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BLAINE SLOAN LECTURE†

**THE PEACEFUL SETTLEMENT OF
INTERNATIONAL DISPUTES
IN PRACTICE**

Ian Brownlie, CBE, QC, FBA††

† This lecture was given at Pace University School of Law on 4 April 1995 for the Ninth Annual Blaine Sloan Lecture in Public International Law. The Blaine Sloan Lecture is presented by the Pace International Law Society and the Pace International Law Review to honor Blaine Sloan, Professor Emeritus of International Law and Organization at Pace University School of Law. The purpose of the lecture is to continue the spirit of scholarly debate for which Professor Sloan is noted for. He has had a distinguished career in the field of international law; serving as Director of the General Legal Division of the United Nations Office of Legal Affairs from 1966-78, and as Deputy to the Under Secretary-General, Legal Affairs, 1978, and as the founder of the Pace International Law Curriculum.

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PROFESSOR SURYA PRAKASH SINHA, PROFESSOR OF LAW†††

Here we are again on this ninth occasion to honor a man who has contributed his entire life to the advancement and study of public international law. I met Professor Blaine Sloan many years ago. Many more years ago than I care to remember, when I was a student struggling with my dissertation and he was on the mock committee then and I met him in one of these American study groups studying international law, so to speak, in flesh and blood. My first meeting with such a distinguished figure in my field of interest, of course, I remain friends since Pat and Blaine were my witnesses when I became a U.S. citizen. So, therefore, to welcome him here gives me very special meaning, personally for me.

University of Nebraska has this habit of producing, every century, a great legal mind. In the last century, it was of course, Learned Hand who went to the other school in Cambridge because Pace didn't exist back then. In the 20th century, Pace is so lucky to have the other distinguished graduate of Nebraska Law School, Blaine Sloan, and indeed we are grateful for having him here. He was the reason I came here. And then what he did, he played a trick on me. He left. He retired to the beautiful paradise mountains of Colorado and left me here to deal with his absence. So, it's therefore, solely appropriate, revenge on my part, to drag him down here and I'm glad to have him here. You have heard about his career, he's accomplished in so many areas of scholarship and practice, particularly his career at the United Nations where he finished as the Deputy Secretary General for Legal Affairs. Words cannot describe the feelings we have here at Pace to be honored today with his return, so with that, it gives me a great, great joy to introduce to you, Professor Blaine Sloan.

PROFESSOR EMERITUS BLAINE SLOAN

I am really overwhelmed. I have often said it is a little like being at your own funeral. I must mention that Wendy Kennedy, President of the Pace International Law Society, gave

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much effort in arranging my travel, and Mr. John Sarcone, Managing Editor of the *Pace International Law Review* who we have to thank for arranging this lecture and for bringing us such a distinguished lecturer, I want to express my appreciation to you and through you to all the students and faculty.

I said while I was here, I did sow a few little seeds of an International Law Program, but I am amazed at how they have grown and I am really very proud. Particularly of the student body and the faculty and the administration for what it has produced.

I have an ideal introduction which goes something like this and it is certainly appropriate for Professor Brownlie that the speaker needs no introductions and then I know to sit down and let him speak. Unfortunately, this evening I have come two thousand miles from Colorado to make this introduction and so I am afraid you are stuck with a little more than this ideal.

Professor Brownlie has come even further than I have. He has come from All Souls College, Oxford England. I am afraid that to most Americans today, Oxford is simply the place where our current President did not inhale. That, of course, is not true for this distinguished audience. We may not accept completely the folk tale that Oxford was founded by Daniel Fitzgrace, but we do know that its origin is lost in the midst of the middle ages and we know that today, it is one of the oldest and most eminent of the world's great educational institution. We also know that holding a professorship at Oxford is itself a certification of eminence in the field.

Professor Brownlie is not the only Professor of Public International Law at Oxford, but he is the Chichele Professor. And while I was not certain, I surmised that this chair was named for Henry Chichele who was Archbishop at the time of Henry IV and also the founder of All Souls College of which Professor Brownlie is a Fellow. Henry Chichele was also engaged in peace settlement although not too successfully. He tried two impossible tasks. One, was to bring together the Pope's of that era, and the other was to bring peace between England and France as an aid of Henry IV. Shakespeare rather slanders Chichele in his great play of Henry IV, making him not as a peacemaker but as an advocate of the Lord.

Professor Brownlie, has had a nearly 40 year career, as a barrister, teacher, writer, editor, arbitrator, honoree, has had so many achievements that it would be impossible for me to enumerate them here. Some of them are listed in your program and that you can read as well as I can. As a barrister, he was called to the bar, engraved in 1958, appointed Queen's Counsel in 1979. This is a substantial appointment not just an honoree appointment. He has been an advocate before many international forums. I think that he has participated in over 20 different legal proceedings in the International Court of Justice. It is probably pretty close to a record. In addition, he has appeared before the European Commission of Human Rights on numerous occasions. I am informed, just recently, also in the European Court of Human Rights and the Commission of The European Union. He has performed legal services for more than 33 states during his career. It is really a remarkable achievement as a lawyer to represent one state in a lifelong career, Professor Brownlie's only clients are states which is in itself admirable.

