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# E-Book

## «Mediation to Foster European Wide Settlement of Disputes»

### Chapter IX

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## International and EU Perspective on Mediation: Mediation as a Tool for the Pacific Settlement of International Disputes

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### Introduction

The study of alternative dispute resolution (“ADR”), such as (but not limited to) mediation, has dominated the doctrine of dispute settlement at domestic level in the last decades<sup>1</sup>. This is due *inter alia* to a general dissatisfaction with adjudication and arbitration. The basic idea purported by conflict theories is that ADRs are more flexible and constructive than adjudication as they are less adversarial and tend to create win-win situations. This is particularly important in cases where parties need to continue their relationship after the resolution of the dispute, such as, typically, in the context of family relations.

However, the mentioned debate has not involved the plane of disputes among actors of the international community (below, § 2). This is probably due to the fact that diplomatic means of settlement, including mediation and conciliation, were traditionally perceived as inherent to the structure of the international community. Indeed, binding dispute settlement mechanisms have for long been considered exceptional in international relations. Since the end of Cold War, adjudication has become more common as a tool of international dispute settlement<sup>2</sup>; however, resort to arbitral or judicial bodies in state-to-state disputes is still comparatively rare<sup>3</sup>.

This said, the changing nature of disputes apt to endanger international peace requires the identification of new flexible processes aimed to reach out to the dynamics of new realities. Adjudicative methods are hardly suitable tools when complex situations arise, where political, ethnic, religious interests of States, peoples and communities are at stake. In this context, a survey on

<sup>1</sup> See other contributions in this *Volume*.

<sup>2</sup> Some (mainly) Eastern bloc and developing countries have historically opposed adjudicative methods for settlement of international disputes. See, G. BOSCO, *La soluzione delle controversie giuridiche internazionali nel quadro delle Nazioni Unite*, Padova, 1989, p. 2 ff.; T. TREVES, *Le controversie internazionali, nuove tendenze, nuovi Tribunali*, Milano, 1999, p. 6 ff.

<sup>3</sup> See A. PETERS, *International Dispute Settlement: A Network of Cooperation Duties*, in *European Journal of International Law*, 2003, p. 30.

mediation as a tool for settlement of international disputes is particularly appropriate, also in view of the thrust this tool has recently gained on global and regional level (below, § 6).

## 1. The relevant notion of international dispute

The existence of disputes is an inherent characteristic of any society, including the international community. According to the definition offered by the Permanent Court of International Justice in the *Mavrommatis Palestine concessions (jurisdiction)* case, a ‘dispute’ arises when there is ‘*a disagreement over a point of law or fact, a conflict of legal views or of interests between two persons*’<sup>4</sup>. An ‘international’ dispute can be deemed to exist whenever disagreement involves governments, institutions or physical or legal persons (corporations) belonging to different national legal orders<sup>5</sup>. Yet, here reference will be made primarily to disputes arising between States (*i.e.* the main subjects of international law). Furthermore, we shall term ‘international’ also a dispute that, though occurring within one State, bears implications for the maintenance of international peace (such as ethnic conflicts or *intra*-state violent confrontations). Disputes between individuals or corporations, including international commercial disputes, as well as disputes between foreign investors and States hosting the investment, instead, fall out of the scope of this work<sup>6</sup>.

In the international legal discourse, a ‘dispute’ is often distinguished from a ‘situation’. Pursuant to the wording of articles 34 and following of the Charter of the United Nations, the Security Council of the United Nations can activate its functions for the pacific settlement of disputes in cases of ‘*disputes or situations... likely to endanger the maintenance of international peace and security*’. According to the majority of the literature, a ‘dispute’ is usually characterized by opposing claims on specific issues readily identifiable, whereas a ‘situation’ generally refers to a more complex state of affairs of a general nature, such as, for instance, the Arab-Israeli problem. A situation may therefore entail the presence of one or more specific disputes within it<sup>7</sup>. However, the distinction is hardly relevant in the practice of the Security Council, and some authors argue that it should have merely ‘quantitative’ implications, *i.e.* a ‘situation’ would involve more States than a ‘dispute’ would do<sup>8</sup>.

Merely doctrinal seems the distinction between the term ‘conflict’, used to signify a general state of hostility not focused on particular issues, and the term ‘dispute’, used to signify a specific disagreement in which parties raise claims and objections, the solution of which, however, hardly solves the broader conflict<sup>9</sup>. An example of the above difference is reportedly found, for instance, in the condition of general hostility between United States and Iran, which also included the specific crisis on the detention of US diplomatic and consular staff, solved by the International Court of Justice in the famous case *USA v. Iran*<sup>10</sup>. Such “conflict” was not overcome by the settlement of the specific dispute, and lasted at least until the Algiers Agreements of 1981<sup>11</sup>.

In this regard, however, it seems more persuasive to distinguish between legal and political disputes, or justiciable and non-justiciable disputes<sup>12</sup>. In principle, the legal nature of a dispute usually determines the possibility to resort to judicial means of settlement. Art. 36, para 2 of the Statute of the International Court of Justice provides that the States parties may recognize its jurisdiction ‘*in all legal disputes*’ concerning questions of international law. The existence of a dispute involving the application of international law is therefore a prerequisite of its ‘justiciability’ before the International Court of Justice. Nevertheless, in the practice, things are inter-connected: international political discourse is supported by legal arguments and legal arguments have their *raison d’être* in political

<sup>4</sup> PCIJ, *Mavrommatis Palestine Concessions (Jurisdiction)*, P.C.I.J. 1924, Series A, no. 2, p. 11.

<sup>5</sup> J. MERRILLS, *International Dispute Settlement*, Cambridge, 2011, p. 1.

<sup>6</sup> For some hints on mediation in investment and commercial disputes, see T. GAZZINI, *Is there any place for Mediation in the Settlement of Disputes Between Foreign Investors and States?*, in *Studi in onore di Laura Picchio Forlati*, Torino, 2014, p. 395 ff.; E. SCHWARTZ, *International Conciliation and the ICC*, in *ICSID Bull.*, 1995, p. 98.

<sup>7</sup> J. MERRILLS, *The Means of Dispute Settlement*, in M. EVANS (ed.), *International Law*, 2014, p. 563-564.

<sup>8</sup> B. CONFORTI, C. FOCARELLI, *The Law and Practice of the United Nations*, Leiden-Boston, 2010, p. 190-191. The authors also reject the idea that a ‘situation’ refers to cases involving the attitude of a State in the domestic sphere, as domestic issues can indeed trigger both a dispute and a situation at international level.

