| Chapter 12 |

International Dispute Settlement

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ABSTRACT

The present chapter aims to discuss the methods and institutions designed to solve international disputes between states (and/or states and international organizations) from the perspective of the Central-Eastern European region. The chapter starts by explaining the notion of an "international dispute," followed by a discussion of the techniques used for dispute settlement. The author invokes Article 2(3) of the UN Charter, which establishes the obligation of states to settle disputes without prejudice to international peace and security. Another important point of reference is Article 33(1) of the UN Chapter, which obliges states to seek a solution to a dispute endangering the maintenance of international peace and security, while listing a non-exhaustive list of methods used for that purpose (negotiations, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangement, or "other peaceful measures of their own choice"). In the subsequent subsections the author comments on the development of the international judiciary and the "renaissance" of arbitrage as a means of international dispute settlement, as well as the specificity of dispute resolution within European regional organizations. The last subchapter includes examples of disputes between Central and Eastern European States that have been submitted to various mechanisms of settlement since the collapse of communism in the late 1980s.

KEYWORDS

international dispute settlement, peaceful resolution of disputes, international judiciary, regional European organizations

1. Introduction

Settlement of international disputes by peaceful means has been expressly recognized as one of the primary purposes and principles of the United Nations (cf. Articles 1(1) and 2(3) of the United Nations (UN) Charter, respectively), though it dates back to an earlier milestone of international law: the 1899 Hague Peace Conference.[1] Having established its firm roots in the UN Charter, the principle of peaceful settlement of disputes found further confirmation *inter alia* in the UN General Assembly Resolution

1 See the Convention for the Pacific Settlement of International Disputes (the I Hague Convention), which established the Permanent Court of Arbitration. The provisions of this treaty were expanded in the convention of the same title adopted during the Second Hague Conference in 1907.

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2635(XXV) on Principles of International Law concerning Friendly Relations and Co-operation among States[2] and the Manila Declaration on the Peaceful settlement of disputes between States.[3]

It is perhaps superfluous to recall that in the UN era international disputes have been supposed to be settled "in such a manner that international peace and security, and justice, are not endangered" (Article 2(3) of the UN Charter). There is no doubt that the prevention of aggression and other threats to peace and security constitutes a primary aim of international law and is of vital concern of the international community as such. Thus, the institutional and procedural developments after both World War I and World War II with respect to settling international disputes can only be described as thriving. Whether or not the plethora of means and techniques available to states interested in settling a dispute is always eagerly or adequately used is another matter. As an introductory remark, however, it needs to be stressed that "international dispute settlement" remains a fairly well-established area of diplomatic, quasi-judicial, and judicial instruments at the disposal of states.

As Chapter VI of the UN Charter deals with the "pacific settlement of disputes," its Article 33 Para. 1 should be quoted here *in extenso*:

> "The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace or security, shall, first of all, seek a solution by negotiations, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice."

Article 33 Para. 2 of the Charter vests the Security Council with the competence to "call upon the parties to settle their dispute by such means" if the Council deems it necessary.

The open catalogue of means referred to above is broad and allows interested states much room for maneuver, depending on a variety of factors such as the character of the dispute, the political will of the concerned parties, the willingness to engage a third party to facilitate the resolution, and the existence of a jurisdictional basis allowing for recourse to an international court.

2. The notion of an "international dispute"

The concept of "international dispute" has been traditionally explained by reference to the *Mavrommatis Palestine Concessions* case adjudicated by the Permanent Court of International Justice (PCIJ) in 1924.[4] The PCIJ ruled that "a dispute is a disagreement

2 Resolution adopted on October 24, 1970.
3 United Nations General Assembly, 1982.
4 Judgment of the PCIJ of August 30, 1924, PCIJ Series A, no. 2.

on a point of law or fact, a conflict of views or of interests between the parties."[5] The International Court of Justice (ICJ) reiterated this concept *inter alia* in an advisory opinion of 1950[6] and its subsequent case law.

One can divide international disputes using several criteria. The first criterion relates to the above-mentioned Article 33 of the Charter, which distinguishes disputes likely to endanger the maintenance of international peace or security. As not all disputes reach that level, some do not fall within the ambit of that provision. Nevertheless, even disputes that do not seem to endanger the maintenance of international peace or security are supposed to be resolved by peaceful means. The distinction between "endangering" and "non-endangering" disputes is important, as it determines the competence of the Security Council to deal with the case and call upon the parties to settle it. The Security Council (SC) may also take other actions as provided in Chapter VI of the UN Charter (Article 33(2)), including an investigation into any dispute or any situation that has not yet developed into a dispute in order to determine whether it falls under the category of endangering the maintenance of international peace or security (Article 34 of the UN Charter [UNC]). If it does, the SC may "recommend appropriate procedures or methods of adjustment" (Article 36 Para. 1 of the UNC). Should the parties to the dispute fail to solve it by the means referred to in Article 33 of the UNC, they are expected to refer it to the SC, which shall decide whether to take action under Article 36 or "to recommend such terms of settlement as it may consider appropriate."