As a teacher, before his appointment at Oxford as Chichele Professor in 1980, he was Professor of International Law at London 1976-1980, and before that a lecturer at Nodingham, Oxford and a reader in the Inn's of Court School of Law. He has been a visiting Professor in Africa, The University of East African Gamen and also in Florence. He has been the Director of study of the International Law Association 1982-1991. He is a member of the Institute Group Schwab International and has been a Raconteur, I think it was for solvent community, and of course Senior Editor of The British Yearbook of International Law. I had the honor of submitting the text to him one time when he was a fellow of the British Academy.

He has received many honors throughout his distinguished career, Commander of the British Empire, Commander of the Order of Merit of the Norwegian Crown, the Japan Foundation of Order and the Scholars Distinction Award from the University of Oxford. He is also a very eminent writer, writing widely in the field of International Law. I will not enumerate his writings but I would say that most American students are first introduced to Professor Brownlie through his book "Principles of Public International Law."

Now in the fourth edition of this book, he has received the Certificate of Merit from the American Society of International Law. As I said, he has wide, wide, experience in the peaceful settlement of disputes. Not only as an advocate but as an arbitrator on the panel of arbitrators and conciliators of the World Bank and the International Investments of Settlement of International Investment Disputes.

Well, I have gone on much too long. I am sure you would have preferred my ideal introduction but I now have the great honor of giving to you Professor Ian Brownlie, Chichele Professor of Publish International Law at Oxford.

PROFESSOR IAN BROWNLIE, CBE, QC, FBA

First of all, I would like to thank Professor Blaine Sloan for the very generous introduction. I would also like to thank the Pace University School of Law, the Pace International Law Society and the editors and members of the Pace International Law Review, who played a part in organising this lecture. It is a little like bringing coal to Newcastle to bring an international lawyer from across the Atlantic to talk about international law and international organisation because New York and its institutions have vast resources in those fields. And thus I benefit from the productions of New York and its institutions and I come here in the spirit of humility to offer my small amount of experience in front of you and with the title of 'The Peaceful Settlement of International Disputes in Practice.' I would like to say what an honor it is to receive an invitation to give the 9th Annual Blaine Sloan Lecture.

What are disputes for present purposes? They are disputes between the existing states with effective governments in place. There are other kinds of disputes involving the presentation of existing states, the disintegration of existing states, and the splitting up of federations, and the settlements of those disputes may involve International Law but the process is one of appalling complexity and I do not have the time to go through the entire zoology, as it were, of disputes.

I shall deal with the typical dispute between states involving effective governments conducting their affairs in a normal way. A dispute is defined, in a rather formal way, as 'a disagreement on a point of law or fact, a conflict of legal views or

interests between two legal persons.' In other words, it is more than a conflict of interest and for most practical purposes, in the International Law world, there are two classes of dispute. Either the dispute relates to an alleged breach of one or more legal duties, in an adversarial process or a dispute as to attribution of title to territory but possibly to some other resource or artefact. In the latter case the International Court or Court of Arbitration is asked for a declaration as to title to territory or as to the determination of an international boundary.

What is peaceful settlement? Well, International Law has always offered quite an array of methods of peaceful settlement. In fact, it long ago preempted what is now called alternative dispute resolution. That which is now being regarded in English law schools as a trendy new appearance, in fact forms part of International Law. Until recently, in international affairs it has been the alternative dispute settlement modes which were typical. Such methods have been not so much alternative but rather mainstream. In the result International Law can offer an orchestra of methods of dispute settlement.

First, and obviously, negotiation. That is the normal mode and we have to remember that when dealing with the regulation and conservation of resources, fisheries, for example, or the protection of the environment in the continental dimension, then the adversarial process is virtually irrelevant. It may be important in the usual way in that it is helpful to have a dispute settlement process in the background. But the kind of social engineering that is required by handling of major problems does not lie in the powers given to judges and arbitrators. So we have to recognise the very particular role of dispute settlement. It has a role but there are many areas in which its role is marginal and perhaps wholly absent.

Secondly and thirdly, we have conciliation and mediation which are hybrids where law may play a role, but elements of politics and of compromise are present. But nonetheless, there is an element to objectivity. The general idea is that of third party intrusion and the possibility of some real outcome, although quite often the report which results from conciliation or mediation is not binding. So far as conciliation is concerned, the third party intrusion mostly relates to modalities and there is no imposition of the substance of dispute resolution.

