Vanderbilt Journal of Transnational Law

Volume 3
Issue 1 *Winter 1969*

Article 8

1969

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I. INTRODUCTION

One of the chief functions of any legal system is to provide the machinery for settling disputes between members of the society which the system serves. No legal system can be expected to solve all such disputes, but law can create an atmosphere in which the parties themselves may effect, without bloodshed, the resolution, minimization or avoidance of disputes. The disputants may choose an arbiter or conciliator to reach a settlement for them, or they may bargain and compromise until they find a common basis for an agreement ending the dispute. The latter process, called negotiation, is the most effective and by far the most prevalent means of settling disputes, whether they are between individuals, organizations, or sovereign states.[1]

International disputes arise when the interests of two or more states conflict. A dispute may be resolved by the use of force or it may be settled peacefully by adjudication, arbitration, conciliation, or negotiation. Regardless of the means of resolution, some negotiation will occur, and it will probably influence the ultimate result. Negotiation may be distinguished from other peaceful means of settlement because it does not rely on the direct influence of a neutral third party. Instead, the disputants rely on their bargaining power and negotiating skill to find a common ground somewhere between their respective positions.

Because the international legal system has not fully matured, certain functions are left to independent resolution. In more advanced and centralized systems these functions would be performed by legislatures, courts and administrative bodies.[2] The predominant role of negotiation in the settlement of international disputes is, therefore, not very surprising, and, as the movement toward a centralized international legal order falls behind the pace of increased international interdependence, the importance of negotiation grows.[3] Furthermore, because negotiation automatically comes into play when a dispute occurs,[4] the role of negotiation in contributing to a peaceful settlement is especially significant.

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[1] See text accompanying note 5, infra, which asks whether adjudication results in the settlement or merely the determination of disputes.

[2] H. KELSEN, PRINCIPLES OF INTERNATIONAL LAW 20 (Tucker ed. 1966).

[3] P. JESSUP, THE USE OF INTERNATIONAL LAW 33-34 (1959).

[4] DAVIES MEMORIAL INSTITUTE, REP. OF A STUDY GROUP ON THE PEACEFUL SETTLEMENT OF DISPUTES 31 (1966).

This note will seek answers to three basic questions: (1) what role does international law play in the negotiation process; (2) how does that role differ from the role of law in other settlement processes; and (3) what are the effects of negotiated dispute settlements on international law? The examination will focus on the role of law in the process of negotiation, and in the framework for the settlement of international disputes. Before one attempts to find answers to these questions, however, some of the important characteristics of negotiation must be identified.

II. THE PROCESS OF NEGOTIATION

As mentioned earlier, the principal distinguishing characteristic of the negotiation process is the absence of direct influence by third parties. This absence of a neutral decision-maker leads to settlement by persuasion rather than by impostion. It can be argued, therefore, that the judicial and arbitration processes in which the parties are bound by the judge or arbiter's decision do not actually settle disputes. Instead, such processes merely resolve disputes by imposing a decision on the parties which each is liable to question.[5]

Does the proposition that settlement by negotiation is settlement by persuasion imply the absence of a sanction and, therefore, the absence of the operation of law? Even if the absence of a sanction is accepted, the answer to this question is negative. Formal sanctions are not necessary to the operation of an international legal system. While an absence of sanctions hinders the effective characterization of rules which ought to be obeyed and lessens the efficiency of the system, it does not seriously jeopardize the legal order.[6] Consent to patterns of state behavior has resulted in a framework of expectancies which operates effectively without formal sanctions. Also, there exist viable sanctions, even in primitive and decentralized societies such as the world community, and these sanctions help guide settlement by persuasion. One primitive sanction is the use of force in war or reprisal against another member of the community.[7] A less primitive example is international opprobrium since no nation wants to stand before the world as a law-breaker.[8] Such an image creates increased diffi-

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[5]Dillard, Some Aspects of Law & Diplomacy, 91 RECUEIL DES COURS 449, 513-14 (1957). But see Keith, The Role of Law in the United Nations, 4 VICT. U. WELL. L. REV. 116 (1963-66): "The essence of a law ordered system is substantial voluntary compliance, not official application and enforcement." See also Spaeth, Book Review, 11 STAN. L. REV. 586, 588 (1959).