<sup>9</sup> J. COLLIER, V. LOWE, *The Settlement of Disputes in International Law, Institutions and Procedures*, Oxford, 1999, p. 1.

<sup>10</sup> ICJ, *United States Diplomatic and Consular Staff in Tehran (USA v. Iran)*, I.C.J. Reports 1980, p. 3.

<sup>11</sup> In *International Legal Materials*, 1981, p. 230; see T. TREVES, *Diritto internazionale, problemi fondamentali*, Milano, 2005, p. 582.

<sup>12</sup> H. LAUTERPACHT, *The Function of Law in International Community*, London, 1933, p. 19 ff.

objectives of States. Whether a dispute has to be termed as political or legal depends to a large extent on the way parties have decided to frame their differences<sup>13</sup>. From this perspective, the term ‘dispute’, as also clarified by the Permanent Court of International Justice in the mentioned *Mavrommatis* case, seems broad enough to cover all the different types of disagreement among States, including very complex conflicts and situations. It is true, however, that when a dispute involves fundamental political interests of the parties, their reciprocal claims hardly fit into merely legal arguments and it is thus unlikely to settle it entirely through judicial procedures. The flexibility of political tools allows to take into account the different interests at stake and might result in more effective outcomes. In this regard, diplomatic means of settlement, such as negotiation, good offices or mediation may have an important role to play, sometimes complementary to the judicial approach. The final settlement of this kind of disputes might take years to develop into satisfactory and effective agreements among the parties.

## 2. The pacific settlement of disputes under international law

Traditionally, disputes among States were resolved through war. The idea that international disputes should be settled by peaceful means rather than by the use of force is relatively recent. It dates back to the end of the XIX century, when States started to undertake treaty obligations imposing to submit the solution of their disputes to pacific means such as conciliation and arbitration, at least as a step prior to the use of force<sup>14</sup>. The international legal framework underwent a decisive change with the adoption of the United Nations Charter of 1945, where the principle of peaceful settlement of disputes was made central to the system of collective security created by the Charter. Art. 2.3 of the United Nations Charter proclaims that: ‘*All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered*’. Accordingly, para 3 of the same article provides that members of the United Nations shall refrain in their international relations from the threat or use of force in a way that is not consistent with the purposes of the United Nations. Such provisions should be read together with art. 1 of the UN Charter regarding the goals of the United Nations, and art. 33 of the UN Charter regarding the means of pacific settlement of disputes under international law (below, § 3)<sup>15</sup>.

Following the adoption of the UN Charter, a series of General Assembly declarations further elaborated the principle: most importantly, the 1970 General Assembly Declaration on Principles of International Law Concerning the Friendly Relations and Cooperation among States of 1970

<sup>13</sup> M. SHAW, *International Law*, Cambridge, 2003, p. 916.

<sup>14</sup> Among the most important early treaties on the matter, one should recall the 1899 Hague Convention for the pacific settlement of international disputes, which was revised by the Second Hague Peace Conference in 1907, the 1919 Covenant of the League of Nations, the 1928 General Act for the Pacific Settlement of Disputes which was concluded under the auspices of the League of Nations and then revised under the United Nations Organization in 1949, the 1928 Kellogg-Briand Pact originally signed by Germany, France and United States and by most other States soon after.

<sup>15</sup> Literature on international dispute settlement is extensive. See among others J. G. MERRILLS, *International Dispute Settlement*, Cambridge, 2011; ID., *The Means of Dispute Settlement*, in M. EVANS, *International Law*, Oxford, 2014, p. 563 ff.; ID., *The Mosaic of International Dispute Settlement Procedures: Complementary or Contradictory?*, in *Netherlands International Law Review*, 2007, p. 361 ss.; D. FRENCH, M. SAUL, N.D. WHITE (eds.), *International Law and Dispute Settlement*, London, 2010; J. COLLIER, V. LOWE, *The Settlement of Disputes in International Law, Institutions and Procedures*, Oxford, 1999; T. TREVES, *Diritto internazionale, problemi fondamentali*, Milano, 2005; ID., *Le controversie internazionali, nuove tendenze, nuovi tribunali*, Milano, 1999; F. MUNARI, *Risoluzione pacifica e prevenzione delle controversie internazionali*, in S. M. CARBONE, R. LUZZATO, A. SANTA MARIA (a cura di), *Istituzioni di diritto internazionale*, Torino, 2011, p. 279 ff.; M. BRUS, *Third Party Dispute Settlement in an Interdependent World*, Dordrecht, 1995; E.-U. PETERMANN, *The GATT/WTO Dispute Settlement System*, London, 1996; M. SHAW, *International Law*, Cambridge, 2003; U. VILLANI, *La funzione giudiziaria nell'ordinamento internazionale e la sua incidenza sul diritto sostanziale*, in *La Comunità internazionale*, 2014, p. 7 ff.; A. PETERS, *International Dispute Settlement: A Network of Cooperation Duties*, above, p. 1; B. CONFORTI, *Diritto internazionale*, Napoli, 2014; G. ARANGIO RUIZ, *Controversie internazionali*, in *Enciclopedia del Diritto*, Milano, 1962, p. 381; M. GIULIANO, *Considerazione sulla "via diplomatica" per la soluzione pacifica delle controversie tra Stati*, in *Comunicazioni e Studi*, 1975, p. 375; G. BOSCO, *La soluzione delle controversie giuridiche internazionali nel quadro delle Nazioni Unite*, Padova, 1989, p. 2 ff.; B. CONFORTI, C. FOCARELLI, *The Law and Practice of the United Nations*, Leiden-Boston, 2010, p. 190 ff.; V. STARACE, *Controversie internazionali*, in *Enc. giur.*, IX, 1988, p. 859 ff.; G. MORELLI, *Soluzione pacifica delle controversie internazionali: ciclo di lezioni*, Napoli, 1991; D. PALMETER, P. MAVROIDIS, *Dispute Settlement in the World Trade Organization, Practice and Procedure*, Cambridge, 2004; C. PECK, *The United Nations as a Dispute Settlement System*, The Hague, 1996; J. P. COT, A. PELLET (sous la direction de), *La Charte des Nations Unies, Commentaire article par article*, 2<sup>a</sup> ed., Paris, 1991; E. MAC WHINNEY, *Judicial Settlement of International Dispute. Jurisdiction, Justiciability and Judicial Law-Making on the Contemporary International Court*, Dordrecht-Boston-London, 1991; B. SIMMA (ed.), *The Charter of the United Nations, A Commentary*, Oxford, 1994; M. EVANS (ed.), *Remedies in International Law. The Institutional Dilemma*, Oxford, 1998; C. CHINKIN, *Alternative Dispute Resolution under international law*, in M. D. EVANS (ed.), *Remedies in international law: the institutional dilemma*, Oxford, 1998, p. 123; A. DEL VECCHIO, *Giurisdizioni internazionali e globalizzazione*, Milano, 2003; C. F. AMERASINGHE, *Jurisdiction of Specific International Tribunals*, Leiden, 2009. See also further references at footnote 28.