In the case of mediation, the third party is more intrusive. The case of mediation, the third party is more intrusive. The intrusion is not just procedural but it goes to substance. Mediation can be structured to fit the particular problem with its own particular history. The literature contains more formal definitions of conciliation and mediation. My own impression is that each exercise is different and some things are called mediation which are much like conciliation and *visé versa*.

Now, a very effective mediation, forming part of recent history, was the mediation relating to the southern region of Chile and Argentina. This was handled by Pope John Paul II, by the Holy See, it lasted five and a half years. The procedure involved numerous meetings between the separate delegations and Cardinal Samore who was delegated by His Holiness to do the work. The process resulted in a very sophisticated peace treaty which involved not simply questions of delimitation but other forms of cooperation between the two neighbouring states and the ending of a dispute which in some form or another had lasted at least since 1881. This mediation is not well-known. Mediations are not conducted in front of the press and yet I think those who know about these things would regard it as a remarkable exercise in dispute settlement.

I shall move on to the series of devices used by the United Nations and its organs. The UN usually calls its forms of intervention good offices and mediation. But there is a whole range of different techniques which have been used which do not really fall into the orthodox categories. For example, the UN, long ago, invented proximity talks. It has had to deal, unlike tribunals, with situations in which one aspect of the dispute is the fact that the two parties do not even accept one another's international status and therefore there is no ready formula of procedural quality. Consequently, proximity talks are organized which the delegations do not sit in the same room but in rooms on the same corridor, and UN officials commute between the rooms with proposals. Sometimes this is done at some distance. The UN has employed a whole series of devices, sometimes involving special furniture arrangements, which sounds rather ludicrous, but in fact is the necessary pre-condition to peaceful settlement of disputes concerning questions of status.

Lastly, there is the formal, legalistic, and adversarial mode of settlement in the form of either arbitration or judicial settlement where there is no political element, or if there is, it is very much in the background. The decisions in accordance with the principles of International Law and the decisions are binding. And so two ends of the spectrum are, negotiations with a relation to politics and compromise, and at the other end, judicial settlement and arbitration.

What are the outcomes? They are surprisingly varied and it is unusual to find attempts to list them. My list is very modest. There are many other versions. First, compromise, in which the role of law is minimal; the political modes of settlement are most likely to result in compromise rather than a legally regulated decision. Secondly, the case of adjudication by the International Court and/or Courts of Arbitration in which there is settlement according to law. Thirdly, the multilateral settlements in which politics plays a major role. Multilateral settlements will involve legal or non-legal elements and they are effectively imposed. The imposition may not involve the overt use of armed forces but it will involve the imposition of political will with an implied threat of sanctions if the parties do not accept the outcome.

An example of such a settlement many years ago, but which in some sense are still in place, is the Geneva Agreement on Indo-China, 1954. It does not follow that a settlement is harmful, simply because it is imposed, but there is no doubt that this particular settlement was imposed on the parties concerned. Thus political and multilateral settlements may be peaceful only in a relative sense. And there is an interesting borderland, which there is insufficient time to explore, where peaceful settlements, as it were, merge into something perhaps rather different.

Now let us look at the instance of peaceful settlement in the more legalistic mode, the mode which we study in law school. The focus then is on the current pattern of the adjudication and arbitration. Both these procedures, in my view, involve a formal method of settlement leading to a binding decision in courts of law. It is true that in the 19th century arbitration was, in some sense, opposed to judicial settlement. Arbitration was often in accordance with the rules of law and equity and arbi-

trators would be expressly charged to decide in accordance with law and equity.

Arbitrators were in some cases heads of state who were expected to provide a decision and outcome which might be to some extent related to law but was essentially to be effective. Since 1899 arbitration has been essentially the same as judicial settlement. It is the form of the procedure and the fact that decisions emanate from *ad hoc* courts of arbitration, which differentiates arbitration from judicial settlement. The essence of the operation of an arbitration is the same as that of the adjudication.

The actual traffic, as it were, in peaceful settlement, in the last thirty or forty years, has been quite reasonable. It is a strange fact that textbooks of International Law by and large do not indicate the pattern. They do not give a quantitative indication and therefore I would like to give a general description.

Most arbitrations by definition are conducted by what are called *ad hoc* courts of arbitration designed to deal with a particular dispute or small family of disputes. Arbitration can take place in two ways. Firstly, there is compulsory arbitration on the basis of standing treaty clauses. This is sort of a compulsory jurisdiction where a standard setting treaty dealing with a particular subject matter has compromisory clause which allows either party to the treaty to invoke the process of arbitration. In air transport service agreements, such clauses are to be found and so the United States and France had an arbitration on the interpretation and application of an air transport services agreement (1963-64).

