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Chapter 3

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Introduction

Writings on the anthropology of law often rest on notions of social evolution. These works often place dispute-resolution forums on a scale, so that self-help and negotiation are commonly placed at the starting-point on an evolutionary continuum towards civilization. Then, with development, societies are shown to move along from these bilateral means, to mediation, arbitration, and adjudication (see Hobhouse, Wheeler and Ginsburg 1930). These same works consider the presence of courts as a sign of societal complexity, or evolution, or development, or all of these, while the simplest societies lack mediation (see Hoebel 1954).

In the 1960s, social scientists even referred to a 'standard sequential order' of legal evolution – each stage constituting a necessary condition for the next (Schwartz and Miller 1964). And in the 1980s, some historians argued that colonial powers considered the development of courts in Africa with third-party mechanisms to be part of their civilizing mission (Chanock 1985). During the same colonial period, the International Court of Justice was promoted by its proponents as the apex of forums for settlement of international disputes by means of adjudication and arbitration, a position ideologically consistent with the works of evolutionary social theorists. However, since the post-colonial 1960s period, there has been a gradual ideological shift away from courts for dispute-handling accompanied by a preference for 'softer', non-adversarial means, such as mediation or negotiation, which by the 1980s and 1990s have come to be considered

more civilized processes by those developing the rhetoric of disputing (see Nader 1989).

In this paper, I argue that preferences for ranking dispute-resolution forums change with the 'civilizing mission' of major power-holders. Indeed, from a preliminary sampling of international negotiation in water disputes, it appears as if the ranking preference for dispute-handling forums changes to mirror the distribution of international power. The interests of power-holders (in this paper dominant nation-states) are furthered by an entrepreneurial spirit among interested professionals such as negotiators.

A number of writers, including myself, have documented the ideological shift (Nader 1989) from adversarial forums (courts) to alternative forums (arbitration, mediation, negotiation) within the United States. In this preliminary paper I move the discussion to the international arena, where the scene is striking in its similarity to that of the US Alternative Dispute Resolution (ADR) movement of the 1970s and 1980s – a move which requires an understanding of the elastic nature of definitions of 'civilized' behaviour.

In a chapter on 'The Standard of "Civilization" and International Law' (Gong 1984) Gerrit W. Gong summarizes the discourse on international law in the first few decades of the twentieth century. He makes an interesting point (ibid., p. 55) at the start:

> In the minds of the nineteenth-century international lawyers, 'civilization' became a scale by which the countries of the world were categorized into 'civilized', barbarous, and savage spheres. The legal rights and duties of the states in each sphere were based on the legal capacity their degree of 'civilization' supposedly entitled them to possess....the nineteenth-century publicists, and the international legal texts they penned, declared that 'civilized' states alone were qualified to be recognized with full international legal status and personality, full membership in the Family of Nations, and full protection in international law. Significantly, the authority to determine the jural capacity of the states in the barbarous and savage spheres also belonged of right to the 'civilized' states.

Gong makes a key observation about mid-way when he notes:

> Like Sisyphus, the less 'civilized' were doomed to work toward an equality which an elastic standard of 'civilization' put for ever beyond their reach. Even to attain 'civilized' status, as Japan was to discover, was not necessarily to become equal. The 'civilized' had a way of becoming more 'civilized' still (ibid., p. 63).

Gong believes the 'new' standards of civilization are related to new human rights standards (ibid., pp. 91–3) and standards of modernity and scientific progress (ibid., pp. 92–3). In an earlier paper (Nader 1989) I argued a further point: that, in the latter part of the twentieth century, a new standard of 'harmony' now ranks adversarial behaviour as somehow less 'civilized' than negotiating behaviours. Just as ADR in the United States moved the rhetoric from justice to harmony, so too at the international level the notion of 'mature' negotiation has been replacing the World Court as the 'standard of civilized behaviour'.

In his book *Disputes and Negotiations – A Cross-Cultural Perspective*, Philip Gulliver (1979) elaborates the distinction between negotiation and adjudication, the key criteria being the presence in adjudication or the absence in negotiation of a third-party decision-maker. He sees negotiation as 'one kind of problem solving' (ibid., p. xiii), the purpose of which is to discover mutually acceptable outcomes in disputing through means of persuasion or inducement. His attempt was meant 'to show that patterns of interactive behaviour in negotiations are essentially similar despite marked differences in interests, ideas, values, rules and assumptions among negotiators of different societies' (ibid., p. xv). By his own admission, Gulliver focuses his attention on the process of negotiations, although recognizing that a dispute and its negotiation occur in broad cultural contexts and social situations. He also notes that 'a fuller understanding of negotiations will be achieved when they are considered in their full socio-cultural context' (ibid., p. 270). It is toward such a fuller understanding of negotiation that this paper is directed.