(hereinafter, “Declaration on Friendly Relations among States”) and the 1982 Manila Declaration on the Peaceful Settlement of International Disputes (hereinafter “Manila Declaration”). In particular, the latter consolidates the principles generally stated under the former, reiterating the general obligation of States - not limited to members of the United Nations - to settle their international disputes ‘*exclusively*’ through peaceful means and adding *inter alia* that: ‘*in the event of failure of the parties to a dispute to reach an early solution by any of the above means of settlement, they shall continue to seek a peaceful solution and shall consult forthwith on mutually agreed means to settle the dispute peacefully*’. The principle of peaceful settlement of disputes, originated as a treaty obligation and consolidated in subsequent documents, is today part of customary international law, as recognized by the International Court of Justice in the *USA v. Nicaragua* case<sup>16</sup>. It applies to all States, whether or not they are party to the United Nations Charter, but also, to some extent, to other subjects of international law such as international organizations<sup>17</sup>.

It should be kept in mind that the operation of such principle is to be coordinated with -and to some extent constrained by - the fundamental structure of the international community, based on the principle of equal sovereignty among States. States are sovereign entities *superiorem non recognoscens*. As a consequence, and by contrast with subjects of domestic legal systems, they are not obliged to solve their differences, nor a Court exists to adjudicate all international wrongs on a compulsory basis: indeed, as recalled by the Permanent Court of International Justice in the historical Advisory Opinion on the *Status of Eastern Carelia*, no State can be compelled to submit its dispute to any settlement, without its consent<sup>18</sup>. The sovereign equality among States entails the “free choice of means” principle. A duty of cooperation with a view to settlement is deemed to be implied in the general obligation to settle disputes peacefully, and is often present in treaty undertakings<sup>19</sup>. Furthermore, States parties to an international dispute, as well as other States, should in principle refrain from actions which may aggravate the situation ‘*so as to endanger the maintenance of international peace and security*’<sup>20</sup>. In this regard, as stated in the Declaration on Friendly Relations among States, ‘*recourse to, or acceptance of, a settlement procedure freely agreed to by States with regard to existing or future disputes to which they are parties shall not be regarded as incompatible with sovereign equality*’.

### 3. The methods for the pacific settlement of disputes

Coming to the methods and procedures offered by international law for the pacific settlement of disputes, they can be divided into two categories: diplomatic and adjudicative methods. Diplomatic methods involve attempts to settle disputes either by the parties themselves or with the help of other States or entities, but without an obligation of the parties to abide to a third party’s decision on the solution of the dispute. Diplomatic means of settlement are therefore based on the *mutual agreement* of the parties on the terms of settlements. Adjudicative methods, instead, involve the settlement of disputes through a binding *decision* of a third party, either judicial or arbitral. Such third party can be resorted to unilaterally, *i.e.* also by only one of the disputing parties. However, it should be reminded that, due to the structure of the international community recalled above, also adjudicative methods require the prior consent of the disputing parties to submit their claim to the jurisdiction of the third party<sup>21</sup>. Such consent can be given once and for all, in the form of an obligation freely undertaken, or, on the contrary, on *ad hoc* base after a single dispute has arisen<sup>22</sup>.

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<sup>16</sup> ICJ, *Case concerning military and paramilitary activities in and against Nicaragua, merits (Nicaragua vs. USA)*, I.C.J. Reports 1986, p. 14, para 290. A series of regional agreements should also be mentioned, enshrining this principle, such as the 1948 American Treaty on Pacific Settlement (Bogotá Pact), the 1957 European Convention for the Peaceful Settlement of Disputes, the 1964 Protocol of the Commission of Mediation and Arbitration of the Organization of African Unity, the 1992 Convention on Arbitration and Conciliation within the OSCE.

<sup>17</sup> U. VILLANI, *La funzione giudiziaria nell’ordinamento internazionale e la sua incidenza sul diritto sostanziale*, in *La Comunità internazionale*, 2014, p. 7 ff.

<sup>18</sup> PCIJ, *Status of Eastern Carelia, Advisory Opinion*, P.C.I.J. 1923, ser. B, No. 5: ‘it is well established in international law that no State can, without its consent, be compelled to submit its disputes with other States either to mediation or to arbitration, or to any other kind of pacific settlement’.

<sup>19</sup> A. PETERS, *International Dispute Settlement*, above, p. 9.

<sup>20</sup> See *Declaration on Friendly Relations among States*.

<sup>21</sup> U. VILLANI, *La funzione giudiziaria nell’ordinamento internazionale e la sua incidenza sul diritto sostanziale*, in *la Comunità internazionale*, above.

<sup>22</sup> PCIJ, *Status of Eastern Carelia, Advisory Opinion*, P.C.I.J. 1923, above.

Settlement methods are listed in Chapter VI of the UN Charter, and namely in art. 33 of the UN Charter. They include ‘*negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice*’. Mediation is therefore one of the diplomatic methods for the pacific settlement of disputes, together with negotiation, enquiry and conciliation. Should the parties fail to settle a dispute, the continuance of which is likely to endanger international peace, by the means indicated in art. 33 of the UN Charter, they ‘*shall refer it to the Security Council*’, according to art. 37 of the UN Charter.

It is interesting to note that no order of priority exists under general international law as regards the means to settle a given dispute. States should seek such peaceful means as may be appropriate to the circumstances and nature of the dispute. They shall continue to seek a settlement of the dispute by other peaceful means, in case of failure of those agreed upon by them in the first place<sup>23</sup>.

A priority order can sometimes be established through treaty obligations: some bilateral and multilateral treaties, for instance, bind member States to resort to third party settlement, including the jurisdiction of the International Court of Justice, only upon failure of negotiations<sup>24</sup>. In such cases, parties are under an obligation to enter negotiations in good faith, with a view of arriving to an agreement, and ‘*so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insist upon its own position without contemplating any modification of it*’<sup>25</sup>. However, such clauses cannot be interpreted in a way as to compel parties to negotiate until agreement is reached, the failure of negotiations being rather the condition for legitimate resort to other settlement mechanisms<sup>26</sup>.

