courts or national mechanisms of alternative dispute resolution.

*iii) The World Bank Guidelines on the Legal Treatment of Foreign Direct Investment*

In 1992, the Development Committee, a joint ministerial committee of the World Bank and the IMF Board of Governors, called the attention of member countries to these guidelines “as useful parameters in the administration and treatment of private foreign investment.” The guidelines were prepared by the World Bank as a non-binding framework embodying essential principles meant to promote foreign direct investment in the common interest of all members, not as a codification of binding, customary international law or a multilateral treaty on the subject.<sup>29</sup> They cover in some detail the issues of admission, treatment, expropriation and unilateral alterations or termination of contracts with foreign investors as well as the settlement of disputes between them and their host countries. One particular contribution of these guidelines is a detailed provision on the compensation due in cases of the unlawful taking of property that goes far beyond typical provisions in investment treaties. The guidelines also make “binding independent arbitration” one of three methods for the settlement of state/foreign investor disputes (in addition to national courts and conciliation), stipulating in this respect that the majority of arbitrators cannot be appointed by one party to the dispute.

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<sup>29</sup> See Shihata, *Legal Treatment of Foreign Investment – The World Bank Guidelines* (1993).

The guidelines are meant to contribute to the development of international law in this area and to prepare the grounds in future for a multilateral treaty on the subject. They have proven useful in the preparations of some modern investment laws and bilateral investment treaties, as well as in the negotiation of the OECD draft of the Multilateral Agreement on Investment.

*iv) The Role of ICSID*

As an international organization whose purpose is to help resolve investment disputes between foreign investors and their host countries through conciliation and/or arbitration, ICSID was established by an international convention which the Bank drafted and opened for signature in 1965. Although the Bank is not a party to that convention, its President is *ex officio* the Chairman of ICSID's Administrative Council. Also, the Bank's General Counsel has traditionally been elected ICSID's Secretary-General. The Bank alone meets ICSID's administrative expenses. The Bank's involvement has been based on its conviction that the fair and efficient settlement of investment disputes helps the flow of investments among its members for their common good and the good of the Bank.

The main characteristic of ICSID arbitration that distinguishes it from any other available form of investor/state international arbitration is that the awards of ICSID arbitral tribunals are not subject to any form of review by national courts. Requests for their revision, interpretation or annulment are handled exclusively within the ICSID regime.<sup>30</sup> Another important characteristic is that resort to ICSID arbitration suspends the right of the state of the investor to espouse his claim *vis-à-vis* the host country, including its right to resort to state-to-state adjudication or arbitration. In practice, ICSID arbitration has also been distinguished by the fact that it has quite often led to the subsequent settlement of disputes by agreement of the parties, at times with the active participation of the ICSID tribunals.

*v) The Role of MIGA*

MIGA was also established through a convention prepared and opened for signature by the World Bank (in 1985). Although this convention does not require any formal linkage with the Bank, in practice the Bank's President has consistently been elected as MIGA's President and the great majority of the Bank's Executive Directors have also been appointed or elected members of MIGA's Board of Directors. Recently, the IBRD provided, out of its net income, a substantial grant to MIGA. MIGA's main objective is to facilitate the flow of foreign investment to developing (including now transition) countries through the issuance of guarantees to foreign investors against non-commercial

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<sup>30</sup> For details on ICSID, see, e.g. Shihata, "ICSID's Role in the Resolution of Investment Disputes", in *The World Bank in a Changing World*, Vol. II, at 425-53 (1995).

risks. Another important means for achieving MIGA's objective, however, consists of helping its members to improve their investment environment through measures such as technical assistance in the removal of impediments to the flow of investments, promotion activities and encouragement of the amicable settlement of disputes between investors and host countries. MIGA, as a result, has involved itself in the mediation of a number of disputes between foreign investors and host governments, even when the disputes were unrelated to a MIGA guarantee operation.<sup>31</sup> MIGA's operations are generally based on the consensus among its members. Any conflict among members or between MIGA and a member related to an investment undermines this consensus and creates a strong incentive for MIGA in the avoidance of such conflict and its early resolution. As an insurer against obligations of the host country *vis-à-vis* the investor, MIGA also has an interest in the avoidance of claims related to the risks it underwrites.<sup>32</sup> Both MIGA and ICSID help in the depoliticisation of investment disputes and serve as a deterrent to the non-amicable settlement of such disputes.<sup>33</sup> In this, they share with the IBRD the objective to promote foreign private investment.

