Dispute Resolution by the International Court of Justice

*Bola A. Ajibola**

Keywords: arbitration; inter-state disputes; judicial settlement; negotiation.

Abstract: Over the years the International Court of Justice has come to play a mediative role in the settlement of disputes. This article focuses on the negotiation process by the International Court of Justice during the settlement of inter-state disputes. Various cases that were brought before the International Court of Justice are discussed to elaborate on this growing trend.

1. INTRODUCTION

International judicial activity in The Hague has reached an all time high in the 1990s. This is due first of all to the addition of a new international tribunal to those already present in The Hague. That city, which has housed the International Court of Justice (the Court, ICJ) and its predecessor (the Permanent Court of Justice) for over 75 years, was chosen as the seat of the Iran-United States Claims Tribunal in the 1980s and now plays host to the International Criminal Tribunal for the former Yugoslavia in 1990s. However, the presence of that new tribunal is not the only reason for an increase in international judicial activity in The Hague and is not the reason this paper focuses on. This paper focuses, in particular, on the activity of the ICJ as it is this tribunal that has a pre-eminent role in the judicial settlement of inter-state disputes. The docket of the Court has increased for a number of years now and more states than ever are using the services of the Court. Whilst the Court had some very lean years in the 1970s (in fact having no case at all on its docket between the rendering the *Western Sahara* Advisory Opinion[1] and the filing of the application in the *Aegean Sea Continental Shelf* case[2]), the problem that the Court now faces is how to get through the

* Judge Ad-Hoc and former member of the International Court of Justice, The Hague, The Netherlands, Justice of the Constitutional Court of the Federation of Bosnia and Herzegovina, Sarajevo, Bosnia and Herzegovina, Judge of the World Bank Administrative Tribunals, Washington, The United States of America.

1. Western Sahara, Advisory Opinion of 16 October 1975, 1975 ICJ Rep. 12 and Order of 3 January 1975, 1975 ICJ Rep. 3.
2. Aegean Sea Continental Shelf (Greece *v.* Turkey), Jurisdiction, Judgment of 19 December 1978, 1978 ICJ Rep. 3.

11 Leiden Journal of International Law 123-130 (1998)

cases before it in a reasonable time. States from all continents and regions of the world are now using the Court. There are currently cases involving Libya,[3] Nigeria,[4] Cameroon,[5] Namibia,[6] and Botswana[7] from the African continent; Iran,[8] Qatar,[9] and Bahrain[10] from the Asian continent (and one may add Indonesia and Malaysia who are recently reported to have signed a special agreement to submit a maritime dispute to the Court); the United Kingdom,[11] Spain,[12] Hungary,[13] Slovakia,[14] Bosnia-Herzegovina,[15] and the Federal Republic of Yugoslavia (Serbia and Montenegro)[16] from Europe; and the United States of America[17] and Canada[18] from North America. This increase in the volume of cases before the Court is obviously a reflection of an increasing confidence that states now have in the Court. It suggests that states are now more ready to submit their differences to adjudication than they were in the past. As Sir Robert Jennings has put it

> [t]his is a new climate, in which resort to an international court or to arbitration is no longer regarded as something outside and different from the ordinary context of relations between governments, but as a device, a tool, which can be used in the course of diplomatic negotiations.[19]

---

3. Questions of Interpretation and Application of the 1971 Montreal Convention Arising From the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya *v.* United Kingdom; Libyan Arab Jamahiriya *v.* United States of America), Interim Measures, Orders of 14 April 1992, 1992 ICJ Rep. 3 and 114 respectively.
4. Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon *v.* Nigeria), Application filed on 29 March 1994, Order of 16 June 1994, 1994 ICJ Rep. 105.
5. *Id.*
6. Kasikili/Sedudu Island (Botswana *v.* Namibia), Application filed on 29 May 1996.
7. *Id.*
8. Oil Platforms (Islamic Republic of Iran *v.* United States of America), Application filed on 2 November 1992, Order of 11 October 1992, 1992 ICJ Rep. 763.
9. Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar *v.* Bahrain), Application filed on 8 July 1991, Order of 11 October 1991, 1991 ICJ Rep. 50.
10. *Id.*
11. *See* note 3, *supra*.
12. Case Brought by Spain Against Canada with Respect to a Dispute Relating to the Canadian Coastal Fisheries Protection Act (Spain *v.* Canada), Application filed on 28 March 1995, Order of 8 May 1996, 1996 ICJ Rep. 58.
13. Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Application filed on 23 October 1992, Order of 14 July 1993, 1993 ICJ Rep. 319.
14. *Id.*
15. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina *v.* Yugoslavia (Serbia and Montenegro)), Application filed on 20 March 1993, Order of 16 April 1993, 1993 ICJ Rep. 29.
16. *Id.*
17. *See* notes 3 and 8, *supra*.
18. *See* note 12, *supra*.
19. Address given by Sir Robert Jennings to the First Conference of the Members of the Permanent Court of Arbitration, 10-11 September 1993, Permanent Court of Arbitration – First Conference of the Members of the Court 29, at 31 (1993).

