Chapter Fourteen

Observations on the Relationship between Diplomatic and Judicial Means of Dispute Settlement

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I. Introduction

The title of this symposium is thought-provoking: “Diplomatic and Judicial Means of Dispute Settlement: Can They Get Along?” As with all complex questions, we must consider first ancillary questions. Here are some. First, what is meant by the word “diplomatic”? In addition to traditional foreign ministry-focused diplomacy, does this word also include “soft” tools of international dispute settlement, such as negotiation, mediation, inquiry and conciliation, which are listed in Article 33 of the Charter of the United Nations? These tools may be considered diplomatic in nature because the parties (ostensibly) retain control of the dispute and may accept or reject a proposed settlement. Of course, how much choice and control parties actually have depends on the Realpolitik of diplomacy.

Second, where and between whom does diplomatic settlement of disputes take place? Answers could include the office of the Secretary General of the United Nations, the General Assembly, the Security Council, international and regional organizations, as well as the formal and informal talks that take place among diplomats and politicians. As an aside, what impact does diplomatic training have on judicial decision-makers? A significant number of the judges sitting on the International Court of Justice (‘ICJ’) have played roles in their respective Ministries of Foreign Affairs. Does their diplomatic training drive them towards consensus?

* The author thanks Viren Mascarenhas and Sam Prevatt, both associates in the International Arbitration Group of Freshfields Bruckhaus Deringer US LLP, for their invaluable assistance in researching and preparing these remarks. The views expressed herein are strictly the author’s own.
Third, what is meant by “judicial means”? Are we discussing (a) decisions, (b) rendered on the basis of international law, (c) by independent third parties, (d) that are binding on the parties? Certainly, as the conference explored thoroughly, we must consider not just the impact of any final decisions rendered – are they followed by the parties? – but also the impact of all stages of the judicial process on the behaviour of actors under international law. For example, what effect does the issuance of an arrest warrant by a criminal tribunal have on the behaviour of the accused, other potential accused, and other players in international criminal law? In some circumstances, the judicial process can have a deterrent effect on future behaviour. Sometimes, however, the judicial process is retrospective. For example, consider the creation of claims commissions that are established to settle pre-existing disputes.

Some other questions to consider: What do we mean by the quotation “can they get along?” Best friends? Sworn enemies? Would we settle for indifference? Healthy sibling rivalry? Also, would the answer to the question differ depending on when it is posed? How would this question have been answered 100 years earlier, in 1910, 12 years before the Permanent Court of International Justice held its inaugural sitting and long before the present wealth of international courts and tribunals? The answer is not necessarily obvious. After all, there were considerably more ad hoc inter-State arbitrations between 1900 and 1945 than between 1945 and 1990.1

II. Observations

With these questions in mind, I offer the following three observations.

A. Observation #1: It Does Not Follow from the Growth of International Courts and Tribunals that Judicial Means will Replace Diplomatic Means of Dispute Settlement

International law and the resolution of disputes arising under international law, either through diplomatic or judicial means, are two distinct things. Law without adjudication was long the norm in international affairs. Still, even without adjudicatory mechanisms, the content of law mattered for at least two reasons. First, where law exists, it is usually followed (except, of course, in locales where the rule of law does not exist). Second, even though international disputes were traditionally resolved without adjudication, law plays a significant part in defining the points in issue and providing a framework

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