Another distinction can be drawn between political and legal disputes. This differentiation is far from clear, and historically it has been a matter of many controversies. It is of little assistance in explaining this division that under Article 36 Para. 3 of the UN Charter: "legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court." This could imply—at least in theory—that non-legal (political) disputes are those that should be resolved in a diplomatic rather than judicial way. The political and legal reality of the international community seems to be more complicated. It would be unsustainable to argue that we can distinguish between purely political or legal international disputes. One could claim that given the contemporary stage of development of international law, there are hardly any areas for virtually political disputes without any legal norms or principles in the background. On the other hand, it would be unrealistic to infer that each and every international dispute can be resolved solely by reference to international law.

Historically speaking, the division between legal and political disputes was juxtaposed with the differentiation between justiciable and non-justiciable ones. The first category denotes disputes that can be effectively examined and resolved by recourse to legal norms, while the other—such as disputes concerning the "vital interests of states" or those "incapable of objective judicial determination"—refers

5 Para. 11 of the judgment.
6 International Court of Justice, 1950, p. 74.

to disputes that cannot be solved "just" by the application of relevant law. It is a matter of individual (and subjective) assessment to determine what kinds of disputes are indeed non-justiciable, and the assessment itself might be a matter of dispute between states. Yet another kind of dispute may arise in justiciable cases: that where the parties disagree as to the appropriate forum of submitting the dispute, for instance if only one party is interested in the adjudication of the International Court of Justice. In general, however, the non-justiciability of an international dispute would result from the fact that it involves a highly political component, at least in the eyes of one of the parties.

In contrast to the above distinction (justiciable v. non-justiciable), it is perhaps less problematic to indicate the meaning of "legal disputes," as the latter are explicitly referred to in Article 36 Para. 2 of the Statute of the International Court of Justice. According to this provision:

> "The states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:
>
> a) the interpretation of a treaty;
> b) any question of international law;
> c) the existence of any fact which, if established, would constitute a breach of an international obligation;
> d) the nature or extent of the reparation to be made for the breach of an international obligation. [emphasis added]"

In essence, the distinction between political and legal international disputes seems to still play a role on the conceptual level; however, the division between justiciable and non-justiciable can be regarded as obsolete.

One should also note that international disputes arise between states as primary subjects of international law, but it is conceivable that a dispute may also arise between a state and an international organization or an organ thereof (e.g., a member state of the European Union and the European Commission). In the latter case, the regime of dispute resolution might be subject to very specific methods of resolution (including judicial ones), although one could argue that negotiations would always remain a method of "first choice." It could also be asked whether an "international dispute" may involve other subjects than states or international organizations, i.e., individuals or international corporations. It is sometimes the case that international law provides these classes of subjects with specific procedural rights allowing them to enter into a dispute with a state, for instance on the basis of a human rights treaty or under an investment treaty (in case of corporations). However, these kinds of disputes usually have a very specific procedural background and the parties do not have the same plethora of "options" as states in the event of an inter-state dispute.

3. The classic methods of peaceful resolution of disputes

By "classic" peaceful methods of international dispute settlement one can list the modes referred to in Article 33 of the UN Charter, comprising: *negotiations, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.* One can differentiate between diplomatic and judicial means of dispute settlement, while the principal criterion that distinguishes diplomatic methods from judicial ones is the degree of involvement of a "third party." In case of diplomatic methods, the parties to a dispute are not legally obliged to follow the result of the settlement, whereas submitting a dispute for a judicial determination creates an expectation (and usually a legal obligation) that the parties will accept the decision adopted this way.

Negotiations are traditionally regarded as the most common and "natural" way of settling international disputes. This method implies the direct participation of parties interested in settling without a third party or a facilitator. Negotiations assist in solving a dispute, but they may also help to prevent one, and such an effect can be achieved through consultations. It is sometimes expected that the parties to the dispute would attempt negotiations before reaching for other means of settlement. For instance, Article 22 of the International Convention on the Elimination of All Forms of Racial Discrimination provides:

> "Any dispute between two or more States Parties with respect to the interpretation or application of this Convention, which is not settled by negotiation or procedures expressly provided for in this Convention, shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement."[7]

Direct consultations or negotiations may or may not be institutionalized in the form of *ad hoc* bilateral (or multilateral) mixed commissions. Notwithstanding the widespread use of negotiations in international relations, it may happen that parties to a dispute arrive at the limits of the possible compromise, and/or the process gets stuck. The question then arises whether the parties are at least capable of agreeing on the next possible step, i.e., choosing an appropriate procedure involving a third party or a judicial method of resolving the dispute. Sometimes the "next step" in case of failed negotiations might be foreseen by a particular treaty and the path to a judicial solution opened. Irrespective of the follow-up to failed negotiations, however, any subsequent method of dispute resolution takes the dispute to the next level by allowing a third party either to facilitate or settle the conflict. This does not mean that unsuccessful negotiations automatically remove the disputes from the hands of the

7 See on the application of this clause in Balcerzak, 2018.

involved parties. Even in the lack of a negotiated settlement and/or during a procedure involving a third party, the parties usually retain the possibility of returning to the negotiating table.