According to Sir Robert, this development is one of the reasons why the Court finds itself so busy.

It is this role that the Court may play and has in fact played in the negotiating process that this paper seeks to examine. If this is what has led to an increase in resorting to the Court, a development which most international lawyers would want to encourage, it is important to seek to understand what this new role of the Court is, how it has been used and what its advantages (and disadvantages) are. Traditional thought of adjudication would postulate that the role of a Court is to settle a dispute by rendering a final and binding judgment that determines the respective rights and duties of the parties and clarifies the action that each is permitted to take in respect to the dispute. In domestic systems in particular, the judgment of a court is final and its method of implementation is straightforward, requiring no further decision by the parties. This is not to say that courts in domestic systems do not play any mediative role in the settlement of disputes. In some systems, courts are empowered to engage in mediation in family law matters as well as in other disputes. In addition, the threat of litigation often plays a part in the settlement of disputes between parties. Many (if not most) cases instituted before courts do not go through to final judgment. They are usually settled before then by the parties.

2. THE COURT AS PART OF THE NEGOTIATION PROCESS

Since adjudication is not that frequent a phenomenon in the international system, one usually expects that where it takes place, it will deal with matters of great import and will lead to a binding and final settlement of the dispute. In most of the contentious cases that have been decided by the Court the parties (at least the applicant) has looked to the Court and to the case as a means of final resolution of the dispute.

However, in other (more recent) cases the parties have looked to the case before the Court as one part in the process of the resolution of the particular dispute. In some instances, the negotiations between states have stalled owing to a disagreement about legal or other issues. The parties have then come to the Court seeking an authoritative clarification of the applicable legal principles. This trend has become particularly noticeable in maritime delimitation cases. The first case to initiate this trend was the *North Sea Continental Shelf* cases.[20] In this case, the Court was not asked to delimit the maritime boundary between the parties but simply to state the applicable le-

20. North Sea Continental Shelf cases (Federal Republic of Germany *v.* Denmark; Federal Republic of Germany *v.* The Netherlands), Judgment of 20 February 1969, 1969 ICJ Rep. 3.

gal principles. The case was used as a means of kick-starting stalled negotiations.

Likewise, in the *Icelandic Fisheries Jurisdiction* cases[21] the Court, after finding that British and German vessels were entitled to fish in certain waters claimed by Iceland, held that the parties were "under mutual obligation to undertake negotiations in good faith for the equitable solution of their differences concerning their respective fishery rights in the areas specified".[22] Furthermore, the Court indicated the factors that parties were bound to take into account in their negotiations.

3. THE ICJ AS A CATALYST FOR NEGOTIATIONS

In other cases, proceedings before the Court have been used as a lever for getting one party to the negotiating table.

In the *Phosphates Lands in Nauru*[23] Nauru, having failed to get Australia to negotiate a dispute concerning damages done to the island nation at the time when Australia (together with New Zealand and the United Kingdom) was the Administering Authority of Nauru under the UN Trusteeship system, instituted proceedings before the Court. The Court rejected Australian arguments that the case was inadmissible and held its jurisdiction to hear the case. This judgment had the effect of persuading Australia to seek a negotiated settlement of the dispute with the result that it agreed to pay about Australian $107 million to Nauru *ex gratia*.[24] This was a significant settlement for the small island nation considering that the country is only 21 square kilometers, has a population of just over 10,000 and its gross national product in 1993 was about US $90 million.

The recent classical example is the case of the *Gabčíkovo-Nagymaros Project*,[25] the judgment upon which was given on 25 September 1997. This is a case involving the issue of sustainable development and environmental protection. This case arose out of a bilateral Treaty between Hungary and Czechoslovakia,[26] a joint investment for the construction of dam structures in Hungary and Slovakia for the production of hydro-electricity power,

21. Fisheries Jurisdiction (United Kingdom *v.* Iceland), Merits, Judgment of 25 July 1974, 1974 ICJ Rep. 3; and Fisheries Jurisdiction (Federal Republic of Germany *v.* Iceland), Merits, Judgment of 25 July 1974, 1974 ICJ Rep. 175.
22. *Id.*, at 34 and 205, respectively.
23. Certain Phosphate Lands in Nauru (Nauru *v.* Australia), Jurisdiction and Admissibility, Judgment of 26 June 1992, 1992 ICJ Rep. 241.
24. *See* for the agreement settling the case, 97 ILR 110 (1992).
25. Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment of 25 September 1997, *see* ICJ Communiqué 97/10 of 25 September 1997.
26. 1977 Treaty Concerning the Construction and Operation of the Gabčíkovo-Nagymaros System of Locks, 32 ILM 1247 (1993). The treaty entered into force on 30 June 1978.