[6]W. COPLIN, THE FUNCTIONS OF INTERNATIONAL LAW 19 (1966).

[7]Id. at 19-20; H. KELSEN, supra note 2, at 20-23.

[8]Larson, The Present Status of Propaganda in International Law, 31 LAW & CONTEMP. PROB. 439 (1966).

culties for the offending state in its relations with all other states. A settlement by persuasion, therefore, does not preclude the operation of law since a flexible international law may be at work.

The negotiation process itself is a dynamic one in which forces representing states' interests play the predominant role. In international disputes the parties have conflicting interests which they wish to promote or defend, but they also possess common interests.[9] Conflicting interests form, of course, the basis of the dispute. For a real dispute to exist and for diplomatic activity to be more than perfunctory, the interests in conflict must at least be moderately important to the parties. A common interest in settling the dispute may, however, outweigh the parties' conflicting interests. This common interest may be the parties' desire to avoid military confrontation, economic disadvantages and other detriments which naturally flow from the prolongation of the dispute. Another common interest may be the maintenance of the system, whether it be simply a dispute-settlement mechanism, such as a commercial arbitration agreement, or an economic-political system, such as the Common Market or the Communist Bloc.[10]

Negotiation involves a polarization and convergence of the stated positions of the parties. Initial assertions must be extreme so that necessary concessions later will not prove overly prejudicial to one's real interests. Settlement can sometimes be reached by the parties' making mutual concessions on a single disputed issue. Agreement will usually be reached at a point approximately mid-way between the initial assertions. Alternatively, settlement can occur when one party makes a concession on one issue and in exchange obtains concessions on one or more of the other issues. There are several characteristics of this concession process which merit attention. Its ease of application contributes to its effectiveness as a method of dispute settlement. Whether a dispute is eventually settled by adjudication or arbitration, negotiations can catalyze these more formal processes toward a determination of the dispute. Negotiation commences almost automatically at the onset of a dispute, and it can assume a variety of forms. Any communication in the early stages is usually directed at settlement or at strengthening and consolidating a party's position with an eye to future settlements. Communication may occur in private or at a well-publicized conference; and it may be effected by conversation, diplomatic votes, public statements, press releases or calculated rumors. No formal procedure is required, but it is generally utilized as is in other settlement processes.

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[9] See F. IKLÉ, HOW NATIONS NEGOTIATE 2 (1964).

[10] Cohen, The Cold War and the Peaceful Settlement of Disputes: A Comment, 6 DUQUESNE L. REV. 117, 119 (1968).

Another important attribute of negotiation is therefore its flexibility. Although ceremony is unnecessary, it can be added to provide gravity or pomp as the case requires, while more effective talks are conducted behind the scenes. This seems to be the format of the current Paris Peace Conference on Vietnam.

Negotiation, more than other settlement processes, is likely to bring the parties to a position of bargaining at arms' length. The adversarial attitude required when before a court or arbitral tribunal seems unnecessary. When circumstances permit, candid exchanges may lead to a quick and uncomplicated settlement.

One of the characteristics which limits the effectiveness of negotiation is the slowness and indefiniteness of its decision-making process. There is no guarantee that a decision will ever be reached. This possibility sends disputing states to a concilator, arbitrator, or adjudicator. Ideally, these decision-makers will make an objective determination of fact or law upon which further settlement efforts may be predicated.

Other limiting characteristics of negotiation include the following: (1) The parties confront each other with only their own legal and factual assertions and whatever evidence they choose to offer; (2) The inclination to use the conference table as means of presenting one's case to the world reduces the efficiency of negotiation; (3) Governments are often reluctant to initiate concessionary moves because of domestic pressures; (4) Negotiation entails a greater risk of the exercise of undue pressure by a state capable of such exercise than do more formalized procedures. Courts can, to some extent, police the parties, and both courts and arbitrators can refuse to consider the presence of undue pressures while seeking to make an objective determination; (5) The success of negotiation depends upon the parties' genuine desire for settlement. Settlement is impossible when one of the parties persists in retaining manifestly unreasonable demands.[11]