Negotiations as means of settling an international dispute might not only be a matter of parties' choice but may result from a treaty or general international law. By way of example, such a legal obligation to negotiate in good faith was established by the ICJ in the *Gabčíkovo-Nagymaros Project* case *(Hungary/Slovakia)* case and expressed as follows:

> "[The ICJ] finds that Hungary and Slovakia must negotiate in good faith in the light of the prevailing situation, and must take all necessary measures to ensure the achievement of the objectives of the Treaty of 16 September 1977, in accordance with such modalities as they may agree upon."[8]

Apart from the above, however, assuming the negotiations were not capable of leading to an amicable solution to a dispute, the other non-judicial methods of settling include *enquiry, mediation,* and *conciliation.* The essence of mediation (sometimes called "good offices") is to allow a third party (a state, an international organization, or sometimes even an individual) to facilitate the negotiations as an intermediary and offer its assistance as may be required. Should the parties to the dispute differ as to the factual background of the case, they may also decide to set up an inquiry commission. Conciliation on the other hand goes a step further than mediation or inquiry (while involving these elements), where it is implicit that a conciliation commission not only facilitates an amicable solution but also impartially examines the case and offers its recommendations as to the settlement of the dispute. The standard rules of conciliation were included in the 1961 resolution of the International Law Institute.[9]

The above-mentioned non-judicial methods of dispute settlement have been used with varying frequency after World War II. States have not been particularly enthusiastic regarding the use of mediation or conciliation, despite many facilitating arrangements, both in bilateral and multilateral treaties. Therefore, examples of successful conciliations in the last decades are not very numerous: One should mention, however, the *Timor Sea Conciliation (Timor Leste v. Australia),* undertaken under Article 298 and Annex V of the United Nations Convention on the Law of the Sea.[10] There have also been interesting developments in the application of the conciliation mechanism provided by one of the UN human rights treaties (International Convention on the Elimination of All Forms of Racial Discrimination [ICERD]).[11]

8 Para. 2. B (operative part), *Gabčíkovo-Nagymaros Project* case *(Hungary/Slovakia),* judgment of September 25, 1997, ICJ Reports, p. 7.A.
9 Available at Institute of International Law, 1961.
10 Proceedings initiated on April 11, 2016, and concluded by a final Award on May 9, 2019. See Permanent Court of Arbitration, 2018, and Tamada, 2020.
11 See Eiken and Keane, 2021.

4. Arbitration and international judicial settlement of disputes

The main reason to distinguish arbitration and the judicial settlement of international disputes from the methods referred to above (negotiation, mediation, inquiry, and conciliation) is the binding character of judicial and arbitral decisions.[12] The essence of arbitration is to submit a dispute to a tribunal or joined commission composed of arbitrators designated by the parties to the dispute and chaired by an arbiter agreed upon by the parties. Arbitration tribunals or commissions may be set up *ad hoc* for a particular dispute or be composed in the framework of a pre-existing arbitral mechanism.

Historically speaking, arbitration has a long tradition in international law. Examples of arbitration can be traced back to Antiquity and Middle Ages, though it was not until the end of the 18th century that this method of settling international disputes started to regain its significance. Several historical treaties and disputes contributed to the development of arbitration, principally those between the United States and the United Kingdom: the Jay Treaty of 1794, the Treaty of Ghent of 1814, and the famous *Alabama* case of 1871. The arbitral practice of the 19th century led to the establishment of the Permanent Court of Arbitration based on the 1899 Hague Convention. While actually not "permanent" and not exactly "a court," the PCA remains the oldest international organization that provides a variety of dispute resolution services (not only in the framework of arbitration) to interested parties (not only states, but also international organizations and other entities). It is seated at the Peace Palace in the Hague, just like the International Court of Justice.

Although the practice of international arbitration in the XXth century has been quite significant, the development of the international judiciary might have been one of the factors why the recourse to arbitration was not particularly frequent, at least not until the beginning of the 21st century. That is not to say that arbitration was fully forgotten following World War II; there have been notable examples of international arbitration, such as the *Lake Lanoux* case (France v. Spain),[13] *Rann of Kutch* case (India v Pakistan),[14] or the *Channel* arbitration (UK v. France).[15] An important development in the history of international arbitration was the set-up of the Iran-US Claims Tribunal in 1981.