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<sup>31</sup> See for details, Shihata, *Miga And Foreign Investment* (1988).

<sup>32</sup> See Shihata, "The Settlement of Disputes Regarding Foreign Investment: The Role of the World Bank Group", in *The World Bank in a Changing World*. Vol. I, pp. 287-8, especially pp. 305-7 (1991).

<sup>33</sup> See Shihata, "Towards a Greater Depoliticization of Investment Disputes: The Role of ICSID and MIGA", *Id.*, pp. 309-42.

## La Cour de Conciliation et d'Arbitrage au sein de l'O.S.C.E.

ROBERT BADINTER\*

Depuis l'an de grâce 1989, l'Europe connaît un moment privilégié de son histoire. Pour la première fois, elle ignore la menace d'impérialismes totalitaires qui voudraient imposer une domination continentale fondée sur la force des armes. Tous les Etats européens se réclament des mêmes valeurs, celles des droits de l'homme et de la démocratie, et des mêmes règles, celles de l'économie sociale de marché. Jamais, dans leur longue et cruelle histoire, les nations européennes n'auront connu pareille chance de construire ensemble une Europe pacifique, prospère et harmonieuse.

Cependant, en Europe centrale et orientale, et au-delà, dans les Etats de l'ex-Union-Soviétique libérés de la gangue du communisme, se trouvent enracinées des causes de conflits. Quelques-uns débouchent sur des confrontations armées qui appellent un règlement garanti par la communauté internationale. Les autres, les plus nombreux, ne revêtent heureusement pas la même intensité mais altèrent l'harmonie des relations entre Etats. Mentionnons les problèmes de minorités, avec leurs multiples aspects culturels, religieux, linguistiques ou éducatifs. On peut y ajouter les questions d'atteintes à l'environnement et de la pollution. Egalement, les questions soulevées par l'accès aux sources d'énergie ou liées à la circulation des personnes et aux migrations de populations, ou aux échanges économiques internationaux.

Au regard de tels différends, l'Europe doit bénéficier d'institutions aptes à les résoudre par la conciliation et l'arbitrage international.

Une question liminaire se pose: n'existe-t-il point déjà des instances permettant d'y pourvoir? Ce n'est point que les institutions juridictionnelles fassent défaut en Europe mais, à les analyser de près, aucune n'est apte à assurer la fonction particulière de prévention et de solution des conflits entre Etats européens de façon satisfaisante. La Cour de Justice de Luxembourg voit sa compétence limitée aux Etats membres de l'Union Européenne et aux dispositions des Traités. La compétence de la Cour européenne des Droits de l'homme s'étend aux pays membres du Conseil de l'Europe. Mais la mission de la Cour de Strasbourg est d'assurer le respect des droits fondamentaux des personnes à l'encontre des Etats membres, et sa compétence matérielle ne recouvre pas les problèmes de pollution, d'accès aux ressources énergétiques ou les différends d'ordre économique entre Etats. La Cour internationale de Justice, qui relève de l'ONU, a, par définition, une vocation mondiale. Les

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principes qu'elle dégage s'inscrivent dans l'ordre public international et revêtent une dimension universelle. Or, s'agissant de conciliation et d'arbitrage entre Etats européens, il est certain que, si les solutions acquises doivent être conformes aux principes du droit international public, tels que la C.I.J. les consacre, elles répondront nécessairement à la spécificité et aux besoins des peuples européens. Au surplus, la justice rendue par la Cour de La Haye est lente et, par conséquent, onéreuse.

Hors les grandes juridictions internationales évoquées, il existe bien des instances ou des mécanismes de conciliation et d'arbitrage. Mais ils n'ont jamais véritablement fonctionné. Ainsi en est-il de la Cour permanente d'Arbitrage créée en 1899 et qui est établie à La Haye. Mais cette instance ne s'intègre dans le cadre d'aucune organisation internationale dont elle serait le mécanisme régulateur. Et, d'autre part, le défaut de toute obligation pour un Etat de comparaître, même à seule fin de tentative de conciliation, devant la Cour permanente d'Arbitrage, lui interdit de prospérer. Ce même défaut affectait la Convention de 1957 du Conseil de l'Europe sur la conciliation et l'arbitrage. Débouchant, de surcroît, sur la compétence de la C.I.J., elle apparaissait comme un mécanisme subsidiaire de celle-ci et ne pouvait, dès lors, dépasser son champ d'effectivité. Elle est, dès lors, demeurée inappliquée et tombée en désuétude.

