
What is a Legal Dispute?

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I. Do You Really Know It When You See It?

It may seem inappropriate to write about disputes in a volume dedicated to Gerhard Hafner. He is the most peaceable and good natured person one could possibly imagine. If international politics were run by people of his disposition, the world would be a much better place. Alas, this is not the case and Gerhard Hafner is fully aware of this reality. Indeed his work reflects the importance of methods for the peaceful settlement of international disputes.¹

Provisions on the peaceful settlement of disputes, by definition, presuppose the existence of disputes for their application. Article 33 of the UN Charter is an obvious example.² The definition of a dispute may appear superfluous at first sight. Everyone knows the meaning of a dispute and one may presume that one will recognize a dispute when one sees it. However, in actual practice the existence of a dispute may be in doubt and may itself be disputed. At times, the existence of a dispute is denied in order to contest the jurisdiction of an international court or tribunal.

The existing definitions have done little to clarify questions that arise in this context. Black's Law Dictionary circumscribes 'dispute' as 'a conflict or controversy, esp. one that has given rise to a particular lawsuit'.³

The Permanent Court of International Justice (PCIJ) and the International Court of Justice (ICJ) have addressed the issue of the existence of a dispute in several cases. In

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¹ G. Hafner, 'The Physiognomy of Disputes and the Appropriate Means to Resolve Them', in United Nations (ed.), *International Law as a Language for International Relations. Proceedings of the United Nations Congress on Public International Law* 559 (1995); G. Hafner, 'Some Legal Aspects of International Disputes', 104 *The Journal of International Law and Diplomacy* 65 (2005).

² 1945 Charter of the United Nations, art. 33(1): 'The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.'

³ B. A. Garner (ed.), *Black's Law Dictionary* (1999).

the *Mavrommatis Palestine Concessions* case, the Permanent Court gave the following broad definition:

‘A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons.’⁴

In another case, the ICJ referred to

‘a situation in which the two sides held clearly opposite views concerning the question of the performance or non-performance of certain treaty obligations.’⁵

The Tribunal in *Texaco v. Libya* referred to a ‘present divergence of interests and opposition of legal views’.⁶

ICSID tribunals have adopted similar descriptions of ‘disputes’, often relying on the PCIJ’s and ICJ’s definitions.⁷

Gerhard Hafner has described these definitions as too wide and too narrow at the same time.⁸ A look at judicial practice proves him right. Whether a dispute in the technical sense exists is rather more complex than these definitions would suggest. Practice also demonstrates that, far from being a purely academic issue, the existence *vel non* of a dispute can be decisive to determine a court’s or tribunal’s jurisdiction.

The present contribution seeks to shed some light on the concept of disputes, particularly legal disputes, by reference to the practice of the International Court and investment tribunals. Taking the PCIJ’s definition in *Mavrommatis* as a starting point, it addresses the following issues:

- Under what circumstances does ‘a disagreement’ or ‘conflict’ become a dispute? Does the communication between the parties need to reach a certain level of intensity to qualify as a dispute?

⁴ *Mavrommatis Palestine Concessions (Greece v. Great Britain)*, Judgment of 30 August 1924, 1924 *PCIJ* (Ser. A) No. 2, at 11.

⁵ *Interpretation of the Peace Treaties with Bulgaria, Hungary and Romania*, Advisory Opinion of 30 March 1950 (first phase), 1950 *ICJ Rep.* 65, at 74.

⁶ *Texaco Overseas Petroleum Company and California Asiatic Oil Company v. Libyan Arab Republic*, Preliminary Award of 27 November 1975, 53 *ILR* 389, at 416 (1979).

⁷ *Maffezini v. Spain*, Decision on Jurisdiction of 25 January 2000, 40 *ILM* 1129, at paras. 93, 94 (2001); *Tokios Tokelès v. Ukraine*, Decision on Jurisdiction of 29 April 2004, at paras. 106, 107; *Lucchetti v. Peru*, Award of 7 February 2005, at para. 48; *Impregilo v. Pakistan*, Decision on Jurisdiction of 22 April 2005, at paras. 302, 303; *AES v. Argentina*, Decision on Jurisdiction of 26 April 2005, at para. 43; *El Paso Energy Intl. Co. v. Argentina*, Decision on Jurisdiction of 27 April 2006, at para. 61; *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. Argentina*, Decision on Jurisdiction of 16 May 2006, at para. 29; *M.C.I. v. Ecuador*, Award of 31 July 2007, at para. 63.

⁸ G. Hafner, ‘The Physiognomy of Disputes and the Appropriate Means to Resolve Them’, *supra* note 1, at 560.