Some observations on the characteristics of the crucial individuals involved in negotiated settlements seem relevant to a discussion of the role of law in negotiation. Negotiators enjoy a multiplicity of roles as participants in the diplomatic process. First, they are advocates representing a party to whom undivided loyalty is owed. Partisanship

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[11] DAVIES INSTITUTE, supra note 4, at 33; Dillard, supra note 5, at 513-514. "The chief weakness of law is that it is 'imposed' upon the parties while the chief virtue of diplomacy is that it is not, . . . conversely, the chief virtue of law that it eliminates the need for 'good faith' and the chief weakness of diplomacy is that it is based on it."

is paramount.[12] Second, the negotiator is a legislator who, through agreement with the other parties, enacts rules of procedure and creates the substantive rights and duties embodied in settlement agreements. Finally, the negotiator is an adjudicator. Acting together, two or more negotiators effect a balancing of interests upon which is based a decision acceptable to all.

It should be remembered that negotiators are human beings and members of a particular society. As the representative of a state, and as the product of that state's cultural and political systems, the negotiator has developed different values from those of his adversaries. He will obviously attempt to predicate settlements consistent with these values.[13] The negotiator's background will also influence his means of thinking and communicating, which, in varying degrees, will be different from those of his adversaries. Language and semantics present problems which cannot be avoided.[14]

The negotiator's domestic political hierarchy exerts immediate personal pressure on him, since what he says and accomplishes, strengthens or threatens his position in his government. This internal pressure often makes the necessary concessions of negotiation difficult and sometimes impossible, since most concessions involve a retreat from a publicly-stated position.

A final characteristic of the men who conduct negotiations is especially relevant to the subject of this note. Many of them are lawyers or persons who have had legal training.[15] Moreover, in almost every case, diplomats are thoroughly briefed by legaladvisers as to the legal implications of their assertions and objectives. In many disputes, and especially in those which raise legal questions diplomats will regard the recommendations of their legal adviser's office as controlling. In all negotiations, the

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[12]It has been argued that the negotiator's primary function is to act as an interpreter between his government and the adversary. Occasionally efforts to analyze and understand the adversary's arguments have weakened the negotiator's convictions concerning the need for him to firmly advocate his own country's arguments. The Russians are said to avoid this problem by permitting their negotiators to do little more than express the centralized decision-makers' positions. Mosely, Some Soviet Techniques of Negotiation, in NEGOTIATING WITH THE RUSSIANS 271 (R. Dennet & J. Johnson eds. 1951).

[13]M. MCDOUGAL, STUDIES IN WORLD PUBLIC ORDER 12-13 (1960). The same is, of course, true of all participants in any dispute settlement process.

[14]See generally A. OSTROWER, LANGUAGE, LAW AND DIPLOMACY (1965) (2 vol.).

[15]P. CORBETT, LAW IN DIPLOMACY 41-42 (1959); M. MCDOUGAL, supra note 13.

legal adviser's influence is substantial.[16]

The foregoing constitutes a summary description of the negotiation process. Before examining the role of law in negotiation, it would be appropriate to consider briefly what is meant by "law" in this context. One definition declares that law is a prophecy of the action of the agents of society.[17] For our purposes, the relevant "society" is the primitive society of nations, whose agents are the nations themselves. Positivists base their prophecies on what nations have done in the past. From past acts inferences may be drawn describing which kinds of state behavior will be consented to by other states. Evidence of this predicted consent may be found in international conventions, customs, judicial decisions, and the writing of publicists. Collectively, these sources may be found in such abundance that they have achieved the status of general principles of law.[18]

Is there a difference between the international law applied by courts and the international law applicable in the negotiation process? The likelihood of a consensus of states agreeing on the relevance of an applicable rule of law will be greater for a localized group of states-parties, most of whom consent to the same kinds of behavior, than if the parties represent groups of nations which are geographically, economically, and culturally different. The existence of these localized legal norms in addition to norms generally recognized by all states, provides a source of applicable rules and increases the probability that law will play a significant role in a given dispute settlement.[19] For instance, Belgium and France entertain similar views of traditional international law as developed by Europe, England and the United States over the past three centuries. Some of the norms represented by this body of law and accepted by western countries are rejected by much of the rest of the world. Such a rule is the requirement of compensation for expropriation. This rule may be available in a dispute between Belgium and France but unavailable in a dispute between France and an underdeveloped country, whose plans for industrial or agricultural reorganization would be hampered by a requirement of compensation

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[16] Bilder, The Office of the Legal Adviser: The State Department Lawyer and Foreign Affairs, 56 AM. J. INT'L L. 633, 654-55 (1962).