Another example was the arbitration between Chile and Argentina relating to the Beagle Channel. This was a full blown arbitration which lasted for three years. The procedures were as formal and as complex as those of in front of the International Court of Justice and the arbitrators themselves, when appointed, were members of the Court. However, they were appointed as individuals and not as judges of the Court. Thus the Court of Arbitration consisted of five judges of the International Court of Justice. The composition is interesting in that in a dispute between two Latin American states, the Court of Arbitration did not include any Latin Americans. All the members of the Court of Arbitration were extra-regional. They were Fitz-

maurice of the United Kingdom, Dillard of the United States, Gros of France, Onyeama of Nigeria and Petren of Sweden.

In the case of the Beagle Channel arbitration, and this is unusual, it was unsuccessful. It is often suggested that arbitrators divide the subject matter between the parties but this is not really the case. This sounds plausible but it does not reflect reality. In relation to some subject matters like islands, the formula is in any case inappropriate. In the *Beagle Channel* case Chile got the islands and Argentina did not get the islands. After the Award in favor of Chile there was a change of administration in Argentina, and the new military government repudiated the Award. And then there was a 12 month period of unproductive negotiations. There was then an attempt by Argentina to occupy the islands.

The United States government acted with great alacrity and warned the Chilean government that they were about to receive visitors and luckily it is a long way from Buenos Aires to the islands near Cape Horn. The US government brought the Holy See into the diplomatic picture. Cardinal Samore, the representative of the Holy See, visited Buenos Aires and Santiago and the two governments were prevailed upon to agree to the terms of a mediation by His Holiness Pope John Paul II. After a process lasting five years, the dispute was successfully resolved.

Apart from treaty clauses, you have arbitration that most often occurs on the basis of a special agreement where there is no arbitral clause in the pre-existing treaty. There is a dispute. The parties want to settle it by arbitration. The two states then negotiate the special agreement precisely to set up the Court of Arbitration. So the only instrument behind the arbitration is the bilateral agreement to arbitrate. The problem with arbitration of course is that each court of arbitration is created for the sole purpose of deciding the particular dispute. The court is custom built and is discarded after its use. In that sense, the parties have to design each Court of Arbitration, and to agree on its composition and its procedure. They also have to appoint and pay a registrar and so forth.

There is quite a long list of modern arbitrations and only some examples can be given. After a war in 1965, India and Pakistan agreed to take the Rann of Kutch question to arbitration. This concerned a very large area of territory. Secondly,

another Argentine-Chile frontier arbitration took place in 1966 concerning some valleys in the Andes. Thirdly, a major continental shelf arbitration between the United Kingdom and France relating to the sea bed of the English Channel and the Atlantic approaches occurred in 1977 and 1978. In addition, the Taba case about a small, but very contentious, territorial dispute between Israel and Egypt was decided in 1988 in accordance with Article 7 of the Treaty of Peace of 1979. There are many other arbitrations which are relatively unknown except to international lawyers.

Cumulatively, the work of arbitral tribunals compare with the work done by the International Court of Justice in terms of the type of dispute and also the scale of the pleadings. The territorial dispute which goes to arbitration will get the same type of attention as it would have got if it went in front of the International Court. There are, however, problems of enforcement. In the case of the International Court, because of the connection to the United Nations and because of the multilaterality of these institutions, so then enforcement tends to be easier, its less likely that the parties will be difficult. In the case of arbitration, if a state party reneges on the award, there is not a lot that can be done. In fact, parties do not often renege on awards of courts of arbitration because if two governments decide that they will arbitrate and agree on the terms of arbitration, then it is unlikely that they will then attack the institution which they have just designed for their own purposes.

The second type of adversarial procedure, moving on from arbitration, is the work of semi-permanent tribunals. There are a number of those on the peace treaties after the Second World War but the one which Americans would be interested in, and which is the most recent example, is the Iran-US Claims Tribunal sitting in the Hague. This constitutes the aftermath of the hostage crisis of 1979-80. The agreement by which that crisis was settled was obviously about the safety and return of the hostages but it was also about \$7.8 billion worth of claims. The tribunal created is a standing court of arbitration. There are in fact three chambers and its work continues to this day. It is a complicated body. Apart from the parties and their representatives, the United States Department of State lawyers are to be

seen sitting there exercising a protective role in relation to US private claimants appearing in front of the Tribunal.

Lastly, we come to permanent tribunals. There has in effect, apart from some human rights bodies and the Central American Courts of Justice, which lasted about 10 years, only been one permanent international tribunal. That is the tribunal known since 1945 as the International Court of Justice, which was originally praised in 1921 with the title 'Permanent Court of International Justice.' The concept of a permanent international tribunal is very revolutionary and even to this day the majority of states will not accept the compulsory jurisdiction of this court. A number of states use it but not by virtue of the compulsory jurisdiction. When the Court is examined, it is seen to be a body of 15 dignified men, and now more recently one woman with the appointment of a new British judge to replace Sir Robert Jennings in July, and it is a conservative looking body. States are suspicious of compulsory jurisdiction of that kind and so it constitutes one of the most radical aspects of international affairs, though not often seen as such.