*Negotiation* is indeed the most widely used diplomatic means for the settlement of international disputes. Governments find it attractive, *inter alia*, because it allows them to retain control of the dispute without the involvement of third parties. Yet it bears major flaws when parties’ positions are too far apart, or parties refuse to speak to one another. Furthermore, negotiations are likely to be refused by the weaker party, when a significant difference exists in the bargaining powers *vis-à-vis* the other party<sup>27</sup>. In such cases, negotiation can be facilitated, or completed, by the employment of procedures of good offices and mediation. Such processes involve a third party to encourage the contending parties to reach themselves a satisfactory settlement, without any prescribed or compulsory procedure to be followed.

Technically speaking, *good offices* are involved where a third party merely attempts to persuade the parties to the dispute to enter into negotiations or functions only as a channel of communication between them, without having an active role in the merits of the dispute. *Mediation*, instead, requires a more proactive role of the mediator in reconciling different claims and improving the atmosphere of discussions. The mediator is authorized to advance ideas for the possible solution of the dispute<sup>28</sup>. In

<sup>23</sup> Declaration on friendly relations among States.

<sup>24</sup> This happens, for example, within the Understanding on rules and procedures governing the settlement of disputes annexed to the WTO Agreements (art. 4), but also within the UNCLOS (art. 283), as well as within the International Convention on the Elimination of All Forms of Racial Discrimination (art. 22).

<sup>25</sup> ICJ, *North Sea Continental Shelf Case*, ICJ Reports, 1969, p. 3, 47. See also ICJ, *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, ICJ Reports, 1996, p. 226, para 99; ICJ, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), preliminary objections*, ICJ Reports, 2011, p. 70, para. 143 ff.

<sup>26</sup> ICJ, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, I.C.J. Reports 2010, p. 14, para 151 ff.

<sup>27</sup> F. MUNARI, *Risoluzione pacifica e prevenzione delle controversie internazionali*, above.

<sup>28</sup> J. G. MERRILLS, *International Dispute Settlement*, above. The definition of mediator given by art. 4 of the Hague Convention for the pacific settlement of international disputes (1907) is still valid: ‘*The part of the mediator consists in reconciling the opposing claims and appeasing the feelings of resentment which may have arisen between the States at variance*’. For further reference on mediation as a diplomatic means of settlement, see V. UMBRIGHT, *Principles of International Mediation, the Case of East African Community*, in *Recueil des Cours*, 1984, IV, p. 307; ID., *Multilateral mediation, Practical Experiences and Lessons*, Dordrecht, 1989; F. CAPORTI, *Sugli aspetti quasi arbitrari di talune forme di conciliazione*, I, in *Comunicazioni e Studi*, 1975, p. 137; G. WINHAM, *The mediation of multilateral negotiations*, in *Journal of World Trade Law*, 1979, p. 193; S. TOUVAL, I.W. ZARTMAN (eds.), *International Mediation in theory and in practice*, Boulder, 1985; F. DE LA BARRA, *La médiation et la conciliation internationales*, in *Recueil des Cours*, 1923, I, p. 553; R. PROBST, “*Good offices*” in *International Relations in the Light of Swiss Practice and Experience*, in *Recueil des Cours*, 1987, I, p. 211; U. VILLANI, *La conciliazione nelle controversie internazionali*, Napoli, 1989; G. NESI, M. BOTHE, N. RONZITTI, A. ROSAS (eds.), *The OSCE in the Maintenance of Peace and Security: Conflict Prevention, Crisis Management, and Peaceful Settlement of Disputes*, The Hague, 1997; E. CARROLL, K. MACKIE, *International Mediation. The Art of Business Diplomacy*, London 1998; M. BÉNIARD, *La médiation officieuse: la spécificité des bons offices dans la gamme des procédures non juridictionnelles de règlement pacifique des différends*, in *Finnish Yearbook of International Law*, 2003; D. J. BERCOVITCH (ed.), *Resolving International Conflicts, the Theory of Mediation*, Dordrecht, 1996; G. PALMISANO, *Sulla duplice valenza, diplomatica e giurisdizionale, della conciliazione internazionale*, in *Studi giuridici in ricordo di Giovanni Battaglini*, Napoli, 2013, p. 181; D. J. BERCOVITCH, J. Z. RUBIN (eds.), *Mediation in International Relations*, London, 1992; S. CHERSTERMAN (ed.), *Secretary or General? The UN Secretary General in World Politics*, Cambridge, 2007; S. M. G. KOOPMANS, *Diplomatic Dispute Settlement*, The Hague, 2008; M.C. GREENBERG, J. H. BARTON, M. E. MCGUINNESS (eds.), *Words Over War. Mediation and Arbitration to Prevent Deadly Conflicts*, Lanham, 2000. See also above footnote 15.

this regard, mediation has much in common also with conciliation, although the proposal of the mediator is based on information supplied by the parties, while conciliation is characterized by independent fact investigation. Conciliation differs from mediation also for a more formal and institutionalized footing of the third party, which makes it somehow comparable to inquiry and arbitration. Yet, the Conciliator's proposal of settlement must be susceptible of being accepted by the Parties, this contrasting with the nature of adjudicative procedures<sup>29</sup>.

In the practice, the dividing line between good offices and mediation is not easy to draw, as they tend to merge into one another, depending on the circumstances of the case. An example of good offices was the role played by the USSR in assisting the peaceful settlement of the India-Pakistan dispute in 1965 or the part played by France in encouraging US-North Vietnamese negotiations to begin in the early 1970s<sup>30</sup>. A successful example of mediation was the US Secretary of State mediation in the Middle East in the 1973-4, or the Papal mediation in the Beagle Channel dispute between Argentina and China between 1978 and 1985<sup>31</sup>.