[17] P. JESSUP, A MODERN LAW OF NATIONS 4 (1950).

[18] See I.C.J. STAT. art. 38.

[19] The increased availability of applicable rules of law also encourages the settlement of disputes by adjudication. See Katz, The Cold War and the Peaceful Settlement of Disputes: The Relevance of International Adjudication, 6 DUQUESNE L. REV. 95, 110 (1968).

for expropriation.[20] If negotiations prove unsuccessful in a dispute involving the expropriation without compensation of French citizens' property by the government of the underdeveloped country, has the rule of law failed to regulate the relations of the parties?

Even negotiating countries operating in the same local international legal system must reach agreement in order to successfully assert the validity of a rule of law, since the party who must be persuaded to accept the rule is an interested adversary rather than a disinterested arbiter or judge. Consequently, several theories of law may be at work in negotations: one based on the consent of all nations and supported by many of the traditional sources of law; and one based on the consent of more localized communities of nations, often limited to the negotiating states themselves. The second is different from that which might be applied by an international tribunal, but it can be effectively utilized in negotiation. In this note, "law" will refer to consensual norms operating at both worldwide and local levels, but the respective distinctions of each should be kept in mind.

III. THE ROLE OF LAW IN NEGOTIATION PROCEDURE

Negotiation is a procedure which international law encourages by prohibiting the use of force to settle disputes.[21] The United Nations seeks to insure that all international disputes will be settled by peaceful means. Toward this end, it requires states to seek solutions by a number of different means, the first of which is negotiation.[22] Where negotiation is directed by law, law is present, though most negotiations would occur with or without the Charter's direction. Nevertheless legal recognition and encouragement of negotiation stimulates the use of law in the negotiation process itself.

That something called the negotiation procedure exists implies that the process is an ordered one in which participating states conduct themselves in a reasonably predictable manner. There may be, therefore, an international law of negotiation procedure. A portion of this law includes what have been collectively referred to as rules of accommodation.[23] These rules generally operate only when all nations, party to the negotiation, are basically friendly and genuinely interested in reaching a settlement. Rules of accommodation

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[20] This was one of the problems in the negotiations between the United States and Mexico in 1927 arising out of Mexican expropriation of land formerly owned by United States citizens. See 3 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 655-61 (1942).

[21] U. N. CHARTER art. 2, para. 3.

[22] Id. art. 33, para. 1.

[23] F. IKLÉ, HOW NATIONS NEGOTIATE, ch. 7 (1964).

are those whose violation would almost invariably terminate the negotiations and threaten the relations between the violator and the other state-parties. Examples of such rules are the generally accepted proscription of the threat or the use of force against other negotiators, and the prohibition of flagrant lies.[24] Some, such as the proscription of force, are observed by nearly all countries, and these form the basis for positive legal doctrines like diplomatic immunity. Others, such as the prohibition of flagrant lying, are regularly followed only by members of the Atlantic Community or other localized nation groups.[25] Negotiators may adhere to rules of accommodation for the sake of expediency or propriety, but the basic reason for such adherence is the hope that it will induce the adversary's adherence, thereby making his behavior more predictable. Because of their consensual nature and the results they seek to bring about, rules of accommodations operate much like rules of international law. Their operation in the negotiation process can therefore be considered to be an example of the operation of law. Rules of accommodation guide international negotiations through consensual procedures which ease tensions by making behavior predictable. These procedures accelerate the possibility of early agreement by increasing the efficiency of the negotiations. International law, as represented by these rules therefore, plays an important role in the negotiation process.