flood control, and improvement of navigation on the Danube River. However, Hungary, in 1989, initially suspended the project and subsequently abandoned the same giving as reason a grave risk to Hungarian environment and the water supply of Budapest. Slovakia contested and denied this allegation and thus maintained that Hungary must carry out its Treaty obligations. Slovakia on its part embarked on an alternative project on its own territory, which operation, however, had effect on Hungary's access to the water on River Danube. According to the special agreement entered into between the parties the Court was called upon, *inter alia*, to decide whether by virtue of acts of violation of some of the provisions of the Treaty of 1977, Hungary was entitled to terminate the Treaty. The Court decided that even though there were violations of the Treaty committed by both parties, the notification served by Hungary on 19 May 1997 for the termination of the 1977 Treaty and other related instruments did not "have the legal effect of terminating them".[27] The Court, further in its judgment, urged both parties to

> negotiate in good faith in the light of the prevailing situation, and [...] take all necessary measures to ensure the achievements of the objectives of the Treaty of 16 September 1977, in accordance with such modalities as they may agree upon.[28]

Earlier in its judgment, the Court remarked that it is not its duty to determine what should be the final result of such negotiations between the parties and it is for the parties themselves to agree on such acceptable solution taking into consideration the objective of the Treaty of 1977 co-jointly with the norms of the international environmental law and the principles of the law of international watercourses as was done in the *North-Sea Continental Shelf* case[29] which the Court referred to.[30]

Another case in which the institution of proceedings before the Court facilitated the diplomatic settlement of an international dispute is the *Great Belt* case.[31] This case arose out of Finnish concern that a Danish project to build a bridge over the navigable channel of the Great Belt strait would affect access to and from Finnish ports and yards of oil rigs and drill ships. Finland asked the Court to declare

1. that there is a right of free passage through the Great Belt (being a strait used for international navigation);

27. *See* Gabčíkovo-Nagymaros Project, *supra* note 25, at 70, para. 155(1a).
28. *Id.*, at 71, para. 155(2b).
29. *See* note 20, *supra*.
30. *See* Gabčíkovo-Nagymaros Project, *supra* note 25, at 67, para. 141.
31. Passage Through the Great Belt (Finland *v.* Denmark), Provisional Measures, Order of 29 July 1991, 1991 ICJ Rep. 12.

2. that this right extends to drill ships, oil rigs, other special ships, and reasonably foreseeable ships;
3. that this right extends to the construction of a fixed link over the Great Belt as planned by Denmark which would be incompatible with the right of passage mentioned above; and
4. that the two parties should start negotiations in good faith, on how the right of free passage shall be guaranteed.[32]

Finland also sought provisional measures under Article 41 of the Statute, seeking an order of the Court for cessation of construction. The Court took the view that the circumstances were not such as to require provisional measures. However, it said "pending a decision of the Court on the merits, any negotiation between the parties with a view to achieving a direct and friendly settlement is to be welcomed".[33]

The parties started negotiations after the decision on provisional measures but proceeded with their preparation of the case through the submission of Memorials and Counter-Memorials and the fixing of dates for oral hearings. An agreement to settle the case was reached by the prime ministers of the two countries only 11 days before the opening of the oral hearings. Denmark agreed to pay 90 million Danish Kroner and Finland withdrew the case. The building of the bridge could therefore continue.[34] In his opening statement in the *Jan Mayen* case,[35] the Agent of Denmark admitted that the nudge of the Court towards negotiations and the proceedings before the Court were instrumental to the settlement of the dispute by the parties.[36]

In 1995/1996, two cases before the Court were also settled by negotiations by the parties with the encouragement of the Court. The first of these cases is the *Maritime Delimitation Between Guinea Bissau and Senegal*.[37] Before the judgment of the Court in the *Arbitral Award of 31 July 1989*,[38] holding that the arbitral award between the parties was valid and binding, Guinea Bissau filed an application for a new case in which it asked the

32. *Id.*, at 14.
33. *Id.*, at 20, para. 35.
34. *See* for a brief statement of the issues in the case and settlement the note by M. Koskenniemi (Co-Agent for Finland in the case), 32 ILM 101 (1993).
35. Maritime Delimitation in the Area Between Greenland and Jan Mayen (Denmark *v.* Norway), Judgment of 14 June 1993, 1993 ICJ Rep. 34.
36. Mr Lehmann (Agent of Denmark in the Jan Mayen case, *supra* note 34, referring to the Great Belt case stated that "[t]he particular character of that case led the Court to accord priority to its consideration indicating at the same time that a negotiated settlement would be welcomed. That indication proved helpful in reaching an out-of-court settlement was reached under the Court's auspices". Oral Transcript CR93/1, at 10.
37. Maritime Delimitation Between Guinea Bissau and Senegal, Order, 1995 ICJ Rep. 423.
38. Arbitral Award of 31 July 1989 (Guinea Bissau *v.* Senegal), Judgment of 12 November 1991, 1991 ICJ Rep. 53.