De ces constatations, l'enseignement devait être tiré. L'Europe d'après 1989 requérait une instance susceptible de prévenir par la conciliation, et de résoudre par l'arbitrage, sur la base des principes du droit international, les différends de tous ordres qui peuvent s'élever entre les Etats, notamment en Europe centrale et orientale. Une telle institution, pour être efficace, devait avoir une compétence régionale et non mondiale. Elle devait être légère dans son organisation, rapide dans ses procédures, et ses membres devaient offrir toutes les garanties de compétence et d'objectivité. Elle devait s'inscrire dans une institution internationale dont elle serait un des facteurs de régulation et de progrès. De l'ensemble de ces considérations est née la *Cour de Conciliation et d'Arbitrage au sein de l'O.S.C.E.* créée par la Convention de Stockholm du 8 décembre 1992, aujourd'hui ratifiée par 27 Etats membres de l'O.S.C.E.

Pour qu'elle réponde à sa finalité, sur quelles bases a été organisée la Cour? Chacun des Etats parties nomme deux conciliateurs et deux arbitres qui doivent être acceptés par les autres Etats. Le Bureau de la Cour est composé du Président, d'un Vice-Président et de trois membres élus par le collège des conciliateurs et des arbitres. Le siège de la Cour est établi à Genève.

L'instance en conciliation est obligatoire en ce sens que tout Etat cité par un autre en conciliation à propos d'un différend entre eux est tenu de comparaître. S'il s'y dérobe, la Commission de conciliation procédera, en son absence, à l'examen du différend et rédigera un rapport formulant son avis sur la solution la plus équitable. Ce rapport sera adressé aux parties, y compris la partie défaillante, et sera communiqué au Conseil des Ministres de l'O.S.C.E. Lorsque

toutes les parties participeront à la procédure de conciliation, elle se déroulera conformément aux règles de la procédure contradictoire. A la fin de l'instruction, la Commission proposera aux parties un règlement équitable du litige, respectueux des principes du droit international. Les Etats seront libres de l'accepter ou de le refuser. La liberté des Etats reste ainsi entière.

Pour assurer aux Etats toutes les garanties nécessaires, la Commission de conciliation est composée d'un membre désigné par chacun des Etats parties et de membres d'autres nationalités, nommés par le Bureau parmi les autres conciliateurs, en nombre supérieur. Ainsi le nombre minimum de conciliateurs sera au moins de cinq.

Quant à l'instance arbitrale, elles n'intervient que si les Etats parties au différend en sont convenus par un accord spécial, ou s'ils ont souscrit à cet effet une clause de compétence obligatoire. Son mode de désignation est comparable à celui de la Commission. L'arbitrage se déroule selon les règles de la procédure équitable. La décision est fondée sur les principes du droit international. Au cours de l'arbitrage, une conciliation fondée en équité peut toujours intervenir si les parties en conviennent. Quant à l'exécution de la décision, elle sera poursuivie par les parties, conformément aux règles et à la pratique internationale. Dans le concert des puissances européennes, il serait bien surprenant d'ailleurs qu'un Etat participant à l'O.S.C.E. n'exécute pas la décision. Ce serait se placer spontanément dans le camp des mauvais joueurs, c'est-à-dire des mauvais risques. Rien de plus mauvais pour le crédit international d'un Etat, à l'époque où chacun en a le plus grand besoin.