IV. LAW AS A NEGOTIATING TOOL

If there exists a means by which a negotiator can strengthen or appear to strengthen his position, he will find that means and use it. Law is a negotiating tool which can be effectively utilized by negotiators as a procedural device and as a support for substantive arguments.[26]

Law can be used in the procedural context of negotiation much the same way as rules of procedure are used by lawyers in domestic court trials. For example, issues to be tried are defined by various pleadings; definition of issues to

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[24] Id. at 92.

[25] Id. at 91. See also C. JOY, HOW COMMUNISTS NEGOTIATE (1955), for a frustrated American negotiator's view of the North Koreans' disregard of rules of accommodation at Panmunjon.

[26] F. IKLÉ, supra note 23, at 90. The author would reverse the emphasis set forth in the text. "[W]hile those who observe rules of accommodation would obviously prefer the opponent to reciprocate, this is not always felt to be mandatory. Some rules are expected to produce beneficial results even if the opponent ignores them; others require reciprocation only in the long run. . . . At any rate, to some negotiators the efficacy of the rules seems secondary because they follow them as the conventionally correct behavior, in keeping with proprieties."

be resolved in international negotiation is accomplished by means of an agenda. Use of and adherence to an agenda has become a settled principle of international law.[27] Participants in negotiations use the agenda both to include certain topics as proper subjects to negotiation and to avoid discussion of other topics.

The application of international law, to support one's arguments and to justify one's actions is a significant characteristic of negotiation. Parties can generally be expected to maintain that their positions are consistent with international law, because no nation wishes to stand before the international community as an admitted law-breaker.[28] Whether or not, therefore, the conduct which initiated the dispute was purely expedient, justification under international law will be attempted. If the disputed conduct was purely expedient, either fact or law may have to be distorted. For instance, Russia distorted facts when she asserted that the Czechoslovakian government had invited intervention under the Warsaw Pact in the summer of 1968. Peru has broadly interpreted the law of the sea as giving her territorial sea rights well beyond the maximum limits established by a consensus of nations. Each case involves the distortion of either fact or law in order to justify state action under international law.

Negotiating states assert that their positions are in accord with international law for a number of reasons. One is to express moral justification for the maintenance of a particular position. The opposing negotiator will probably be too sophisticated to make concessions on the basis of the other side's moral arguments. What is hoped for is the persuasion of those not privy to the negotiations, viz. the world community, of the justness of one's position. If this proves successful, it may bring indirect pressure on the opposing negotiator or his country.

Law can also be used in negotiation to express firmness. An effective demonstration that one's position complies with international law and that the opponent's position does not, implies that concessions would amount to submission to the opponent's illegal conduct. The negotiator, therefore, attempts to create an impression that his position is firmly grounded on legal principles.[29] If such an impression is successfully created, a slight concession from the position sought to be justified may be regarded by the opponent as a substantial concession.

Finally, the assertion that one's position is in accord with principles of international law may express an intent or desire to negotiate within a framework of law. Such assertions will invite counter-arguments based on law and perhaps they will invite a settlement based on law.

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[27] Id. at 98.
[28] See Larson, supra note 8 and accompanying text.
[29] F. IKLÉ, supra note 9, at 201, 202.

These are some of the effects hoped for by those who employ legal arguments in negotiation. Another result may or may not occur: the settlement of the dispute may be based on law. Legal arguments will be meaningful and a settlement based on law will result only when negotiation takes place in an atmosphere which is conducive to legal argument and where the arguments are bona fide. Ostensibly sound legal arguments are meaningless when either a fact or a proposed principle of law is stretched beyond reasonable interpretation in order to accommodate an extreme negotiating position.

For example, in a bilateral dispute the parties may find themselves in direct conflict on one issue. One side's position may be supported by propositions of law which truly reflect an international norm. The other side's position may have to be distorted to fit a rule derived from international norms, or the party may attempt to distort the rule to fit the facts. President Theodore Roosevelt's justification for the United States' intervention in Panama in 1903, as action representing "a mandate from civilization," is an example of the former tactic.[30] Russia's justification for the Hungarian and Czechoslovakian invasions as being in response to requests from the respective governments of those countries, exemplifies the latter. When law is used in this manner by a party to a negotiated dispute settlement, that settlement is not based on law. Negotiated settlements are reached by process of mutual compromise in which the parties find a basis for agreement somewhere between their extreme positions. When one party's initial position can be supported by general principles of international law but the other party must distort the law to support his position, the established rule of law will be necessarily compromised. If the compromise is substantial, law will have been effectively rejected as a basis for the settlement. If the compromise is slight, law will probably have strengthened the position of the party using it for support, and the settlement will, therefore, have been indirectly based on law.