The first two decades of the XXIs century could be considered as a period of renaissance of international arbitrage, both in inter-state disputes, as well as those involving other states and private investors.[16] As regards inter-state arbitration cases between Central and Eastern Europe (CEE) states, one should mention the *Arbitration between the Republic of Croatia and the Republic of Slovenia*, which concerned a territorial

12 Merrills, 2011, pp. 83 et seq.
13 Lake Lanoux Arbitration (France v. Spain), 1957.
14 United Nations, 1968.
15 United Nations, 1977–1978, p. 6.
16 On the latter kind of disputes in Central Eastern Europe, see Nagy, 2019.

and maritime dispute.[17] Based on an Arbitration Agreement, both parties entrusted the Arbitration Tribunal, composed of five arbiters, to apply "the rules and principles of international law" as well as "international law, equity and the principle of good neighborly relations in order to achieve a fair and just result by taking into account all relevant circumstances." The proceedings started in 2012 and a Final Award in the case was rendered in 2017.[18]

Notwithstanding the importance of arbitration as a means of international dispute settlement, the last hundred years could be regarded as an era of international judiciary. It started with the establishment of the Permanent Court of International Justice by the Covenant of the League of Nations in 1919. The PCIJ was the first permanent international court, and from its inaugural sitting in 1922 until its dissolution in 1946 it was seised with 29 contentious cases and delivered 27 advisory opinions. The PCIJ's successor, the International Court of Justice, was established in 1945 as a principal judicial organ of the United Nations. The ICJ is without doubt the most important international court, and its jurisprudence is an object of constant scholarly attention. In its more than 75 years of operation, the ICJ has only very rarely had an opportunity to adjudicate cases involving CEE countries. One of these (*Gabčíkovo-Nagymaros Project* case, Hungary/Slovakia) will be briefly commented upon in the last section of this chapter.

In discussing the development of the judicial settlement of international disputes, one should at least mention the phenomenon of the second half of the XXth century known as the "proliferation of international courts and tribunals." While the very term "proliferation" might not be the most fortunate in this context, it is supposed to denote a tendency to set up specialized and/or regional international courts, exercising their jurisdiction in matters relating *inter alia* to human rights law,[19] international law of the sea[20] or international criminal law.[21] It can be argued that some reservations initially expressed as to the "multiplication" of international courts and fears of weakening the ICJ's role as the principal judicial organ of the UN have not proved justified. Regional and/or specialized international courts play a vital role in the international administration of justice and reflect the will of states to submit specific kinds of disputes to the jurisdiction of these courts. Another problem is whether states are always eager to abide by judgments of international courts in cases in which they are parties. In any event, however, there is no doubt that the expansion of the international judiciary over the last century has greatly contributed to the development of international law.

17 See Permanent Court of Arbitration, 2017a.
18 See Permanent Court of Arbitration, 2017b.
19 Cf. the European Court of Human Rights (established on the basis of the Convention on the Protection of Human Rights and Fundamental Freedoms of November 4, 1950), the Inter-American Court of Human Rights (established under the American Convention on Human Rights of November 22, 1969), and the African Court of Human and Peoples' Rights (acting under the Protocol to the African Charter on Human and Peoples' Rights adopted on June 9, 1998).
20 Cf. the International Tribunal for the Law of the Sea (ITLOS), established under the UN Convention on the Law of the Sea of December 10, 1982.
21 Cf. the International Criminal Court, established under the Rome Statute of July 17, 1998.

5. Specificity of dispute settlement within European regional organizations

5.1. European Union

EU law is a specific legal order, governed *inter alia* by the principles of autonomy and direct effect. "Classic" inter-state disputes over the application of EU law occur very rarely. More often than not, a dispute over the incorporation of EU directives or adopting provisions that are not in conformity with EU law may arise when the European Commission launches an infringement procedure under Article 258 of the Treaty on the Functioning of the European Union (TFEU),[22] which provides:

> "If the Commission considers that a Member State has failed to fulfill an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.
> If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union."

However, it may happen—albeit exceptionally—that a Member State of the EU directly confronts another Member over the non-application of EU law. This is considered exceptional because the general idea of the resolution of legal disputes in the EU is based rather on persuasion or negotiations between the European Commission and the interested Member State or the interested Member States themselves before addressing the Court of Justice of the EU. The judicial way of settling inter-state disputes among the EU Member States is thus far from preferred, but possible under Article 259 of the TFEU, which provides:

> "A Member State which considers that another Member State has failed to fulfill an obligation under the Treaties may bring the matter before the Court of Justice of the European Union.
> Before a Member State brings an action against another Member State for an alleged infringement of an obligation under the Treaties, it shall bring the matter before the Commission.
> The Commission shall deliver a reasoned opinion after each of the States concerned has been given the opportunity to submit its own case and its observations on the other party's case both orally and in writing.
> If the Commission has not delivered an opinion within three months of the date on which the matter was brought before it, the absence of such opinion shall not prevent the matter from being brought before the Court."

22 Consolidated version of the Treaty on the Functioning of the European Union, 2012.

Fewer than 10 disputes under Article 259 TFEU have found their way to the Court of Justice of the European Union (CJEU), with some of them considered by the Court to be outside the scope of the EU law and thus inadmissible,[23] and some were resolved before a judgment of the CJEU as to the merits (see the Czech-Polish dispute over the Turów mine commented upon at the end of this chapter).