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Quel sera l'avenir de la *Cour de Conciliation et d'Arbitrage au sein de l'O.S.C.E.*? La culture politique n'a pas encore intégré le recours institutionnel à des modes de solution des différends entre Etats autres que diplomatiques. Je suis grand admirateur de l'art millénaire des diplomates. Mais, si la négociation diplomatique est un facteur déterminant et irremplaçable des rapports internationaux, elle est rendue plus difficile et aléatoire par le réveil des nationalismes auxquels l'on a assisté à l'Est de l'Europe et dans les Balkans depuis la fin des régimes communistes. Le développement de la démocratie, salutaire dans ces régions de l'Europe, s'accompagne parfois d'une surenchère démagogique exploitant ce nationalisme. Toute négociation directe entre Etats voisins en devient plus ardue encore. Face à une telle situation, le recours à une instance de conciliation et d'arbitrage permet de créer un circuit de dérivation des tensions. En effet, dès l'instant où une telle instance est saisie et qu'à la négociation directe succède un temps de discussion sous les auspices de tiers compétents et impartiaux, la confrontation se transforme en débat, à la recherche d'un compromis ou d'une

décision équitable et conforme aux principes du droit international.

Dans la partie occidentale de l'Europe qui ne connaît point les mêmes tensions, la Cour offre aussi aux Etats parties à la Convention de Stockholm, des modes aisés, rapides et peu onéreux de solution de leurs différends. Ces procédures où les parties confrontent leurs points de vue, sous les auspices d'un collège de personnalités, selon des règles reconnues par tous, ont inévitablement un effet apaisant et ouvrent la voie à des solutions constructives. De surcroît, tandis que le débat se déroule ainsi devant l'instance de conciliation ou d'arbitrage, les Etats parties, ayant ainsi confié à une instance tierce le soin de résoudre leur différend, peuvent entretenir plus aisément des rapports amicaux, libérés qu'ils sont des tensions inhérentes à tout litige qui ne trouve pas aisément son issue sans une négociation diplomatique. Les grandes entreprises qui conduisent ensemble des opérations industrielles, commerciales ou financières de dimension internationale, ont depuis longtemps mesuré l'avantage considérable de résoudre par voie de conciliation et d'arbitrage leurs différends. Ce recours permet de poursuivre l'entreprise commune tout en réglant rapidement et discrètement les conflits qui peuvent s'élever entre les parties. Dans la nouvelle Europe d'où doit disparaître le recours aux rapports de force traditionnels, la conciliation et l'arbitrage rendront les mêmes services aux Etats européens qu'aux grandes entreprises européennes. Il faut aussi rappeler que toute instance permanente de médiation engendre un corps de principes qui s'élaborent au fil des décisions ou des recommandations. A cet égard, la *Cour de Conciliation et d'Arbitrage au sein de l'O.S.C.E.* pourra contribuer à l'élaboration et à l'affermissement des règles coutumières de solution des différends entre Etats européens qui contribuera au progrès de la construction européenne.

## Profile / Profil

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### Mr. Max van der Stoel

On behalf of the editorial board, Catherine Kessedjian had the pleasure of meeting Mr. Max van der Stoel in his office in The Hague, in February 1999. A one-hour meeting is not enough to do justice to the vast knowledge and keen understanding of international affairs of this former Minister of Foreign Affairs of the Netherlands, who is now the OSCE High Commissioner on National Minorities.

Max van der Stoel finds it difficult to trace the origins of his interest in international affairs. Even as a young child, he remembers reading newspapers and being fascinated by international events. He was twenty when the Second World War ended, and his interest had only deepened after having witnessed his own country and people being subjected to brutal force and total lawlessness. At the same time, his desire to “be involved” was increased by the demise in 1948 of the then Czechoslovak democracy and the fact that some of his own friends were forced to live in exile.

Straight out of University, he joined the newly-reinstated Dutch Labour Party only one day after it was formed. This was no mere chance. The Labour Party’s agenda for political renewal, social justice and human rights, together with its policy for helping the poorest countries suited his own personal thinking and philosophy. Throughout his career he stayed a member of that party, even though, at times, his own ideas came to be at odds with the Party’s evolving policies. This led to his decision, in the early 1980s, not to run again for election under the Party umbrella. By then, he had served as Foreign Minister of the Netherlands from 1973 to 1977 and from 1981 to 1982.

Max van der Stoel’s influence and experience as an internationalist took him from that point on to the highest levels of the newly-developing organs of international cooperation. His entire professional life has been devoted to public affairs, with a strong emphasis on human rights. This led notably to his appointment as Rapporteur for the Parliamentary Assembly of the Council of Europe on the situation in Greece after the colonels’ coup, and prompted him to recommend that Greece be excluded from the Council of Europe. More recently, he was also active in the Iraqi crisis.