The rejection of law described above need not occur if both sides' legal arguments represent reasonable interpretations of international legal principles. Compromise will result in the mutual acceptance of interpretations which reasonably conform to consensual international law, and the settlement of the dispute may be based on those interpretations. Between 1927 and 1938, the United States and Mexico conducted negotiations by exchanging notes on the expropriations of United States citizens' property in Mexico.[31] While both sides acknowledged that the expropriations were lawful, the United States argued, and Mexico denied, that such expropriations must be accompanied by "adequate, effective, and prompt payment for the properties seized."[32] Mexico expressed a

[30] P. CORBETT, LAW IN DIPLOMACY 55-56 (1959).

[31] See, 3 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 655-661 (1942).

[32] Note from Secretary of State Hill to the Mexican Minister of Foreign Affairs, August 22, 1938, in 3 G. HACKWORTH, supra note 31, at 658.

willingness to make some payment but contended that no rule of international law required her to do so. The rule propounded by Mexico appeared inappropriate to the United States because her citizens believed that property taken for public use had to be paid for in full. The rule asserted by the United States was inappropriate from Mexico's point of view, because Mexico had expropriated the property as part of a general plan of agrarian reform. Eventually, the parties agreed to form a commission which would determine the appropriate compensation for the seized property. The compromise resulted in recognition by Mexico that some compensation was necessary, and the United States recognized that such compensation could be less than adequate, effective, and prompt. Neither concession was expressed in the correspondence. The settlement was based on an unexpressed proposition lying somewhere between the positions stated by the parties. In this case, the parties effectively used law as a negotiating tool and found a workable rule of law through the bargain-and-compromise process of negotiation.

It should be noted that adjudicated settlements also avoid the problem created by distorted legal arguments. Although a judge will balance the conflicting interests of the disputing parties in reaching his decision, he can impose a settlement without having to accommodate a distorted legal proposition offered to support a party's position. The resulting settlement will also be consistent with what a consensus of the members of the community regard as "law."

Unfortunately, international law is particularly amenable to distortion by negotiators seeking to justify their actions. Rules of international law are derived from many sources, none of which is entirely authoritative. Furthermore, within each general source, such as court decisions and writings of publicists, many varying interpretations may be found. Finally, those settled rules which have been generally accepted by many states are few in number. These few are stated in broad terms subject to variant interpretations, especially when states attempt to apply them to new and increasingly complicated fact situations.

V. LAW AS A FRAMEWORK FOR THE SETTLEMENT OF THE DISPUTE

When the parties to a dispute expressly or tacitly acknowledge that relevant rules of law exist, that such rules are applicable, and that they should be used as a reference for determining the rights and duties of the parties, then the dispute may be settled within a framework of law. This is the ultimate role that law can play in negotiations. Rarely does law play a significant role in negotiated dispute settlement since factors which militate against an increased role of law in negotiations are generally present, and factors which encourage settlement,within a framework of law are generally absent.

One factor which discourages the influence of law in negotiation is that the parties rarely possess equal strength or bargaining power. When one of the parties is stronger and has the opportunity to use his military or economic power, to influence the negotiations, he will be disinclined to forego the benefits of that advantage and to agree to a settlement based strictly on law. In almost every case, one party to the negotiation will enjoy some advantage in power over his adversary.

A related factor is that nations of different social and economic backgrounds will entertain different views of international law. The Mexican-American dispute, concerning the expropriations arising out of Mexico's agrarian reform, is a case in point. Mexico needed to reallocate land which had previously been held under the laws of a colonial and feudal system. Since immediate and full compensation to prior landowners was impossible, Mexico, like other emerging nations, was naturally inclined to view the international law of expropriation as requiring something less than full and immediate compensation. The United States, on the other hand, was a prosperous country with deeply rooted traditions demanding respect for private property. She was, therefore, inclined to embrace a rule which supported full compensation. The dispute was finally settled by compromising legal arguments, but no generally accepted rule of law was found to which both parties would submit.[33] Negotiations proved completely unsuccessful because of this failure to discover a justifiable legal compromise when Cuba nationalized the property of United States citizens in 1960.