Another existing but extremely rarely used possibility of bringing an inter-state dispute to the jurisdiction of the CJEU can be traced in Article 273 of the TFEU, which stipulates:

> "The Court of Justice shall have jurisdiction in any dispute between Member States which relates to the subject matter of the Treaties if the dispute is submitted to it under a special agreement between the parties."

This provision of the TFEU lay dormant until Germany and Austria brought a case to the Court over an interpretation of a bilateral convention for the avoidance of double taxation with respect to taxes on income and capital.[24] The CJEU judgment in this case clarified some aspects of the application of Article 273 TFEU,[25] though it should rather not be expected to have opened the gates to a flow of new inter-state disputes brought under this head.

5.2. Council of Europe

The Council of Europe does not have a statutory[26] organ entrusted with the competence to adjudicate international disputes between its member states. However, two issues need to be mentioned in the context of the role of this organization in the judicial settlement of inter-state disputes. The first relates to a special instrument adopted for that purpose: the European Convention for the Peaceful Settlement of Disputes.[27] The other is the competence of the European Court of Human Rights to adjudicate inter-state cases based on Article 33 of the Convention on the Protection of Human Rights and Fundamental Freedoms.

As regards the European Convention for the Peaceful Settlement of Disputes, it could be regarded as an expression of the good intentions of the Council of Europe member states in the first years of its functioning, even though the Convention itself has not necessarily brought tangible results. The adoption of this Convention might in a way be perceived as an attempt to mitigate doubts around the establishment of the European Court of Human Rights, which at that time was considered by some

23 See judgment of the CJEU of January 31, 2020, Case C-457, *Republic of Slovenia v. Republic of Croatia*, ECLI:EU:C:2020:65.
24 See judgment of the CJEU of September 12, 2017, Case C-648/15, *Republic of Austria v. Republic of Germany*, ECLI: EU:C:2017:664.
25 See Nowak, 2020.
26 The Statute of the Council of Europe was adopted in London on May 5, 1949. European Treaty Series no. 1.
27 Adopted on April 29, 1957, European Treaty Series no. 023.

commentators as creating a "competition" with the International Court of Justice. The parties to the 1957 Convention agreed to submit to the jurisdiction of the ICJ "all international disputes that may arise between them," without prejudice to other undertakings that the states might have undertaken to accept its jurisdiction (for instance, by way of a declaration recognizing the jurisdiction of the ICJ as compulsory under Article 36 Para. 2 of the Statute of the ICJ). The 1957 Convention includes also provisions on conciliation and arbitration procedures (Chapters II and III). Importantly, the Convention does not apply to disputes "which the parties have agreed or may agree to submit to another procedure of peaceful settlement" (Article 28).

The moderate success of the 1957 Convention is illustrated by the fact that it was ratified by only 14 (of the current 46) Council of Europe member states, mostly West European (with the notable exception of the Slovak Republic, which ratified it in 2001). This does not mean that the convention is obsolete: It was directly invoked by Germany in instituting proceedings against Italy at the International Court of Justice in 2008[28] and 2022.[29]

The second important aspect of settling inter-state dispute in the framework of the Council of Europe is the competence of the European Court of Human Rights under Article 33 of the European Convention on Human Rights (ECHR). While the control system of the ECHR is primarily focused on individual complaints (brought under Article 34 of the Convention), the adjudication of inter-state cases is part and parcel of the Court's judicial agenda. The ECHR allows any state party to bring a complaint about "any alleged breach of the provisions of the Convention and the Protocols thereto by another High Contracting Party" (Article 33). Thus a complaint under this head need not concern an allegation of a violation of the Convention against the applicant state's national(s). In the history of the ECHR system, it has happened that some states decided to launch inter-state proceedings in the general interest of the European public order.[30]

In general, the inter-state disputes at the ECHR in the past two decades were either a reflection of the serious deterioration of international relation, with an armed conflict in the background or examples of less grave disputes over rights and freedoms protected in the Convention that could not be solved in an out-of-court way.[31] The two major groups of cases from the first category concern the conflicts between Ukraine and Russia, Georgia and Russia, and Armenia and Azerbaijan. The exclusion of the Russian Federation from the Council of Europe on March 16, 2022, did not result in the discontinuation of cases launched against it by Ukraine.

28 International Court of Justice, 2008.

29 International Court of Justice, 2022.

30 See the so-called "Greek cases" (no I and II) submitted between 1968 and 1970 by Denmark, Norway, Sweden, and the Netherlands. The cases did not reach the European Court of Human Rights, as in the control system prior to the entry into force of Protocol no. 11 (in 1998) both individual and inter-state complaints were first lodged with the European Commission on Human Rights. The first inter-state complaint adjudicated upon by the Court was *Ireland v. United Kingdom* (judgment of June 27, 1978).

31 See e.g., the *Liechtenstein v. the Czech Republic* case (no. 35738/20).

Concerning the inter-state disputes involving CEE states, one should mention the *Slovenia v. Croatia* case concluded by the decision of the Grand Chamber of the ECHR, which found that it had no jurisdiction to hear the case. The complaint will be commented upon at the end of the chapter.