When asked to identify the major success of the last fifty years in international law, Max van der Stoel does not hesitate. The Universal Declaration of Human Rights and the development of international standards applicable to all States around the globe constitute, in his eyes, the greatest achievement. Having said that, however, he readily admits that he is disappointed by the still enormous discrepancy between the theoretical and actual positions of States,

who sign and ratify human rights conventions or covenants, but, in practice, continue to perpetrate violations of them. He also recognises that some cultures may have a different conception of human rights than others, and that specific obstacles must be overcome in certain regions and not in others. Nonetheless, he firmly believes that basic human rights are truly international and the same all over the world. This, again, is the universalist speaking. As an example, he points to the fact that human rights are no longer considered as the internal affair of a given State, but of concern for all States, and that this has become one of the principles generally accepted today. He refers, in this context, to the Moscow Declaration of 1991 on the Human Dimension of the CSCE.

When the conversation turns to his present function, Max van der Stoel expresses surprise that since the Second World War, questions relating to national minorities have so often been neglected. He draws our attention to the fact that the United Nations Charter is silent on this subject, as if the demise of the League of Nations, which, by contrast, had been heavily involved with minorities, had frightened off the founders of the UN and made them reluctant to touch this "hot potato" (on the other hand, the UN Charter puts a heavy emphasis on human rights). It is striking that the Soviet Union denied the specific identity of national minorities by emphasising the concept of a "homo Sovieticus". His guess, also, is that the Soviet Union, which denied having any national minorities on its territory and suppressed all trace of their existence, had succeeded in influencing the negotiations.

At present, however, we are often faced with major threats to international peace, precisely because of the neglect of the question of national minorities. On this subject, Max van der Stoel has developed his own clear-sighted formula for preserving the balance between the two antagonistic viewpoints. His ideas may be summarised as follows: the rights of national minorities must be exercised within the established boundaries of a given State, bearing in mind the need to maintain its territorial integrity; by the same token, minorities must be fully recognised and not forced to assimilate, although they must integrate. This gives rise to some novel ways of looking at public affairs and governance, some of which Mr. van der Stoel shared with us. He proposes, for example, that minority councils be put in place, to be consulted each time new legislation is proposed, so that minority rights will be taken into consideration. Regional councils could also play an active role in responding to minority rights and needs. Minorities could also be accorded some degree of functional autonomy in the field of education or other areas considered vital to their identity. Max van der Stoel is again careful to emphasise the difference between "integration" and "assimilation". The first is a necessity, whereas the second is to be avoided. Minorities have common interests with the majority. They should not live on a "little island" in isolation from the majority. All of these ideas and more were developed during an international conference he convened in Locarno in

October 1998, to discuss “Governance and Participation: Integrating Diversity”. In addition, he has asked a group of experts to further reflect on these issues and report to him. This report is expected some time during 1999.

Our interview ended with a discussion of the function of the High Commissioner on National Minorities within the OSCE. The High Commissioner is only one of the tools of conflict prevention put in place by the OSCE. For his role to be effective, he must act at a very early stage, at a time when conflict is foreseen but the parties have not yet taken the hard-line positions from which it becomes very difficult for them to depart without losing face. He is puzzled by the fact that governments seem incapable of dealing with issues other than the immediate crises of the day, pleading their overburdened agendas. They act, he says, as if they were hoping the clouds would disappear by themselves. The Kosovo situation is an unfortunate but good example. Max van der Stoep warned governments a long-time ago; they delayed too long in acting. When asked whether this could be a consequence of the still sacrosanct principle of sovereignty, which leads States to wait and see whether a crisis can be resolved internally without too much interference from outside, Max van der Stoep partly agrees. States wrestling with serious minority problems often resent outside interference. On the other hand, the serious consequences of minority problems getting out of hand increasingly force States to recognise that such questions cannot be seen as matters which only concern that State. He adds that the period in which we are living is one of transition. We have developed a consciousness that these matters are of international concern, but that consciousness must do battle with – still firmly anchored – principles of international law such as State sovereignty.