#### 4. Mediation as a tool for the settlement of international disputes

Mediation can only take place if (i) a mediator is willing to act in this respect (ii) parties to a dispute so consent. As regards the first requirement, international organizations' organs, such as the UN Secretary General or the General Assembly, but also non-governmental organizations, such as the International Committee of the Red Cross in case of humanitarian crisis, can undertake this role (see below, § 6). Governments can also offer their own services to this purpose and are sometimes interested in doing so, as mediation gives the chance to influence the outcome of a dispute, in the pacific settlement of which a State might bear a specific interest. For instance, political concern underpinned the US mediation in the Falkland war, driven by the wish of the US to avoid a forced choice between two different allies, respectively within the NATO (UK) and within the Organization of American States (Argentina). Also the papal mediation of the Beagle Channel dispute was led by the will of the Holy See to avoid a war between catholic countries. Smaller countries might have an interest in offering mediation also as a chance to improve their relations with super powers, as happened for example in the Algerian mediation of the Iran-US dispute on diplomatic hostages<sup>32</sup>. Multiparty mediation, often under the chairmanship of international organizations, is also an option (see below, § 6)<sup>33</sup>. Yet, the existence of a willing and able mediator or mediation coalition should not be taken for granted. In a significant number of international disputes, mediation was excluded due to the lack of available mediators<sup>34</sup>: mediation offices not only require an intensive diplomatic effort, but can sometimes even jeopardize existing alliances, whereas no guarantee of success can be ensured.

As regards the second requirement, namely the parties' consent to mediate, when willingness to negotiate is lacking, it is very unlikely that mediation is accepted or, even less likely, requested. Although mediation proposals are not binding, the decision to engage in a mediation has implications that might not be acceptable for the governments involved. In the first place, by accepting mediation, a State also accepts that a certain matter is a legitimate concern of the international community, which might in turn entail some kind of international accountability that the Government is not ready to acknowledge. This happened, for instance, in the case of South African *apartheid*. Furthermore, a mediated settlement usually entails some kind of compromise. If the time is not ripe for mutual concessions among the parties, room for mediation is very constrained. On the other hand, it is true that States have an interest in solving their disputes and intransigence towards diplomatic efforts might be politically expensive to defend, especially today, taking into account the increasing role of public opinion in diplomatic relations.

<sup>29</sup> See, e.g. the 1957 European Convention for the Peaceful Settlement of Disputes, art. 15; the 1992 Convention on Arbitration and Conciliation within the OSCE, art. 20 and ff.

<sup>30</sup> M. SHAW, *International Law*, above, p. 922.

<sup>31</sup> G. R. MANCAYO, *La médiation pontificale dans l'affaire du Canale Beagle*, in *Recueil des Cours*, 1993, p. 197-389; M. LAUDY, *The Vatican Mediation of the Beagle Channel dispute*, in M.C. GREENBERG, J. H. BARTON, M. E. MCGUINNESS (eds.), *Words over war. Mediation and Arbitration to Prevent Deadly Conflicts*, above, p. 293.

<sup>32</sup> J. MERRILLS, *International Dispute Settlement*, above, p. 29 ff.

<sup>33</sup> Some academic literature shows that small sized coalition of mediators can be more effective than a single mediator or a large coalition, see T. BOHMELT, *Disaggregating mediations: The Impact of Multiparty Mediation*, in *British Journal of Political Science*, 2011, p. 859.

<sup>34</sup> J. MERRILLS, *The Means of Dispute Settlement*, above, p. 566.

It should be added that parties also need to agree upon the mediator. The fact that a State might have an interest in the dispute solution is not necessarily a disqualification element, if parties believe that the mediator can offer them ‘something they want or they cannot afford to refuse’. Sometimes, closeness of the mediator to one of the parties even increases its chances of delivering, and might be an incentive to cooperation from the other party<sup>35</sup>. Yet, as we shall see, the impartiality or, sometimes, neutrality of the mediator, as well as its individual skills and reputation influence the consent of the parties and also the outcome of mediation.

As regards the functions of mediators, they can play an important task as a channel of communication and information, which allows parties to conduct a reasonable assessment of the situation, and of the consequences of their choices. Yet, governments do not always give full credibility to State mediators as sources of information, being aware of their own motives and interests. A powerful mediator may also be able to influence the parties<sup>36</sup>. When a mediation has begun, chances of success still rest on parties’ willingness to compromise. Failure is unavoidable when parties are not willing to give up on issues deemed to be fundamental to their political interests. In the Falkland war case, issues of sovereignty were deemed so vital for both parties, that, despite the US mediation, the dispute eventually ended in an armed conflict<sup>37</sup>. Normally, a mediator is only concerned with finding a solution that can be accepted by all Parties to the dispute. However, sometimes, international Conventions set “external” standards, such as the requirement that settlement is based on ‘*respect for human rights*’, found in art. 38 of the European Convention of Human Rights<sup>38</sup>. Furthermore, compliance of the mediated agreement with applicable international law is generally required.

## 5. Mediation today: the UN approach...

Mediation has gained new momentum in the recent years. After some decades of decrease, research shows that the number of conflicts has been increasing again. Their nature, however, is progressively changing: traditional *inter*-state conflicts, although still cause of instability in some areas of the world, seem to be replaced, to a large extent, by ethnic disputes, *intra*-state conflicts and low-intensity confrontations. *Intra*-state conflicts also tend to relapse and re-emerge from failed peace agreements. The above is further complicated by trans-national threats, extremism and terrorism, leading to criminal conducts and greed-driven violence. Such conflicts, especially when protracted for long, are capable to create instability and endanger international peace<sup>39</sup>. Their changing nature and their new complexities seem to point to mediation as one of the most suitable tools to cope with shifting realities, thanks to its flexibility, cost-effectiveness, and capability to be implemented on a large scale at international, regional and sub-regional level.

In the past decade, a series of initiatives, workshops and talks have been held on the topic both at UN and regional level. Such efforts culminated in the adoption of the UN General Assembly resolution 65/283 of 28 July 2011, through which the importance of mediation for the peaceful settlement of disputes and conflict prevention and resolution was reaffirmed and valorized<sup>40</sup>. It was the first document dealing with mediation adopted by the UN General Assembly, then followed by Resolution 66/291 of 13 September 2012 and by Resolution 68/303 of 31 July 2014 on the same topic<sup>41</sup>. The support for mediation among Member States was re-launched, building upon previous documents such as the General Assembly Resolution 57/337 of 3 July 2003 on the prevention of armed conflict and the 2005 World Summit Outcome which recognized the important role of the good offices of the Secretary

<sup>35</sup> J. MERRILLS, *International Dispute Settlement*, above, p. 34.

<sup>36</sup> J. MERRILLS, *The Means of Dispute Settlement*, above, p. 566-567.

<sup>37</sup> See L. FREEDMAN, V. GAMBA-SONEHOUSE, *Signals of War: The Falklands Conflict of 1982*, London, 1990, p. 150 ff.

