Chapter Sixteen

Negotiation and Adjudication: Complementarity and Dissonance

Georges Abi-Saab

It is with particular pleasure that I speak in this round-table not only because we are meeting here at the Graduate Institute where I taught for almost four decades, but also to bring the greetings of the African Foundation for International Law that I preside to this Conference organized by the Latin-American Society with the collaboration of the European Society and the American Society of International Law.

Having given no title for my intervention in advance, I thought I would comment on the interventions of my colleagues along the axis of convergence and divergence between the two modes of the peaceful settlement of disputes: negotiation and adjudication. But as I listened to what was being said, I thought a better axis would be that of complementarity and dissonance. We have heard a lot on complementarities, but much less – if any – on dissonance, and perhaps rightly so. Still, there is some, which I shall address at the end of my remarks.

Starting with the foundational dictum of the PCIJ already cited by Marcelo Kohen in the Free Zones case, which characterizes the relationship between the two modes of the settlement of disputes; but I have to quote it in French – because it was initially written in French, and in my submission, badly translated into English – and, as such, in French it reads:

…le règlement judiciaire des conflits internationaux, en vue duquel la Cour est instituée, n’est qu’un succédané au règlement direct et amiable de ces conflits entre les Parties; que dès lors il appartient à la Cour de faciliter, dans toute la mesure compatible avec son Statut, pareil règlement direct et amical.¹

It was translated in English as “judicial settlement is simply an alternative to the direct and friendly settlement of such disputes...”. However, “succédané” in French is not merely an “alternative”; it is, according to Le Grand Robert, “quelque chose qui supplée, qui remplace une chose absente”. It is a replacement to make up or fill in for something that does not exist or is unattainable; not merely an equivalent alternative, but a second best or an imperfect substitute. This was the perception of adjudication still lingering on then, in 1929; the direct heritage of the Westphalian paradigm with sovereignty and equality as its major premises or parameters; prompting sovereigns not to yield to any higher authority, be it a court. The great German historian of international law, Wilhelm Grewe describes the Peace of Westphalia era (until the last part of the 19th century) as the “nadir” of international adjudication; the rare arbitrations that took place during that period were more like two contending sovereign princes soliciting the intercession of a third one, i.e. a peer, to help them resolve their difference. Whence, the “old hat” mandate theory of arbitration, which is still occasionally echoed, depicting arbitrators as mandatories of the parties, settling the dispute in their place, rather than as persons endowed with jurisdictional power (be it based on consent) to decide the case by the application (i.e. as an arm) of the law. That was then the heritage of the PCIJ which, as a “permanent”, i.e. standing Court, was still a novelty in 1929.

This reminds me of the repeated criticisms of my teacher, mentor and friend, Sir Robert Jennings, of the adjective “pacific” in the title of the Hague “Convention on the Pacific Settlement of International Disputes” of 1899 (revised in 1907); insinuating that going to court is as momentuous and extreme a decision as its “non-pacific” alternative of going to war; whilst, according to Jennings, going to court in international law should be considered, as in municipal law, as a banal routine act. Still, this is probably how resort to international litigation was perceived at the time of the adoption of the Convention in 1899, or even in 1929 when the PCIJ enunciated its dictum; viewing adjudication as a rare exception that remains subservient to the normal way of settling international disputes by negotiation, to be used only in the last resort.

Things have radically changed since, though deeply ingrained ideas die hard. We live in a different world now, where recourse to international adjudication is much more frequent, before multiple fora on the universal, regional and sectorial levels, and where the two modes of the settlement of disputes interact and complement each other in diverse manners.