A third factor which militates against the negotiated settlement of disputes within a framework of law is that states are still reluctant to rely on law in the face of a threat to their security or other vital interests. Survival is more important than the maintenance of the system. Thus, as elements in the dispute threaten vital interests, the parties will be less inclined to submit to a determination of issues according to law. Instead, they will employ more concrete bargaining tools, such as threats of countermeasures or retaliation.

The factors which militate toward negotiated settlements within a framework of law are generally not present; these are the same factors which would militate toward dispute settlement by other means within a framework of law.[34] One such factor is the availability of a set of applicable legal rules. As has been demonstrated above, those predictions

[33]Nor has a generally accepted rule regarding compensation for expropriation yet been found. See I. OPPENHEIM, INTERNATIONAL LAW 352 (8th ed. Lauterpacht 1955). Rarely is any compensation paid for national expropriations, though it is often promised. E. MOONEY, FOREIGN SEIZURES 4 (1967).

[34]See Katz, supra note 17, at 110-111.

of national behavior to which the world community as a whole consents are generally very broad and few in number. Were there a sophisticated and large body of applicable rules of law, decisions based on such law, whether made by adjudicators or negotiators, would be easier and distortion of legal arguments would be more difficult. This requires the sophistication and development of other forms of peaceful dispute settlement. Applicable principles of law, to be effectively used by negotiators to settle disputes within a framework of law, must emanate from established sources through established procedure.[35]

Another factor which should help effectuate a settlement within a framework of law is a high degree of legal development within the states which are party to the negotiations. Men who are used to solving domestic problems in the context of an effective domestic legal system will be more likely to seek solutions to international disputes within a framework of law, than will their counterparts from countries with ineffective legal systems.

If all of the factors which favor the negotiated settlement of an international dispute within a framework of law are present, and all the factors which militate against a settlement based on law are absent, such a settlement nevertheless may not occur. Negotiation is a simple and practical method of conflict resolution. The parties deal at arms' length and are in a position from which they can easily trade concessions to achieve mutually desirable results, despite the availability of applicable rules of law which might suggest other arrangements. Law may be used as a tool by a party whose position it supports, but, in that case, law may only have the effect of adding weight to concession from that position. If all the factors which favor the facile and effective operation of the negotiation process are present, the parties will proceed expeditiously to a settlement, with or without the aid of legal rules.

VI. THE IMPACT OF NEGOTIATED SETTLEMENTS ON LAW

A principal source of international law is the custom and usage of nations,[36] which is derived from patterns of state behavior. The settlement process of international disputes represents state behavior. It also indicates that certain forms of state behavior have in certain circumstances been consented to by other states. Analysis of the arguments pressed by negotiators and of the bases for agreement which they find, may, therefore, be a useful source of law. Additionally, such analyses may reveal changes in the law.

Negotiated settlements may be subjected to quantitative analysis, and such an analysis of similar agreements in negotiations on similar subjects may reveal international

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[35] Id.

[36] P. COBBETT, CASES AND OPINIONS ON INTERNATIONAL LAW 5-6 (3d ed. 1909).

usage or an international consensus as to permissible patterns of behavior. For example, an analysis of negotiations arising out of national expropriations, such as the negotiations between the United States and Mexico, might reveal a consensus as to the quantum of compensation forthcoming after the seizure of aliens' property. The result might be that no compensation is required. Despite the strenuous maintenance of legal arguments supporting compensation and promises by expropriating states that compensation is forthcoming, former property-owners are rarely paid.[37]

Quantitative analysis can also be made of the number of states (and their interests) involved in a single negotiation or series of negotiations in which participation is widespread. Often the process of analysis is facilitated by the integration of consensus positions into a convention, such as the Conventions on the Law of the Sea[38] or a resolution, such as the Universal Declaration of Human Rights.[39] These documents have a greater significance than mere evidence of contractual relations between signatory states. They can be regarded as evidence of general principles of law, depending on the number of signatories, the substance of the agreement, and other factors.