5.3. Organization for Security and Co-operation in Europe

The Helsinki Final Act of 1975, which has been the cornerstone of the then Conference and since 1995 the Organization for Security and Co-operation in Europe, refers to the peaceful settlement of disputes in Para. V and stipulates:

> "The participating States will settle disputes among them by peaceful means in such a manner as not to endanger international peace and security, and justice.
> They will endeavour in good faith and a spirit of cooperation to reach a rapid and equitable solution on the basis of international law.
> For this purpose they will use such means as negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement or other peaceful means of their own choice including any settlement procedure agreed to in advance of disputes to which they are parties.
> In the event of failure to reach a solution by any of the above peaceful means, the parties to a dispute will continue to seek a mutually agreed way to settle the dispute peacefully.
> Participating States, parties to a dispute among them, as well as other participating States, will refrain from any action which might aggravate the situation to such a degree as to endanger the maintenance of international peace and security and thereby make a peaceful settlement of the dispute more difficult."

While the Helsinki Final Act was not an international treaty, it can be considered an important step toward alleviating the tensions between the West and the East in the Cold War era. The transformation of the Conference into an international organization (OSCE) has retained the idea of peaceful resolution of disputes as one of the basic assumptions of international order. To this end, the OSCE has specifically developed two areas of activities: mediation support and conciliation and arbitration services.

As regards mediation, it is noteworthy that a Mediation Support Team was established within the Conflict Prevention Center[32] with a view to provide states with a variety of services to facilitate dialogue and mediation arrangements. As regards other methods of pacific dispute settlement mentioned in the Helsinki Final Act, a special court was established by the Stockholm Convention of 1992: the Court of Conciliation and Arbitration, with the mandate to settle disputes between states.[33]

32 See Organization for Security and Co-operation in Europe Secretariat, 2014.
33 See Commission on Security and Cooperation in Europe, 1992. The Convention entered into force on December 5, 1994. There are 34 state parties to the Convention as of 2022.

The Court is a non-permanent body, and conciliation or arbitral commissions are supposed to be established on an *ad hoc* basis. There have not so far been any cases submitted by the parties to the Stockholm Convention. On the one hand, this fact could call the Court's utility into question, but on the other one should recall that also another Court offering conciliation and arbitration services, i.e., the Permanent Court of Arbitration, experienced long periods of underuse in the 20th century. Only time will tell if there will be any demand for the services of the OSCE Court of Conciliation and Arbitration in the new security architecture that sooner or later will emerge in Europe after the armed conflict in Ukraine.

6. Selected disputes between Central and Eastern European States

This section comments on three selected international disputes that involved Central and Eastern European States: (1) *Gabčíkovo-Nagymaros Project* case *(Hungary v. Slovakia)* at the ICJ, (2) *Slovenia v. Croatia* at the European Court of Human Rights (appl. no. 54155/16), and (3) Case C-121/21 *Czechia v. Poland* at the Court of Justice of the European Union (Turów mine case). Essentially, only the first dispute resulted in a judgment as to the merits; in the second dispute, the Grand Chamber of the ECHR found that it had no jurisdiction to take cognizance of the application, whereas the third dispute led to some procedural orders by the CJEU, followed by an agreement between the interested states and the withdrawal of the complaint by Czechia.

Since each of these cases concerns a different factual and legal context and was adjudicated by a different international court, it would be hard to argue that these examples allow us to reach any definite conclusions as to the character of "Central European disputes." However, one might observe that, in essence, the first two disputes concerned in one way or another the aftermath of the political and economic transformation of the region in the late 1980s and early 1990s. Further, the first and third of the disputes discussed below concerned environmental law.

6.1. Gabčíkovo-Nagymaros Project case (Hungary/Slovakia) at the ICJ

The *Gabčíkovo-Nagymaros Project* case can be considered unique for a few reasons: It is the only contentious case brought so far to the ICJ by two Central European States; it was the first environmental dispute submitted to this Court; and further, for the first time in the history of the ICJ that the judges paid a visit to the site during the proceedings. It is also quite unusual for a case at the ICJ to be still on the list of cases almost 30 years after it was brought and 25 years after the delivery of the judgment.

The case originated from a dispute between Hungary and Slovakia over a large barrage project in the Danube. The project was undertaken on the basis of the Budapest Treaty signed between the Czechoslovak Socialist Republic and the Hungarian People's Republic on September 16, 1977. While the work on the Slovakian part proceeded, the project came to a halt in 1989 when Hungary first suspended and then abandoned the works that were supposed to be undertaken on its part. In 1993

Hungary and Slovakia agreed to submit the dispute to the ICJ by a Special Agreement, asking the Court: (1) whether Hungary was legally entitled to suspend and abandon the works on the Nagymaros Project, (2) whether in 1991 the Czech and Slovak Federal Republic was entitled to enforce a "provisional solution," and (3) what were the legal effects of the termination of the Budapest Treaty by Hungary in 1992.