<sup>38</sup> For an account of the practice of this friendly settlement procedure, S.M.G. KOOPMANS, *Diplomatic Dispute Settlement*, The Hague, 2008, p.184 ff.; J. MERRILLS, A. H. ROBERTSON, *Human Rights in Europe*, Manchester, 2001, p. 279 ff.

<sup>39</sup> OSCE Secretariat, *Developing Guidance for effective mediation, Consultation with Regional, Sub-regional and Other Organizations*, Jeddah, 3-4 April, Vienna, 2012, p. 13 ff.

<sup>40</sup> GA Res. 65/283, *Strengthening the role of mediation in the peaceful settlement of disputes, conflict prevention and resolution*, 28 July 2011. For an account of previous initiatives, see the Report of the two-day workshop held in Vienna, Austria on 6-7 December 2010, *Perspective of the UN & Regional Organizations on Preventive Quiet Diplomacy, Dialogue Facilitation and Mediation – Common Challenges and Good Practices*, OSCE, Vienna, 2011, available at [www.osce.org](http://www.osce.org).

<sup>41</sup> GA Res. 66/291, *Strengthening the role of mediation in the peaceful settlement of disputes, conflict prevention and resolution*, 13 September 2012; GA Res. 68/303, *Strengthening the role of mediation in the peaceful settlement of disputes, conflict prevention and resolution*, 31 July 2014, available at [www.un.org](http://www.un.org).

General of the United Nations, also in the mediation of disputes<sup>42</sup>. Digging back in the past, the Report of the UN Secretary General Boutros Ghali “An Agenda for Peace, Preventive diplomacy, peacemaking and peace-keeping” of 1992 already stressed the importance of conflict prevention and management in the maintenance of international peace<sup>43</sup>.

In this context, the Resolution 65/283 aims to provide new perspectives on the use of mediation to contemporary disputes and conflicts, acknowledging the contribution of all key actors in this field. To this end, the General Assembly *inter alia* requested the UN Secretary-General to develop guidance for more effective mediation, also in consultation with other organizations, with a view to identifying lessons and best practices stemming from past and on-going mediation experiences. The outcome of such consultation was the *United Nations Guide on effective mediation* issued as an Annex to the report of the Secretary-General on ‘Strengthening the role of mediation in the peaceful settlement of disputes, conflict prevention and resolution’ of 25 June 2012 (hereinafter, the “Guide”)<sup>44</sup>.

## 6. ... and the UN guidance on effective mediation

The Guide identifies some key points for effective mediation and provides some insights as to how they can be applied in practice. Fundamentals of effective mediation can be divided into three categories: those referring to the role of the mediator; those referring to the characteristics of the process of mediation, and those referring the quality of the peace agreement.

As to the first category, *i.e.* mediator’s role, any State or organizations seeking to play a mediation should be responsible for the *preparedness* of mediator, with reference not only to his/her individual experience, knowledge and skills (such as cultural sensitiveness, authoritativeness, integrity, impartiality, objectiveness), but also to the support of a team of specialists, as well as political, financial and administrative staff. The profile of the selected mediator, in terms of seniority and gravitas, should be commensurate to the context of the specific dispute. Specialists’ team could include experts in the design of mediation processes, country/regional specialists and legal advisers, as well as logistics, administrative and security support. Thematic experts can also be deployed. Involvement of women in the team, in a proper balance with men, is deemed important, also to send positive signals to the parties in dispute as to the composition of their delegations. Conflict analysis and internal assessments should be carried out throughout the process on regular basis. A crucial part of the conflict analysis is assessing when the time is ‘ripe’ for mediation, so to identify a windows of opportunity for mediation to get under way. In this perspective, mediators need to understand whose *consent* is necessary for the mediation process to start. They need to create a common understanding with the conflicting parties on their role and rules of their activity. If only some of the parties to the conflict have agreed to the mediation, the mediator may need to engage with such parties in order to gradually expand the consent base. Informal contacts and the use of confidence building measures may help cultivating such consent and monitoring it throughout the process. In order to maintain consent, the *impartiality* of the mediator is considered of uttermost importance. The mediator should engage in treating all the parties in a fair, balanced and transparent way, avoiding to be perceived as biased. It is important to remind that impartiality does not mean neutrality, as a mediator, especially when representing an international organization, purports certain principles and values that need to be made known to the parties.

Coming to the features of the mediation process, it is deemed effective if the inclusion of all the relevant stakeholders is ensured. This can be achieved through a preventive mapping and selection of all conflict parties and interested stakeholders and relative assessment of their importance to the peace process. If both conflict parties and the broader society are committed to the mediation, *national ownership* on the process can be better achieved. This is of critical importance because, although it is the conflict parties who decide to stop fighting, it is society as a whole that is involved in the implementation process. To this end, once the process is about to conclude, mediators should elaborate an effective exit strategy, in order to pass on to local actors the knowledge and capacities necessary to secure sustainable peace. Furthermore, the possible co-existence of a plurality of entities involved in

<sup>42</sup> See 2005 World Summit Outcome, A/Res/60/01, available at [www.un.org](http://www.un.org).

<sup>43</sup> Report of the Secretary-General, An agenda for peace, preventive diplomacy, peacemaking and peace-keeping, A/47/277 - S/24111, 17 June 1992.

<sup>44</sup> See Report of the Secretary-General, Strengthening the role of mediation in the peaceful settlement of disputes, conflict prevention and resolution, A/66/811, 25 June 2012, available at [www.un.org](http://www.un.org).

the mediation of the same dispute makes *coordination, complementarity and coherence* essential to avoid duplication of efforts, undue interference and forum shopping from the conflict parties. To this purpose, a lead mediator should be appointed, and mediation initiatives with more than one entity should be based on a coherent mandate and effective coordination practices.