Negotiated dispute settlements may be found to have an impact on law when they are subjected to an analysis of a qualitative nature. Examination of the duration and difficulty of the settlement process may reveal the availability or absence of rules or precedents. Analysis of the arguments used, their effectiveness, which positions are successfully maintained, and which are compromised may indicate which propositions of law can weather contentious proceedings. Finally, if the settlement is effective and if the parties find a way to eliminate or to live with the circumstances which caused the dispute, a workable rule of suggested conduct may emerge possessing general applicability to other similar circumstances which threaten to precipitate disputes.

By such inquires, one may discern the limited and subtle influences that negotiated settlements have on law. The law is influenced, but such influences differ from those of other forms of dispute settlement. This is true, principally because negotiation lacks a common characteristic of these other methods - the impartial third party decision-maker. Conciliation is much like negotiation. The conciliator's decision is not necessarily binding, but it will probably represent a compromise position and the

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[37] See E. MOONEY, supra note 33.

[38] Signed April 29, 1958, U.N. Doc. A/ CONF. 13/L. 52-55, reprinted in 52 AM. J. INT'L L. 834 (1958).

[39] G.A. Res. 217A, 3 U.N. GAOR, Res I, at 71, U.N. Doc. A/810 (1948), reprinted in 43 AM. J. INT'L L. 127 (Supp. 1949).

parties will likely agree to follow it. The disputants do not ask the conciliator to decide which rule of law applies. They seek only a fair decision as a basis for the settlement of their dispute. An arbitrator also seeks a solution to the dispute before him, but he has much more latitude in referring to law to determine how the dispute ought to be settled. An adjudicator should attempt to ground his decision in generally accepted principles of law. In the international context, a judge's interest in the continuing efficacy of his court and in the rendering of a decision with which both parties can abide may lead him to reach a decision that is apparently a compromise of interests. Again, however, the decision must be grounded in recognized principles of law.[40] As the authority of the third party decision-maker increases, there is therefore, greater likelihood that his decision will reflect more than a compromise of competing interests. There is, in fact, a greater likelihood that his decision will reflect international community attitudes concerning the manner in which disputes like the one at hand ought to be decided. There is also a greater likelihood that such a third party decision-maker will look to international law as evidence of those community attitudes and ideas.

In a negotiated settlement there is much less likelihood that the "decision" agreed upon by the parties will be based on international law or justified under it. Other than providing evidence of national behavior, decisions reached by negotiation are therefore, not as precise indicants of international law as the decisions of arbitrators or judges. In some cases negotiated settlements may even be misleading, as where a party whose position accords with law compromises his position to obtain concession on another issue.

On the other hand, a significant number of negotiated dispute settlements, when properly analyzed, can provide evidence of what the law is and how the law may have changed. This is especially true when the analysis reveals that law played an important role, either as a negotiating tool or as a framework for the settlement of the dispute.

VII. CONCLUSIONS

From the foregoing it may be concluded that there is some operation of law in most negotiated dispute settlements. The extent of the role of law as a procedural guide, as a negotiating tool, or as a framework for the entire negotiation and settlement, depends upon a variety of factors. These will vary in every negotiation and are capable of change during the course of each single negotiation. The role of law and the impact of settlement on the law are less apparent in negotiation, than they are in other forms of

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[40] See, e.g., I.C.J. STAT. art. 38.

dispute settlement.

Should negotiation, for this reason, be discouraged in favor of more sophisticated means of dispute settlement, which may contribute more to the development of law? This might be desirable were the rule of law the ultimate goal of world organization. Whatever that ultimate goal may be, it must embrace a system of orderly and peaceful means for settling the disputes which naturally arise from increased international intercourse. Negotiation is a simple, efficient, and flexible means of dispute settlement, and, therefore, furthers this policy whether or not law plays a substantial role. As world order based upon law continues to develop and law increasingly pervades other forms of international interaction, law should increase its role in negotiated dispute settlements.