The ICJ delivered a judgment on September 25, 1997, holding that Hungary was not entitled to suspend and subsequently abandon the works on the Nagymaros Project and that the "provisional solution" enforced by Czechoslovakia in 1991 was in conformity with international law. However, the Court found that Czechoslovakia was not entitled to put into operation the barrage system back in 1992, and further that Slovakia was a legitimate successor as a party to the Budapest Treaty from January 1, 1993. The Court stressed the obligation of both parties to negotiate in good faith and take all necessary measures to ensure the achievement of the objectives of the Treaty. The ICJ has also ruled on the mutual financial claims of both parties.

The implementation of the 1997 judgment met with some unwillingness on the part of Hungary, which prompted Slovakia to request the ICJ for an additional judgment. According to Slovakia, a draft Framework Agreement between the parties was reached but was later disapproved and disavowed by Hungary. Both parties submitted their observations to the Court but in the end no subsequent judgment was delivered, given that both states resumed negotiations and informed the Court about the progress. In 2017 Slovakia requested the ICJ to "place on record the discontinuance of the proceedings," which Hungary did not oppose.

The *Gabčíkovo-Nagymaros* judgment is considered one of the most influential pronouncements of the ICJ.[34] The ruling contributed to the development of certain areas of international law, such as the law of treaties and the law of international state responsibility. The case is illustrative of legal struggles originating in a huge construction project that was not completed in the shape originally planned by signatories to an international treaty. While the *Nagymaros* part of the waterworks has never been built, the *Gabčíkovo* power plant operates, though not at full efficiency. The uncompleted project also resulted in obstacles to inland navigation. In any event, the *Gabčíkovo-Nagymaros* case remains a landmark example of an environmental dispute in Central Europe submitted to the attention of the ICJ.

6.2. Slovenia against Croatia (appl. no. 54155/16) at the ECtHR

This inter-state dispute originated in civil claims of Ljubljana Bank, established in 1955 in the former Yugoslavia, and later reorganized, nationalized, and restructured by the Slovenian state. The claims were raised against various Croatian companies in relation to unpaid and overdue loans granted before the 1990s. Following unsuccessful civil proceedings lodged by Ljubljana Bank with Croatian courts, there were attempts by the Ljubljana Bank to seek protection under Article 1 of Protocol No. 1 to the European Convention on Human Rights (protection of property). In the decision

34 See Forlati, Mbengue and McGarry, 2020.

Ljubljanska Banka D.D. v. Croatia[35] the ECHR declared the application inadmissible, since according to the Court the applicant bank did not have sufficient institutional and operational independence from the state. Therefore the applicant bank could not be considered a "non-governmental organization" and the application was incompatible *ratione personae* with the provisions of the Convention. It should be noted that under Article 34 of the ECHR only "individuals, non-governmental organizations or groups of individuals" may be applicants before the Court.

Slovenia lodged an inter-state complaint with the ECHR under Article 33 of the Convention, which provides that *any High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and the Protocols thereto by another High Contracting Party.* According to the applicant State, the Croatian authorities had prevented and continued to prevent Ljubljana Bank from enforcing and collecting the debts of its Croatian debtors in Croatia. Slovenia argued that the case revealed multiple violations of Articles 6 Para. 1 (right to a fair hearing), 13 (right to an effective remedy), and 14 (prohibition of discrimination) of the Convention, as well as Article 1 of Protocol No. 1 (protection of property).

The case required the Strasbourg Court to address the question of whether it is permissible to examine an inter-state application that had been lodged by a State-Party to protect the rights and interests of an entity that was not a "non-governmental organization" and thus could not successfully lodge an individual complaint under Article 34 of the Convention. The respondent state opposed an interpretation of the Convention that would allow state parties to invoke a violation thereof by entities other than those indicated in the aforementioned Article 34.

The Grand Chamber of the Court decided to follow its findings in the *Lubjlanska Banka D.D. v. Croatia* case insofar as the applicant bank was found to enjoy insufficient institutional and operational independence from the State and therefore could not be regarded as a "non-governmental organization." The Court recalled that the Convention must be read as a whole and interpreted in a way that promotes internal consistency and harmony. The fact that Article 33 of the Convention does not refer to "classes" of victims or applicants—in contrast to Article 34—does not change the specific nature of the Convention as an instrument for the protection of human rights. According to the Court, even in inter-state cases it was always an individual who was directly or indirectly harmed and primarily "injured" by the violation of the Convention. Neither states themselves nor legal entities that have the status of "governmental organizations" can be bearers of the Convention rights.

The Slovenian-Croatian dispute over the unpaid loans granted to Croatian debtors by the Ljubljana Bank before the dissolution of Yugoslavia is an illustration of how the unsettled claims from the pre-1990s can lead to international litigation three decades later. The case referred to above was unique among the inter-state applications submitted to the ECtHR under Article 33 of the Convention. More often than not, the inter-state disputes brought to the Court are a consequence of an armed conflict or another

35 *Ljubljanska Banka D.D. v. Croatia*, appl. no. 29003/07, decision of May 12, 2015.

situation involving grave violations of human rights endangering European public order. Nevertheless, some inter-state cases raise also the allegations of "individual violations" with no armed conflict in the background. Regardless of the origin and nature of the dispute, the inter-state mechanism under Article 33 of the Convention can only be useful when the applicant state seeks to protect the rights and freedoms of individuals, groups of individuals, or non-governmental organizations, rather than entities that do not have sufficient institutional and operational independence from the state.