Finally, a *quality peace agreement* is the necessary outcome of an effective mediation. Different kinds of agreements can be reached: ceasefires, procedural agreements or more comprehensive peace agreements. Indeed, a peace agreement aims to end violence, providing a platform for sustainable peace, justice, security and reconciliation. To this end, major past wrongs should possibly be addressed, but a common vision for the future of the country should also be purported by the agreement. The impact of the agreement on the different segments of society as well as the gender dimension of all issues should be considered, in order to avoid hardship or discriminatory harm in the implementation phase. During the consultation process that led to the adoption of the Guide, it was disputed whether the peace agreement should address the root causes of the conflict or rather aim to end hostilities, by establishing new mechanisms or institutions to address them over time through democratic processes. Both options are valid solutions, depending on the specificity of the case. Where a comprehensive settlement is not possible, the mediator should strive to establish mechanisms for dealing with sensitive issues at a later moment. Furthermore, agreements should include realistic timetables for their implementation, as well as effective monitoring and dispute resolution mechanisms at different levels (local, regional and international), so that problems can be addressed prior to their escalation. Compliance with applicable *international law* is a key aspect that reinforces the durability of the peace agreement, but also the legitimacy of the entire process of mediation. Reference is made not only to the rules and regulations of the appointing entity (should it be an international organization), or the mandate that mediators receive from such entity, but also to the rules of international law that govern the given situation, including global and regional conventions, international humanitarian law, human rights and refugee laws and international criminal law. Where applicable, the Rome Statute of the International Criminal Court is also to be taken into account. In this perspective, for example, the Guide stresses that the mediator should limit contacts with actors that have been indicted by the International Criminal Court to what is necessary for the mediation process. Furthermore, peace agreements providing for amnesties for genocide, crimes against humanity, war crimes or gross violations of human rights should not be endorsed<sup>45</sup>. Finally, in order to reduce the risk of pressures to reopen the agreement to negotiations during the implementation phase, it is advisable actors other than the mediators conduct that implementation.

## **7. International organizations involved in mediation, dialogue facilitation and conflict management**

International organizations have a leading role in the field of preventive and quiet diplomacy, dialogue facilitation and mediation. The UN is a central actor in this regard, its mandate deriving directly from the UN Charter. In this respect, one can mention not only the UN Security Council's tasks in conflict management pursuant to articles 34 and following of the UN Charter, but also the role of the Secretary-General in accordance with art. 98 of the Charter. More precisely, the Secretary-General, '*shall perform such other functions as are entrusted to him*' by other UN organs. These often include functions for the prevention and the peaceful settlement of disputes, such as good offices and mediation. Furthermore, the Secretary-General's can act at his own initiative in response to a request from one or more of the parties to a dispute. Such role has developed through extensive practice over the years.

Furthermore, the UN has a long-standing expertise in the implementation of peace agreements, through the deployment of a large number of peacekeeping operations under Chapter VII of the UN Charter. Talks or crisis diplomacy often take place during such missions by UN envoys. In 2004, the UN High-level Panel on Threats, Challenges and Change recognized the increasing need for UN mediation and called for '*more consistent and professional mediation support*'<sup>46</sup>. Following the 2005 World Summit, the UN General Assembly approved the establishment of a Mediation Support Unit

<sup>45</sup> By contrast, amnesties for other crimes or for political offences, such as treason or rebellion, may be considered in situations of non-international armed conflict. See *Guide*, above, p. 17.

<sup>46</sup> UN General Assembly, *Follow-up to the outcome of the Millennium Summit*, A/59/565, 2 December 2004, available at [www.un.org](http://www.un.org), p. 37.

(MSU), which was created in 2006 within the UN Department of Political Affairs. In 2008, a Standby Team of Mediation Experts deployable within three days in support of UN mediation efforts was also established.

Yet, the UN is not the only actor in this field. According to Chapter VIII of the UN Charter, States are encouraged to settle local disputes through regional arrangements, if such arrangements are consistent with the purposes of the Charter. Art. 52(2) of the UN Charter further clarifies that member States should make every efforts to settle local disputes through regional arrangements or agencies, before referring them to the Security Council. However, ‘*no enforcement action shall be taken... without the authorization of the Security Council*’ (art. 53(1) of the UN Charter). Provided that coordination with the UN Security Council is ensured in the enforcement phase, several UN documents restate the importance of the action of regional organization for the maintenance or restoration of peace and security in areas under their respective purview<sup>47</sup>. Regional organizations are also considered to be best placed to take such action, because they have a closer understanding of the political, social, cultural and economic underpinnings of the conflicts.

For instance, the experience of the Organization for Security and Cooperation in Europe (“OSCE”) on mediation is of great relevance. It dates back to the early 90s, when the Conflict Prevention Centre and the High Commissioner on National Minorities were established within the (then) Conference on Security and Cooperation in Europe (“CSCE”)<sup>48</sup>. The ‘Corfu Process’ launched in 2009 and aiming to restore confidence and take forward the dialogue on European security has further emphasized the importance attached to support facilities to mediation. The OSCE has been actively engaged in mediation efforts in the three main protracted conflicts: the Nagorno-Karabakh frozen conflict<sup>49</sup>, the conflict in the Transdniestrian region<sup>50</sup> and the Georgia/South-Ossetia conflict<sup>51</sup>.

The European Union (“EU”), within the development of its Common Foreign and Security Policy, is facing an increasing demand to get involved in conflict prevention. In 2009, the Council of the European Union adopted a *Concept on Strengthening EU Mediation and Dialogue Capacities*, with a view to shifting from an *ad hoc* approach to mediation to a more systematic attitude to this security policy tool. In 2011, a Mediation Support Team was created within the European External Action Service, providing for coaching, training, knowledge management and operational support for EU mediations efforts around the world. The EU is currently engaged in mediation efforts, together with the UN and the OSCE, within the framework of the mentioned Geneva Discussions on the Georgian

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<sup>47</sup> UN Security Council, S/2008/186, p. 5, para. 3

<sup>48</sup> In 1994, following the Budapest Summit of Heads of State or Government, the (then) Conference on Security and Cooperation in Europe (“CSCE”) changed its name into the Organization for Security and Cooperation in Europe (“OSCE”), acquiring permanent institutions and operational capabilities. The OSCE played an important role in managing the historic change taking place in Europe in the post-Cold War period. The Conflict Prevention Center was established by the 1990 Charter of Paris for a New Europe to help reduce the risk of conflict in the (today) OSCE area. The Center facilitates political dialogue among States, supporting negotiation, mediation and dialogue facilitation efforts and processes to prevent and resolve crises and conflicts, assisting with the implementation of confidence and security-building measures, supporting the daily work of field operations, providing advice and analysis on matters related to the conflict cycle. The High Commissioner on National Minorities is an autonomous institution of the Organization having the task to identify early resolution of ethnic tensions that might endanger peace, stability or friendly relations between OSCE participating States.

<sup>49</sup> This is a conflict between States, namely Armenia and Azerbaijan, regulated by the ceasefire Agreements of Minsk (1994), brokered by the Russian Federation. The so called OSCE “Minsk Group”, co-chaired by France, the Russian Federation, and the United States, is today mandated to provide an appropriate framework for conflict resolution in order to assuring the negotiation process, obtain conclusion by the Parties of peace agreement on the cessation of the armed conflict and promote the peace process by deploying OSCE multinational peacekeeping forces. For an account of OSCE mediation activities, see E. JAFAROVA, *OSCE Mediation of Nagorno-Karabakh conflict*, in *The Washington Review of Turkish and Eurasian Affairs*, March 2014, available at [www.thewashingtonreview.org](http://www.thewashingtonreview.org).