Since 1945 the Court has been concerned with 72 contentious cases and at least 20 advisory opinions, but it is unrealistic to look at the numbers of cases without actually looking at the type of cases, which include a range of territorial disputes or boundary delimitation cases where the threshold of justiciability is normally very high. Outside federal systems it is normally the case that the boundaries of public law units within states are not justiciable. Thus, it is probably the case that the boundary between Scotland and England is not a justiciable issue.

It is impressive when states allow matters of territorial sovereignty or boundaries to be justiciable and it is a paradox that a high proportion of cases going in front of the International Court of Justice are in fact about territorial sovereignty and boundaries. The Court has been reasonably active since 1978. Since then it has had about 22 contentious cases. From time to time there are some disasters. In 1966, the court came up with a very unpopular decision in the *South-West Africa* cases, where it found on technical grounds that it could deal with the questions arising out of South Africa's role as Mandatory. Third World states, now known in politically correct terms as "devel-

oping states," were very disillusioned with this outcome and pronouncements were made that the Court had dug its own grave.

More recently, especially in North America, after the *Nicaragua* case, there were further pronouncements that the useful life of the Court had come to an end. One of the chief benefits of living long is to know that most of these pronouncements are not true and the Court, after the *Nicaragua* case, got more business than ever before because small states were pleased that the Court had not done what it did in the Nuclear Test Cases, that is to say, on technical grounds, to refuse to deal with the merits of the case, thus raising the suspicion that because in that case the Respondent State was a permanent member of the Security Council, the Court managed to find a basis on which it could avoid dealing with the merits. If the Court had actually backed off the *Nicaragua* case, one government, that of the United States, would have been pleased but many other governments would have been very unimpressed.

Presently the Court hears an array of cases from all regions of the world. There is no particular pattern and although the United States, being disenchanted, left the compulsory jurisdiction as a result of the *Nicaragua* case, the United States very shortly afterward took a dispute which it had with Italy to the Court on the basis of a treaty provision. It is widely believed that the United States deliberately used the Court on that occasion to demonstrate that it was not totally divorced from the Court. It is also true to say that cases of reneging on judgments are rare and that the Court tends to hear major rather than minor disputes.

It recently decided the major territorial dispute between Libya and Chad. This was on the basis of a special agreement. In this way states that are not parties to the compulsory jurisdiction may use the Court like a standing court of arbitration. A state may negotiate a special agreement with its neighbour to take a particular quarrel to the Court. The International Court decides the case and that is that. Though committed to the compulsory jurisdiction of the Court, the parties settle that particular dispute. The Libya-Chad case involved the Aouzou Strip. This had been the source of a conflict between Libya and Chad. The case was decided by the Court in favour of Chad and

within the last 18 months a specially formed UN agency has supervised the withdrawal of Libyan forces and administration from the disputed area. This significant episode in peaceful settlement did not receive much publicity in the media.

I shall now turn to the comparison between the International Court and *ad hoc* Courts of Arbitration. If a small state wishes to submit a dispute to third party settlement, arbitration is not convenient. It will have to start from scratch. An agreement has to be negotiated which creates the entire future of arbitration. The arbitrators and the registrar have to be paid. However, arbitration is politically attractive. It takes place in private and is thus attractive to governments. But it is expensive. The International Court on the other hand has user-friendly habits. It has a standing Registry which offers advice to states who have not appeared in front of the Court before. In the result and for all sorts of practical reasons, the International Court is a more attractive forum than arbitration.

Lastly, I shall take a look at some of the problematics of peaceful settlement of disputes. So far a rather upbeat picture has been given and positive elements have been emphasised. There are, of course, some problematics. First, there is a duty in International Law to settle disputes peacefully, but there is not a duty to settle disputes. Thus the Argentine claim to the Falklands (or the Malvinas) is based upon not inconsiderable legal premises and has stood in diplomatic history for many years. The United Kingdom is not willing to take the dispute to a court. And possibly Argentina is also unwilling. And the dispute remains a source of tension from time to time. The absence of a duty to settle disputes constitutes a gap in the international system.

Secondly, there is a serious problem when settlement is effected by political organs. This is because there is a certain absence of due process. So for example, in the American Society of International Law in 1981, my colleague Professor Elihu Lauterpacht expressed reservations about the way in which the Security Council takes decisions in matters affecting the legal interests of states. He used the examples of the decisions taken in relation to issues concerning the Middle East, issues affecting what was then Rhodesia, and certain other cases. And there are perhaps some problems as to whether there are inherent

limitations of the type of decision which a political organ should take. For example, the Security Council has in the recent past decided to demarcate the boundary between Iraq and Kuwait. It did this on a perfectly reasonable basis that having ejected Iraq's forces by way of collective self-defence from Kuwaiti territory, the source of danger to regional peace should be removed. And one aspect of the exercise was the fixing of the boundary which was one of the alleged reasons for Iraq's action. Now, there is a question, which I shall not treat dogmatically, whether in fact the boundary between Kuwait and Iraq has actually been settled yet.