Gulliver is mainly dealing with intra-societal, rather than international, data, whether he examines dispute negotiation among the Arusha of Tanzania or labour–management relations in the United States. His identification of negotiation is sharpened by comparing joint decision-making (negotiation) with adjudication or unilateral decision-making. His stance is more or less detached while focusing on non-judicial means of resolving disputes, seeking the common patterns that characterize interactive behaviour in negotiations. Gulliver does not appear to valorize or rank one mode of problem-solving over another, nor does he see mediation or negotiation as non-confrontational processes. Such a stance is by no means universal, as others *do* attach preference to specific forums, often conflating process and outcome.

Thus, in the international context, two distinct standards of how 'civilized' nations settle disputes have been advanced by Europeans and Euro-Americans. Before the 1960s, the dominant rhetoric held that it was more civilized to *adjudicate* disputes using third-party judges from the World Court. Gerrit Gong (1984) and others describe this attitude, which is embedded in anthropological, sociological, and jurisprudential theories of legal evolution. The more recent rhetoric (post-1960s) views *negotiation* between two parties as more 'civilized' or at least more 'mature' or more harmonious. As a more 'humane' standard, negotiation stands in contrast to the rule-of-law standard mentioned above.

The valorization of negotiating that has been part of the dispute-resolution rhetoric since the early 1970s represents a shift in what (in terms of law) it means to be civilized. Why did this shift occur? What are the implications of this change? When representatives of a more powerful party claim that weaker adversaries prefer less developed, civilized, or humane methods for settling disputes, it behoves us to probe further. Gerrit Gong provides us with an observation on the elasticity of the standard of civilization which allows the 'civilized' to stay a step ahead of the less 'civilized'. Edward Said, in the context of the 'East' and the 'West', calls this a 'flexible *positional* superiority, which puts the Westerner in a series of possible relationships with the Orient without ever losing him the relative upper hand' (1978: 7). What both Gong and Said acknowledge is that the valorization of one cultural form over another is all too frequently linked to imbalances in power or in other words, now that the 'primitives' have courts, we move to international negotiations, or ADR.

In the present context, it appears that a new standard of international negotiations is being promoted as the older standard of adjudication/arbitration in the World Court has become less useful to the more powerful nations of the world. The older standard lost its utility since the emergence in the 1960s of new nations, many of them 'Third World' nations ready to use the International Court of Justice to represent new interests. It is even more interesting that the pendulum swing from adjudication and the rule of law to a valorizing of negotiation and harmony coincided with the development of ADR in the United States and its export abroad, often in the guise of expanding democracy through law.

What follows are: (1) introductory notes on the World Court, illustrating *why* it no longer appears to be useful to stronger nations; (2) a description of the professional culture of international negotiators, whose activity illustrates *how* the negotiating standard has been promoted; and (3) key points of a series of international water disputes to show how the alleged positional superiority of harmony practice plays itself out for the benefit of the stronger disputant. The concluding remarks (4) suggest that valorizing negotiation and harmony above the rule of law is part of the radiation of ADR. It functions to hold the line on power redistribution, and is reminiscent of other neo-colonialist attempts to maintain and increase hegemony by means of civilizing (or development) missions.

From the World Court to International Negotiating Teams

The International Court of Justice is the supreme court for international law. The Court is situated at the Hague, having inherited the precedents of the Permanent Court of International Justice, which was a part of the League of Nations. At present, the Court operates under statute as part of the United Nations Charter organized after the Second World War. The Court consists of fifteen independent judges elected by the Security Council and the General Assembly of the United Nations. Although a series of US presidents supported US membership in both courts, others (including members of the US Congress) voiced concern that national sovereignty would be threatened. The US joined in 1946. Since that time, there have been important changes in the Court's composition and in the types of cases it considers. For example, in 1946, two-thirds of the judges were either Americans or West Europeans. With the addition of over one hundred states (many of them post-colonial 'Third World' states), the World Court now consists of judges who are often sympathetic to the causes of the newer 'Third World' nations (Franck 1986: 36).

According to Thomas Franck, the influence of the Third World in the World Court began to take effect after 1964 (ibid.: 37). A number of decisions, which ruled in favour of 'Third World' and post-colonial states, reflected the influence of these 'newly-recognised "forms of civilization"' (ibid.: 37). For example, in 1966 the Court ruled in favour of Liberian and Ethiopian plaintiffs, and

against South Africa; in 1974, New Zealand and Australia were favoured in a decision against France; and in 1984, Nicaragua filed suit against the US, which withdrew from the case when it was apparent that Nicaragua had a legitimate claim (ibid.: 37).

Shortly thereafter, in 1985, the Reagan administration withdrew the US's 1946 agreement voluntarily to comply with the compulsory jurisdiction of the World Court, which effectively ended any serious US commitment to its viability. This was perhaps the most visible continuation of a wider United Nations tendency: for a decreasing percentage of member states to submit to compulsory jurisdiction (ibid.: 49). This phenomenon has been described by one legal scholar as 'the Court's vanishing clientele' (ibid.: 47). A gradual diminishment of jurisdiction, coupled with an inability meaningfully to enforce its decision, clearly have limited the Court's role in adjudicating international disputes. Furthermore, the Soviet Union in the mid-1960s and the US in the mid-1980s, both charter members of the World Court, have both withheld dues, thereby abdicating their financial responsibility and evincing a mood of indifference to international law.