<sup>50</sup> This is a complex *intra-State* conflict rooted in the conflict that broke out in 1992 between the Transdniestrian authorities and the central government of Moldova. The OSCE Mission to Moldova has a specific mandate to help resolving the conflict. Furthermore, a mechanism of international multi-party mediation is in place in a format known as the “5+2” talks. Negotiations take place between the two parties to the conflict, the OSCE as a chairman, Russian Federation and Ukraine as mediators (the “5”). In addition, the United States and the European Union play a role of observers in the mediation process (the “2”). Further information on the process is available at [www.osce.org](http://www.osce.org).

<sup>51</sup> Since 1993 the OSCE has been monitoring the security situation in Georgia, encouraging negotiations between the conflicting parties of the Georgian-Ossetian conflict and supporting the UN-led peace process in the zone of the Georgian-Abkhaz conflict. The OSCE Mission was *inter alia* engaged in diplomacy and worked to build confidence between the communities to help to prepare the way for peaceful settlement. After the new break out of hostilities in South Ossetia in August 2008, and the military involvement of the Russian Federation on the territory, the OSCE Mission refocused its work toward stabilization and easing of the humanitarian crisis. However, the Mission was eventually discontinued at the end of 2008 with the expiration of its mandate, due to a strong Russian Federation opposition to its extension, in absence of recognition of the independent status of Abkhazia and South Ossetia. The OSCE mediation in the conflict terminated, and its role shifted to co-chair the Geneva Discussion aimed at bringing stability in the Region, together with the UN and the EU who launched the initiative. See E. JAFAROVA, *Conflict Resolution in South Caucasus, Challenges to international Efforts*, Lanham, Maryland, 2015, p. 50 ff.

conflict, and in the dialogue between Kosovo and Serbia<sup>52</sup>. Such role is accompanied by member States' action. In fact, EU member States continue to play their political role besides the EU in international relations. This was particularly clear in the Ukraine crisis: France and Germany managed to reach a ceasefire agreement between the Russian Federation and Ukraine in Minsk in February 2015, and the EU was called to have a support role of the agreement. The peace plan for the implementation of the ceasefire agreement was then managed by OSCE, active in dialogue facilitation functions in the crisis.

The African Union ("AU") is also faced with a large demand of mediation intervention, this task being expressly provided for in art. XIX of its Charter. With the adoption of the 2002 Protocol Relating to the Establishment of the Peace and Security Council of the AU, a formal mandate on mediation was given to the Organization. It usually sends Special Envoys to crises, but it is also carrying out a Mediation Support Capacity Project, in co-operation with civil society and the UN, in order to build its own mediation support capacities. Furthermore, a number of sub-regional organizations in Africa are playing an increasing role in conflict prevention and management, such as Economic Community of Western African States ("ECOWAS") and the Southern African Development Community ("SADC").

The Organization of Islamic Cooperation ("OIC") has a specific mandate in this field, according to art. 27 of its Charter. Due to a different cultural approach, the ASEAN Charter puts its focus on dialogue facilitation rather than mediation. Several other regional organizations do not have specific mandates for mediation, but are capable of getting involved in preventive and quiet diplomacy, dialogue facilitation and mediation as a collateral activity to their main engagement. For example, the Council of Europe plays a role of long-term conflict prevention through initiatives in education, legal work and culture. The Pacific Islands Forum ("PIF"), though mandated to promote economic growth, assumed responsibility for security-related threats in the Pacific region, such as, for example, within the political turmoil in the Fiji and in the Solomon Islands. The so-called Biketawa Declaration of 2000 provides a framework for pursuing collective responses to security crises affecting PIF Member States, including quiet diplomacy and third party mediation. Crisis management is also one of the NATO's fundamental security tasks. Other organizations, such as the Organization of American States ("OAS"), the Collective Security Treaty Organization ("CSTO") and the Conference on Interaction and Confidence-Building Measures in Asia ("CICA") are also exploring the field, with the possibility to set up a unit dedicated to mediation and political analysis<sup>53</sup>.

## 8. Final remarks

The renewed attention that the international community, and in particular the UN, has recently paid to mediation in the context of international disputes' prevention and resolution is indeed to be welcomed and seems to share several aspects of the ongoing debate at domestic level. In particular, in an interconnected and globalized world, threatened by transnational challenges, it seems more and more important to create cooperative processes where differences can be tackled without the disruption of relations, though with the contribution of an informed, reasoned and impartial third party. This pattern should not be limited to issues of international peace and security, but can be extended to virtually all sectors of international law and international relations.

It is clear that, in this context, international organizations or bodies created under multilateral legal framework have an increasing role to play. Signs of this approach can be found in the role of the conference of State parties for the non adversarial management of the compliance with several multilateral conventions<sup>54</sup>.

Diplomatic means of settlement, when agreed upon through treaty obligations, can be particularly "demanding" for States or parties to the dispute, as they are required to sit at the table of discussions and question their own positions, without devolving differences among them to the binding decision of a third party. Furthermore, the less institutionalized and the less binding the mean of settlement is,

<sup>52</sup> T. TAMMINEM (ed.), *Strengthening the EU's peace mediation capacities*, Finnish Institute of International Affairs, 2012.

<sup>53</sup> See OSCE Secretariat, *Perspectives of the UN & Regional Organizations on Preventive and Quiet Diplomacy, Dialogue Facilitation and Mediation*, Vienna, 2011, available at [www.osce.org](http://www.osce.org), p. 13 ff.

<sup>54</sup> See, *ex multis*, Cartagena Protocol on biosafety to the Convention on Biological diversity of 29th January 2000, art. 34; Comprehensive Nuclear Test ban Treaty (TBT) of 10th September 1996, art. IV, para 4; Kyoto Protocol of 12 December 1997 to the Framework Convention on Climate Change, art. 17. For further references, see A. PETERS, above, p. 32, at footnote 147.

the more it is dependent on horizontal relations among sovereign actors, and their consent to settle the dispute, or cooperate towards the settlement. The weakness of the system, therefore, continues to rest on the Westfalian structure of the international community. A community in transition, however, if one considers the increasing number of cooperation obligations that States have decided to establish among them and the proliferation of institutions ready to engage, should mediation be called for the settlement of international disputes.