In International Law terms the issue outstanding may have been a delimitation rather than a matter of demarcation. Demarcation relates to a boundary which in principle has been established. The Security Council considered that it was demarcating an existing delimitation established in 1963. Some international lawyers have questioned whether the delimitation of 1963 was a definitive delimitation. Secondly, there was also the establishment by the Security Council of a maritime delimitation, which had not existed previously. It is a nice question whether a political organ has the power to settle the boundaries of states. The source of doubt consists in the fact that if a boundary is created in the conditions in which the Security Council proposed to do it, in other words, in accordance with International Law, then at least some international lawyers have always assumed that it could only be done either with the consent of the parties or on the basis of a judicial settlement, that is, in accordance with due process of law.

There are other problematics. The invasion of Kuwait involved a dispute which was in fact a situation involving various factors of interest as between Iraq and Kuwait. The issues between Nicaragua and the United States in the 1980's included legal issues. But the context extended to clashes of geopolitical interest in the region, involving non-regional powers. And so when you have matters which cannot be classified as legal issues, which constitute conflicts of interest, then the lawyers have to withdraw because the vehicles we design are not really suited to resolving such conflicts. This is not necessarily a criticism of lawyers and the whole area of political disputes is not really susceptible to legal action in the ordinary form.

BRIEF QUESTION AND ANSWER SESSION WITH THE AUDIENCE

PROFESSOR SINHA: Professor Brownlie has very kindly agreed to hear respective views, and those questions and comments and I will be here assisting in recognizing who you are.

DR. EMMANUEL J. LOBATO: Professor Brownlie, has the world reached a situation where we have to redefine sovereignty? If you take a look at what has happened in Venezuela and Ecuador and where you can settle peacefully between Canada and Spain on the fishing dispute. But why did the US need force to buy into China to sell many aspects of it when the rest of the world takes our world market seriously? Have we reached a point where we ought to redefine sovereignty and force upon nations, peace, without perhaps building an international military force for the UN? But I think we have to do something or face disaster. Have we reached that point?

PROFESSOR IAN BROWNLIE: Well, the difficulty is, I have a debate with myself practically everyday on this kind of issue. If we are dealing with a threat to the environment, sometimes with irreversible results or if we are dealing with a problem of the proliferation of weapons of mass destruction, then we naturally incline towards limiting sovereignty and having controls which are effective even if those controls involve an erosion of sovereignty.

But then there is the other side. If we are talking about proliferation of weapons of mass destruction and it is effective or is it fair to say within a given region, some states must undergo that sort of control while others are not subjected to any kind of control. Probably equality which is an aspect of the existence of states. The other side of the same problem, in the international order, is that no one has yet designed an alternative to the state. If we go behind the state, we say boundaries don't matter, and of course, powerful states tend to say boundaries do not matter, not weak states, what will happen is you will have even more difficulties. And in former Yugoslavia, and possibly in areas of the former Soviet Union, where the state system dissolves, it ceases to work effectively, you have even more breaches of human rights. Refugee flows, maltreatment of minorities and general instability. So, I hear what you say, I hear with sympathy but I also know there are, as it were, counter currents or currents the other way, which recognize that the

state and its boundaries is a public order system. It may be flawed but it is there. And when it disappears, as it threatens to do in parts of Eastern Europe, the results are very unattractive.

DR. BENJAMIN B. FERENCZ: Professor Brownlie, you have suggested incorrectly that questions have been raised about the validity of Security Council decisions acting under Chapter 7 which seem to international lawyers to go beyond what might have been cited had there been a judicial interpretation. The presence of that kind of doubt about the Security Council undermines the Security Council to a certain degree. Would it help the situation if the rules of the Security Council were amended, they are still operating under draft rules going back to 1946. I believe, in which the Security Council themselves said, in cases where there is a legal element involved, we will seek an advisory opinion from the International Court of Justice before we decide upon the enforcement which is necessary.

PROFESSOR IAN BROWNLIE: Well, I think that might, so to speak, improve the atmosphere. But the second time, I appreciate that if you are dealing with governments for some purposes, and the Security Council is a government, then a high time of judicial review will, as it were, power plays of government. The problem is how we can balance between maintaining the rule of law and controlling discretionary powers to some extent. And at the same time, allowing governments to be effective. The difficulty with the Security Council is it has been very, very, reluctant to ask for advisory opinions. But on the sort of question that has arisen in the recent past, I think it is more the attitudes towards decision making of individual members of the Security Council which creates problems.