Court to delimit the maritime boundary between the two states. In its judgment in the *Arbitral Award* case, the Court noted the readiness of the parties to negotiate the dispute and stated that it

> consider[ed] it highly desirable that the elements of the dispute that were not settled by the Arbitral Award of 31 July 1989 be resolved as soon as possible, as both Parties desire.[39]

At a meeting with the President of the Court, the two parties requested that no time-limit be fixed for the filing of written proceedings in the new case pending the outcome of negotiations. At several stages, the parties asked for more time to negotiate and in 1993 they signed an agreement providing for the joint exploitation of the maritime zone in issue.[40] In July 1995, the parties signed a protocol to this agreement[41] and in November 1995 the parties notified the Court of their intention to discontinue the proceedings. This case was removed from the list of the Court that month.

The second of these cases, the case concerning the *Aerial Incident of 3 July 1988*,[42] arose out of the tragic destruction over the Persian Gulf of Iran Air Flight 655 and the killing of its 290 passengers and crew by surface-to-air missiles fired by United States naval cruiser *USS Vincennes*. Iran brought proceedings against the United States, claiming that the latter country had violated the Chicago Convention on International Civil Aviation of 1944[43] and the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation 1971.[44] The United States filed preliminary objections to the jurisdiction of the Court and the Court ordered that the proceedings were first to be directed to this issue. After several requests for extension of the time limits by the parties, oral hearings were set down to commence on 12 September 1994. In August of that year, the parties jointly informed the Court that they had commenced negotiations on settling the case and the Court decided to postpone these oral hearings *sine die*. The parties reached an agreement in early 1996 under which Iran agreed to withdraw the case and the United States paid US $61,800,000 to the heirs and

39. *Id.*, at 75, para. 68.
40. 1993 Dakar Accord de gestion et de coopération entre le Gouvernement de la République du Sénégal et la Republique de Guinée Bissau, *see supra* note 37, at 425.
41. 1995 Bissau Protocol d'accord ayant trait á l'organisation et au fonctionnement de l'agence de gestion et de coopération entre la République du Sénégal et la République de Guinée Bissau intituée par l'accord du 14 octobre 1993, *see supra* note 37, at 425.
42. Aerial Incident of 3 July 1988 (Islamic Republic of Iran *v.* United States of America), Order of 13 December 1989, 1989 ICJ Rep. 132. For the Order of 22 February 1996 placing on record the discontinuance of the case, *see* 1996 ICJ Rep. 9.
43. UKTS 8 (1953), Cmnd. 8742.
44. 10 ILM 1551 (1971).

legatees of the 248 Iranian victims of the aerial incident in full and final settlement of the case.[45]

4. CONCLUSION

All these cases point the way in the development of an international community that is based on law and in which adjudication plays a more central role. They demonstrate the fact that submission of a dispute or even a part of a dispute to the International Court can very often be the catalyst needed for settlement of the dispute. This may happen in a number of ways: the resolution of certain legal questions by the Court can help to solve certain aspects of the case that the parties had not been able to resolve. As the Court stated in the *Hostages* case,[46]

> [i]t is for the Court [...] to resolve the legal question that may be in issue between parties to a dispute; and the resolution of such legal questions by the Court may be an important and sometimes decisive factor in promoting the settlement of the dispute.[47]

Also the mere engagement by the parties in the proceedings before the Court may lead to a situation that facilitates resolution. The fact that the parties have to respond to the case of the other party means they have to take time to understand it and have to strive to counter it. This may lead to a situation under which the parties decide to talk to each other directly rather than through the Court. This is no small matter in a case where the parties or one of them have earlier refused to come to the negotiation table. It must be remembered that the purpose of resort to the Court is the peaceful settlement of international disputes. As long as the Court's procedures lead to such a result, the ideals and the purposes of the Court have been served.

45. For the terms of the settlement, *see* 35 ILM 553, at 566 (1996).
46. United States Diplomatic and Consular Staff in Tehran (United States *v.* Iran), Merits, Judgment of 24 May 1980, 1980 ICJ Rep. 3.
47. *Id.*, at 22, para. 40.

https://doi.org/10.1017/S0922156598000090 Published online by Cambridge University Press