6.3. Czechia v. Poland (Case C-121/21) at the CJEU

The dispute concerned a Polish coal mine located in Turów, in the vicinity of the Polish-Czech border, which has delivered coal for a large Turów Power Station. The license for the extraction of coal at the mine was supposed to expire in April 2020, but the Polish authorities decided to extend it by another six years and expressed the intention to continue extraction for another two decades. The prolongation was in accordance with Polish law, but doubts arose whether it might have infringed the applicable EU law and in particular Directive 2011/92 of the European Parliament and of the Council on the assessment of the effects of certain public and private projects on the environment.[36] These doubts were voiced by Czechia, who claimed that the operation of the mine had a considerably negative impact on the environment and endangered the quality of life of several nearby Czech communities. It was feared that the continuing operation of the mine would lead to the drying up of wells and might also cause soil subsidence.

Both governments engaged in negotiations in 2020; however, given the delays in negotiations, the Czech government submitted the dispute to the European Commission, alleging the violation of EU law by the Polish side. The Commission concurred and subsequently, on February 26, 2021, the Czech authorities brought an action against Poland to the Court of Justice of the European Union, alleging violations of several EU Directives.[37] The applicant state also invoked Article 4(3) of the Treaty of the European Union (the principle of sincere cooperation). The principal allegation concerned the prolonging of the consent for extraction of coal at the Turów Mine without an environmental impact assessment. Czechia claimed that the prolongation was performed in a way that effectively prevented it—or the public concerned—from any possibility of intervening in the procedure for the grant of the final development consent for extraction activity in the Turów Mine until 2026.

36 Official Journal of the European Union (hereinafter OJ), 2012 L 26, p. 1.

37 Apart from the Directive 2011/92/EU referred to above, the Czech government also pleaded the violation of Directive 2000/60/EC of the European Parliament and of the Council of October 23, 2000, establishing a framework for Community action in the field of water policy (OJ 2000 L 327, p. 1), and Directive 2003/4/EC of the European Parliament and of the Council of January 28, 2003, on public access to environmental information and repealing Council Directive 90/313/EEC (OJ 2003 L 41, p. 26).

It is extremely rare for an EU member state to bring legal action against other EU member states for infringement of obligations stemming from EU law. It was also the first case in which one EU member challenged another at the CJEU over an environmental issue. Apart from the main complaint, the Czech government filed with the CJEU an application for interim measures under Article 279, requesting the Court to order that Poland shall immediately cease lignite mining activities at the Turów Mine. The request was granted by an Order of the Vice-President of the Court, delivered on May 21, 2021 (Case C-121/21). Moreover, by another Order of 20 September 2021,[38] and given Poland's failure to comply with the order to stop mining at Turów, the same Vice-President (R. Silva de Lapuerta) obliged Poland to pay the European Commission a penalty payment of EUR 500,000 per day from the date of notification of that order until Poland enforced the Order of 21 May 2021 and ceased mining activities. The order imposing a financial penalty per day for non-compliance with the CJEU order on interim measures was unprecedented and resulted in fierce criticism on the part of the Polish government. The latter argued that a sudden halt of operations at the Turów Mine would endanger national energy security and induce serious social consequences.

However, the Czech and Polish governments returned to the negotiation table and managed to achieve an agreement on February 3, 2022. Poland agreed to pay damages (EUR 45 M) and complete the construction of a barrier to stop the lowering of underground waters on the Czech side. As a result of the agreement, the applicant government withdrew the complaint to the CJEU and the case was discontinued on February 4, 2022.[39] The total amount of penalties due for non-compliance with the CJEU Order of 21 May 2021 was EUR 68 M. The attempts of the Polish government to have the penalty annulled in view of the agreement reached with the Czech Republic failed, and the penalties were deducted from the funds due to Poland from the EU budget.

The Polish-Czech dispute over the Turów Mine at the CJEU proves that even between EU member states there might be cases that are not easily resolved by negotiations. While the parties to the dispute have finally reached an agreement and the court proceedings have been discontinued, the "intervention" of the CJEU was far more expensive for Poland (due to the penalties for non-compliance with interim measures) than the sum finally agreed on as satisfying the Czech claims. It is another matter whether or not the CJEU "overreacted" as regards the scope of interim measures and the amount of penalties imposed for non-compliance. Be that as it may, the Czech-Polish dispute can serve as a background for discussion of the EU climate and energy policies as well as of the effectiveness of settling disputes between EU member states.

38 EU:C:2021:752.

39 Order of the President of the CJEU of February 4, 2022, removing Case C-121/21 from the list of cases.

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