Now, there is no judicial review in international system. In the sense that no individual member state of UN has a right to go to the court to challenge a decision of the organ and it is true that the International Court is seized of issues. In other words, one of the political organs actually asks for advisory opinion. The price of asking for advisory opinion is that the court is going to act judicially does not have to weigh the legal validity of decisions of the political organs. So you get an incidental matter of judicial review as a result of the operation of the advisory opinion jurisdiction by the court. But that is incidental, it does

not happen very often. I am more concerned at the moment at the extent of the Security Council is being used essentially as a vehicle for the current policy of a very small group of states, essentially three. It does not mean that group of states is getting in trouble all the time. But nonetheless, a group in all terms, it is a worry situation.

The International Law for the most part is law of its self-limitation, as it is public law within the state. But my lines is always to defend International Law, pointing out the public law within the state where you have rules addressed to government which are also made by government. Then it is the policy of the individual actors in the Security Council, which I think is, at the end of the day, what is important. I sympathize with your idea. The rules could be changed that the councils could be made institutionally more responsive to law in that sense. I think probably that is unrealistic and it is the attitude towards International Law of the individual members of the Security Council which is perhaps the problem.

DR. ROY S. LEE: Thank you. There are two questions. The first one relates to your second part of your lecture regarding the problematic settlement of dispute. Your second point, while there is a duty to settle disputes peacefully but it is no duty to settle disputes. I think that is the problem that is the most fundamental point. That in the international system, I meant a state is willing and consents to settle a dispute, nobody can compel you to settle a dispute. Given that being the basis, I wonder if you see any possibility at all that this basis may be modified. On the assumption that such basis cannot be changed and will continue. What alternative do we have?

For example, since we cannot compel states to settle their disputes, which are only entitled to settle dispute. We have to promote development, we have the USDT for help, we have the WHO for children, welfare, we have UNICEF. But we do not have a broker to promote dispute resolution. I was told perhaps this is an area that we should think about. Looking at the recent development, one realizes that the Court of Arbitration is trying to stick to spearheading this area creating a trust fund and also trying to improve its procedure. How do you see the possibility of this development?

My second point is that I would like to ask your view regarding the question of multiplicity of the International Courts and Tribunal. That word was used by a former president of the International Court of Justice. The Spanish interpreter afterwards told me that he thought he heard the word duplicity. Any possibility of making these tribunals and courts more compatible and complimentary in their function? I think the ICJ and the coming tribunal, the International Law of the sea tribunal. Thank you.

PROFESSOR IAN BROWNLIE: Well, I do not have any, these phases or proposals, I do not think there are any easy solutions. I think that it would be a good thing, especially international relations people as well as lawyers did study disputes more often. I do not think just legal settlement of dispute, but the nature of dispute. There are those of us involved in disputes. There is a certain topology of disputes. For example, disputes involving air services agreements and are solved within the nation any international civil air transport which is a very important aspect of International Law which we all benefit from each time we move across boundaries, is a very good example of a law regulated area. When you have a dispute settlement which is not sort of imposed upon the customers. The legal theory in the law schools, especially in England, I would say, but possibly also in the US, tends to talk about laws that have to be imposed on people. You have Admiralty law for shipping, international civil air transport and so forth, where the law is part of the milieu. It is part of the operation. And some of the lower administrators are not even aware they are applying International Law, and, of course, they are. So, the certain types of dispute within the kind of milieu gets settled because nobody has an alternative, you want to run your airlines in certain countries, you have to play by the multilateral rules, otherwise you cannot play ball at all.

Territorial disputes are rather different. And international disputes are not like municipal law disputes. For example, municipal law most often somebody sues you, he is not your neighbor. The great thing about the international system and the appalling thing about it is that you cannot choose your neighbor. You can't shift neighbors. You have the neighbors you have and it gives a different dimension to boundary disputes. It

is not just you have a boundary dispute with another state but it is your neighbor and your whole relations are at issue to some extent, at least in a political sense. So, international disputes vary in type, the treatment varies. So, in international air transport, for example, but there are other examples, in a sense you cannot play at all, you cannot go out and trade, you cannot travel unless you accept the entire dispute settlement apparatus in the regions, the whole settlement.

Boundary disputes, strange as it may seem, not out of pacifism but simply because fighting wars to settle dispute is appallingly inconvenient. There are all sorts of states, great variety of types of states, different religions, different political backgrounds, some autocratic, some democratic, use the International Court or use arbitration to settle major disputes among their territory. Why do they do that? I think this has to be looked at and then answer to Professor Lee is, well you find what induces states to do this instead of that. To use bureaucratic peaceful legal matters rather than use the threat of force.