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## **Work in Progress / Travaux en cours**

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### **ILA Committee on Accountability of International Organisations**

KAREL WELLENS\*

In May 1996 the ILA's Executive Council decided to establish a Committee on Accountability of International Organisations under the Chairmanship of Judge Pieter Kooijmans. Professor Malcolm Shaw (UK) and the present writer were nominated as Co-Rapporteurs. The proliferation of International Organisations (IOs) and the subsequent unprecedented expansion of their norm-setting and operational activities had gradually made them important actors in present-day international relations. The time had come to consider how these new actors could be held accountable for their acts and omissions.

The Committee was given the mandate to consider what measures (legal, administrative or otherwise) should be adopted to ensure the accountability of public International Organisations to their members and to third parties, and of members and third parties to such organisations. The Committee's terms of reference specified that it might consider such issues as the relations between Member States, third parties and IOs; redress by and against IOs, including access to the ICJ and other courts and tribunals, and related issues of procedure; the relations between different forms of accountability of IOs (legal, political, administrative, financial); the dissolution of IOs and related questions of succession.

An internal interim report by the two Rapporteurs was discussed at the Committee's first meeting held in The Hague on 2 July 1997. The outcome of this discussion and the replies to a questionnaire which was circulated to the Committee members in September 1997 resulted in the First Report of the Committee, which was submitted for consideration at the 62nd ILA Conference held in Taipei (1998).

Chapter I of the Report contained an overview of the operational issues the Committee was facing; Chapter II provided the legal framework for the Committee's future activities.

Given the focus on "measures" in the terms of reference, the Committee decided that the most suitable outcome of its work would consist of a set of model rules which should be based upon a careful analysis of existing practice on accountability of IOs coupled with a cautious selection of progressive

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developments where needed. The main set of model rules would be generally applicable to IOs almost irrespective of the special peculiarities of individual organisations, although specific rules could be added for particular categories.

The model rules would be addressed not only to IOs (including their supervisory organs) and their Member States (including their domestic judicial and parliamentary organs), but also to other main actors in the field such as international courts and tribunals, NGOs on both the national and international level, and private parties.

The Committee provisionally decided that the relations between different forms of accountability (legal, political, administrative and financial) did not require separate treatment at this stage, as they were bound to come up through further study and analysis. Given the rather infrequent occurrence of cases of dissolution of IOs, it was also decided to postpone consideration of that issue.

A two-stage approach is being followed: the relations between Member States, third parties and IOs are under consideration in the current process of mapping out the territory of accountability. Later on, the Committee will address the more procedural and consequential issues of redress and remedies.

Chapter II of the First Report laid down the legal framework for the Committee's activities. Three major questions are interrelated: the applicable law, the notion of accountability and the international legal personality

Given the wide range of levels that IOs might operate upon, there is a variety of layers of legal contexts depending upon the circumstances and matters at issue. In their search for greater flexibility, IOs are faced with assertion of control by different legal orders (international, regional and national).

Four different legal layers could be identified: the governing law (the legal order by which the IO has been constituted and which determines matters of constitutional standing and status); the internal law (concerning internal organisational and operational issues); the law common to a group of IOs (the UN system, financial and economic IOs, European Organisations); the external law governing relations between the IOs on the one hand and Member States and third parties on the other .

The notion of accountability is considered by the Committee as comprising three components: the daily monitoring of the fulfillment by IOs of their responsibilities, tort liability that may arise from their acts or omissions and their responsibility for breaching a norm of the applicable law. The second and third components are necessarily linked to the concept of legal personality.

The mixture of legal, political, administrative and financial accountability will be different for each of the separate components.

Given the overarching nature of the concept of accountability, a plurality of yardsticks is called for in order to make the accountability of IOs an operational reality: principles of good governance (e.g., transparent and democratic decision-making process, access to information, proper functioning of the international

civil service, sound financial management), objectives and principles common to all IOs and to particular categories of IOs, specific objectives and principles of individual IOs, the applicable law and the practice of IOs demonstrating a certain general pattern of conduct.

Express attribution of municipal legal personality to IOs is a necessary prerequisite for the multiple operational activities undertaken by IOs. Both the status approach and the function approach to the question of international legal personality raise important issues.

The Committee decided that as a start the emphasis of its work would be on the first component of accountability.