In the case of oil sea bed disputes, about oil, it is well known that if the dispute settlement mechanism is not used, none of the companies will drill. Because you have to have legal stability, you have to know who your landlord is going to be. So, what I am saying is, there is a whole series of setups, milieus in which you can study what motivates states to use peaceful settlements, legalistic matters as opposed to some other manner.

In respect to the multiplicity problem, then my own view is it does no harm. I do not see that it would be particularly valuable, it might be, so to speak, effectively more attractive if there was some higher of international tribunals. In fact, I think the multiplicity of tribunals reflects the multiplicity of relations between states, the complexities of regional customs and ways of doing things. It gives a wide range of preferences. So you may have a state that is quite happy to use one mechanism but not another, there is choice. There is competition between the international courts and ad hoc courts of arbitration, not an antagonistic competition but a simple competition. If everybody used arbitration the people in Hague would get less business and they would not be too happy about that. But it is not an antagonistic competition, it is a set of options of procedural options and I see no great harm in it. The way you do have insti-

tutional incoherence or at least complications in relations as between the European Information of Human Rights and the Court of Human Rights, then the experience is used over a period to evolve reform. In the case of the European established institutions the relations between the two institutions are now being rationalized. The setup is being tidied up. So, there are problems that can be removed. Generally, multiplicity is fine, it is the biggest set of options, it reflects the complexities of the world.

MR. STAN KURTZBAN: In the last ten thousand years, we have developed legal systems as opposed to subjects have been individuals and after two or three thousand years, we've evolved to the point where people are peacefully resolving their disputes more often than not. There debits are less common. Now, nations have been the subject of such laws and such tribunals for less than a century. Do we have to wait another three thousand years before we repeat that good lesson, before we learn to trust tribunals for fair disputes and before we develop the mechanisms for effective enforcement of those fair decisions that are rendered? I think, particularly, about the commitment of nations to forces to the United Nations for enforcement of resolutions of disputes.

PROFESSOR IAN BROWNLIE: Well, I think the ultimate problem is the nature of governments and the quality of governments and decision making within the states. When it comes to peaceful settlement of disputes, the fact is the vehicles are there, they are not lacking, it is simply a question of political will and even habit patterns. For example, it is a strange fact that the International Court is very busy. It gets important cases from a great variety of states and the only explanation for that, and academics always like explanation. You have to have an explanation, or at least you have to have an intellectual interesting explanation.

My explanation is banal, not intellectually interesting, which is simply as more and more states use that method to get results further customers go to the same door. So the International Court actually produces competence and objective decisions. Everybody thinks so. Those that use it are quite happy with the results. It is a question of governments deciding, having the political will, and it tells us it is not as simple as that

because if you take the dispute to an international tribunal on the basis that if you lose, you will still accept the result. You may be in serious trouble with your own political constituents. In a case like the Gulf of Mexico, the case between the United States and Canada and Gulf of Maine. Then there were important political constituencies. There were federal state relations involved and each government was taking quite a considerable political risk. In losing control of disputes you lose control over an adversary, part of your policy if you take a case to an international tribunal. And so it is not if the governments are being particularly responsible at the end of the day, it is how governments behave. Vehicles are there, traffic is taking place and there is no reason why the traffic should not increase.

MR. MARK CONSTANTINE: Along the lines of the political risk a leader of nations takes in conforming with this peaceful dispute process you mentioned, for example, it's 5 years. I think for the resolution between Chile and Argentina, isn't it also a political risk for a leader to make himself a party to process which takes this long amount of time? In the United States in a matter of four years, this president may not be around to see the results, he might not be here, and in this day and age it's like Operation Desert Storm where things can get done rather quickly. What are the prospects for this process to be streamlined somewhat and will it always take 5 years?

PROFESSOR IAN BROWNLIE: It has to be said that there are disputes of a small territory involving failure to identify where a boundary leads to walls placed some years back. There are many disputes which are literally faced on the telephone between the two ministers on either side of the boundary or even between quite local or regional administrators. States with good relations, working relations, frequently settle disputes, or at least avoid the development of a dispute, very rapidly. All too often when you have a dispute that is difficult to settle, it is because those two states have bad relations anyway and they cannot tame the boundary quarrel when it starts or breaks out again. In the case of Ecuador and Peru, while that dispute is by no means a new one, but I think federal states have a lot to offer in terms of setting a political example, because in the United States, boundary disputes between states are justiciable in the Supreme Court. By and large when you do not have control

over disputes between states now they use their worst option and use the rather technical boundaries involving river boundary disputes between Tennessee and one of its neighbors through a series of such disputes.

There are boundary disputes between federal system and the individual states over maritime delimitation and Professor Westerman who is somewhere in the room, who is an expert on that problem. So federal states model really on having compulsory jurisdiction precisely for the settlement of disputes about the boundaries of public law units, the states. Thank you.