The working session held in Taipei was attended by some 70 ILA Members. There was a general preference to limit the approach to the “passive” side of accountability, i.e., accountability *by* IOs. The issue of “denial of justice” in international administrative law was referred to as deserving particular attention. Questions were raised about the distinction between liability and responsibility of IOs and it was pointed out that the problem of legal personality of IOs has not been appropriately resolved so far.

At the Committee’s second meeting held in The Hague on 11 September 1998 it was agreed to focus, at least for the time being, on the accountability *of* IOs, since the active side falls within the traditional mechanisms of international law such as fact-finding and monitoring of conduct of Member States. International Organisations are however accountable for the way they perform these duties.

The question of liability and responsibility will be reviewed in the light of the analysis of practice, which may confront the Committee with a possible “sliding” scale of accountability.

The Committee decided to invite legal counsels of several IOs to contribute to the Committee’s activities by presenting, during a series of three consecutive closed seminars, their views, based on their daily experience, on a number of issues which are vital to the elaboration of the envisaged model rules.

The third meeting of the Committee will be held on 2 June 1999 in The Hague. A working paper by Professor Shaw on the relations between Member States and International Organisations will be discussed, as well as papers submitted by Committee Members on the following issues: denial of justice in international administrative law, accountability of treaty-based organs, the main problems facing NGOs when calling upon IOs to render account, accountability of international financial institutions and the World Bank, the main trends in the handling of claims for damages within the UN family, and a global picture of crucial issues in both Anglo-American and continental legal systems touching on the problem of legal personality of IOs and the main trends in the jurisprudence as to immunities.



## The Bookshelf / La bibliothèque

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de MOHAMED SALAH Mohamed Mahmoud\*

L'ouvrage dont j'ai choisi de parler dans cette rubrique est celui de Mireille Delmas-Marty intitulé *Trois défis pour un droit mondial* (ed. Seuil, 1998). C'est un ouvrage qui traite d'un thème actuel mais toujours mystérieux: la mondialisation. Née de la conjugaison des moyens de communication modernes et de l'explosion des flux d'échanges de biens et de services, la mondialisation s'entend généralement du phénomène d'extension à la planète de l'interdépendance. Elle introduit des bouleversements considérables pour toutes les institutions et toutes les idéologies sociales. Pourtant, elle a surtout retenu l'attention des économistes, fascinés par les effets de la «révolution libérale mondiale» (Fukuyama) et l'émergence d'un marché unique à l'échelle planétaire. Les juristes, hormis quelques rares internationalistes, sont restés discrets comme s'ils avaient peur que leur discours ne dérange, dans un contexte général dominé par la célébration des vertus de la libre concurrence. Aussi l'ouvrage de Mireille Delmas-Marty vient, me semble-t-il, à point nommé. C'est une réflexion d'envergure qui s'inscrit dans la tradition des grands juristes humanistes. D'emblée, l'auteur se démarque de l'économisme ambiant non pas en opposant à la rationalité économique dominante une rationalité juridique ignorée mais en insistant sur la nécessité de conjuguer économie et droits de l'homme pour relever les défis de la «société mondialisée».

L'objectif est ambitieux. Il tranche avec le positivisme affiché par la doctrine dominante qui ne paraît pas troublée par les lézardes que la mondialisation dessine tout au long du temple vénéré. Il reste à savoir si le projet «*est possible, souhaitable et raisonnable*». Le premier obstacle sur lequel bute tout effort de construction d'un droit mondial (fondé sur «l'interdépendance du juridique et de l'économique») est le décalage existant entre les progrès réels d'une mondialisation économique qui se réalise de façon non consensuelle et les retards d'une universalisation des droits de l'homme qui reste tributaire des conceptions culturelles propres à chaque aire civilisationnelle.

A cet égard, ce qui me semble fondamental à souligner c'est la lucidité avec laquelle l'auteur analyse les effets de la mondialisation économique sur le droit. On assiste sous la pression des impératifs concurrentiels à une uniformisation des dispositifs juridiques relatifs à l'économique. Mais cette uniformisation se réalise sur le mode mimétique, les législations nationales s'alignant sur le modèle le plus libéral, en l'occurrence le modèle anglo-saxon. L'irrésistible propagation

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des A.D.R. et des codes de conduite privés, l'étonnante expansion des autorités administratives indépendantes (A.A.I.), la montée du thème du gouvernement d'entreprise, la contractualisation du droit des sociétés, apparus dans la foulée du vent de déréglementation qui a déferlé sur l'Europe à partir des U.S.A. sont à rattacher à ce phénomène. Progressivement se constitue une sorte de droit économique universel qui ne peut cependant constituer une réponse adaptée aux défis de la planétarisation des échanges. Nous sommes ici en présence d'une mondialisation du droit – sous-tendue par l'idée chère aux milieux d'affaires (dont le projet d'A.M.I. négocié dans le cadre de l'O.C.D.E. se voulait le couronnement), selon laquelle le but du droit doit être uniquement de créer et d'entretenir un cadre adapté aux affaires. Ce n'est même pas le triomphe de la conception libérale qui, dans la lignée de Grotius, de Pufendorf ou de Locke, fonde le système économique sur les droits naturels et imprescriptibles de l'homme. C'est la consécration au niveau mondial des thèses de l'école réaliste américaine qui professe une vision purement instrumentaliste du droit débouchant sur une extension de l'ingénierie économique à l'ensemble du système juridique.

Il était nécessaire qu'un tel credo fasse l'objet d'un réexamen critique à l'heure où la multiplication des crises financières rend urgente la mise sur pied d'un dispositif de contrôle des nouveaux "pouvoirs qui dominent le monde" – en particulier le pouvoir économique devenu tentaculaire.

De tels dispositifs supposent l'articulation des réponses nationales et quelquefois régionales avec les réponses transnationales car une réponse exclusivement nationale est insuffisante. Le mérite de Mireille Delmas-Marty est moins d'apporter des réponses définitives à des questions par essence ouvertes que d'indiquer la voie de ce que doit être le débat d'aujourd'hui.

## **International Law FORUM du droit international**

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### **Sur la couverture**

Le Comité de Rédaction a choisi d'orner la couverture du FORUM du droit international d'une oeuvre d'art qui changera avec chaque volume. "Une oeuvre d'art est un coin de la création vu à travers un tempérament" a dit Emile Zola. Or, nous voulons que le FORUM soit aussi l'expression du monde dans lequel nous vivons à travers le tempérament de ses auteurs et lecteurs. Le lien entre le FORUM et l'art était donc aisé et naturel à établir. L'oeuvre choisie pour le premier volume ("Uil" – "Chouette", en français) a été créée par Edith Brinkman qui a donné au FORUM l'autorisation gracieuse de la reproduire. Elle représente la liberté et la force, l'élan et la légèreté que tous les membres du Comité de rédaction espèrent mettre en oeuvre pour la création et le développement du FORUM.

Edith Brinkman est représentée par la Galerie Het Cleyne Huys, Noordeinde 117, 2514 GE La Haye, Pays-Bas. (Tel. +31-70-364-3556).

### **On the Cover**

The Editorial Board has decided to illustrate the cover of the FORUM with a work of art that will change with each volume. "A Work of art is a segment of creation seen through a temperament," said Emile Zola. We hope that the FORUM will also be an expression of the world in which we live, seen through the personality of its authors and readers. The connection between the FORUM and art is thus easy and natural to establish. The work chosen for the first volume ("Uil" – "Owl" in English) has been created by Edith Brinkman who has graciously given permission for FORUM to reproduce it. It represents the freedom and strength, the élan and lightness that the members of the Editorial Board hope will be realized in the creation and development of FORUM.

Edith Brinkman is represented in the Gallery Het Cleyne Huys, Noordeinde 117, 2514 GE The Hague, Netherlands (Tel: t31 70 364 35 56).

### **Information for Authors**

Manuscripts and correspondence relating to articles for submission should be sent to: International Law FORUM du droit international, The Publisher, Annebeth Rosenboom, Kluwer Law International, P.O. Box 85889, 2508 CN The Hague, The Netherlands. Four typewritten copies of papers should be submitted with double spacing between the lines. Footnotes should be numbered consecutively. Figures should be provided camera-ready. No page charges are levied on authors or institutions. Twenty-five free offprints will be provided for each accepted paper; additional offprints will be available to order. The author will receive one set of page proofs. One set with corrections must be returned to the publishers without delay to avoid hold-up in the production schedule. A charge may be made for any substantial alteration to the manuscript at this stage.