The instrument which Calvin Coolidge described as 'a convenient instrument to which we could go, but to which we could not be brought' (ibid.) was no longer convenient, possibly because of its role in several major controversies such as the Iran-hostage issue, the use of the CIA to attack Nicaragua, the Iran–Iraq conflict, the Afghanistan war, the Vietnam–Kampuchea war (Yoder 1989: 116–19). In sum, the US commitment to international law and the International Court of Justice has, for the most part, been declining. The Third World presence in the Court has made it generally less beholden to 'developed' nations since the late 1960s, and as a result there has been a gradual divergence between the Court's decisions and the national interests of the developed countries. As the interests of the 'developed' world are at stake, fewer countries are willing to recognize the jurisdiction of the World Court. Thus the US shift in 1986 was away from compulsory jurisdiction. Interestingly, this new trivialization of international adjudication came about at the height of the 'ADR explosion' in the United States and its attacks on domestic adjudication. In addition, a number of 'Third World' countries have also refused to recognize the court's jurisdiction because they are unwilling to surrender their newly gained national sovereignty.

The recent stimulus for international negotiation teams sprang from a different source than did the International Court of Justice, although negotiation is part of the work of the United Nations. During the Reagan years and the decade before Reagan, there was a movement in the United States away from adversarial processes for dispute settlement and towards dispute management by the use of 'alternative dispute resolution' (ADR). It was an attempt to stem the 'rights movements' of the 1960s – a pacification scheme in part. In the 1970s, the role of the Chief Justice of the US Supreme Court Warren Burger was pivotal in highlighting the rhetoric about what is civilized behaviour in dispute processing: 'Our distant forebears moved slowly from trial by battle and other barbaric means of resolving conflicts and disputes and we must move away from total reliance on the adversary contest for resolving all disputes ...' (Burger 1984). His remedy was privatization, to move toward taking a large volume of private conflicts out of the courts. An ADR profession was born and institutionalized. The prime focus was on organizational expansion, with implications for profitable new jobs for professionals, and a new source of repression for American citizens (Grillo 1991).

International Negotiators

Who were these new professionals, and what was new about them anyway? ADR professionals come from a variety of fields – law, economics, psychology, political science, therapy – very few from anthropology. What was new was not so much that they were practising mediation, arbitration or negotiation – after all, such modes of dispute-processing had been around for a long time, and in the US as well. What some had in common was a distaste for a confrontational adversarial process, for courts as a way to handle the problems of the masses (or we might say the uncivilized), for justice by win–lose methods. Indeed, one of the few anthropologists practising alternative dispute-resolution, William L. Ury (1990), describes 'primitives' as having 'softer', non-adversarial means: '... there is little or no evidence that our hunter and gatherer ancestors were as warlike as we have imagined them to be. Indeed, they may have been more peaceful than we who call ourselves "civilized". Such "primitive" cultures may have lessons to teach us about dispute-resolution.' In a light piece

called 'Dispute Resolution Notes from the Kalahari', Ury concludes with the statement: 'Indeed one might argue that the existence of courts and police in a society is an indicator not of compliance with socially-arrived-at dispute settlements but rather of lack of compliance' (ibid.: 238). Some were against the adversarial mode because it was thought to be uncivilized for the civilized élites. So for example, people in this category would prefer to handle interpersonal, neighbourhood, environmental, consumer, women's cases by ADR means, often arguing it was more dignified, respectful, and fairer. Others would prefer to handle inter-corporate cases by ADR means because adversarial processes were less gentlemanly and more costly than ADR.

At the time I thought I was witnessing a forum fetish – the non-rational preference of one forum over another for purposes of dispute-processing. Gradually, I began to interpret such preference as part of a moving escalator in the civilizing mission, activity commonly associated with assertions of superiority. What had been thought to characterize a primitive level of development – negotiation – was now civilized, and what had been thought to be civilized – litigation – was not.

Probably the most well-known international negotiator of recent US history is former President Jimmy Carter. Carter published an address on negotiation in a book entitled *Negotiation: The Alternative to Hostility* (1984) in which he states his position. Basically he agrees with and echoes Chief Justice Burger's publicly proclaimed position: litigation is an 'unnatural process'; negotiation is the absence of litigation or war. In summarizing the number and diversity of negotiations that he was personally involved in, he observes that negotiations have become increasingly more prevalent as a means of conflict-resolution than in previous decades. He refers to the most well-known issues: the Panama Canal Treaty, Salt II, majority rule in South Africa, securing the release of hostages in Iran, peace in the Middle East, relations with China. Carter is practised in his advice and clearly indicates a flexible framework. He concludes in a manner that recognizes power differentials: 'Although military, economic and political strength certainly favours the more powerful side, the matter of simple justice is a counterbalancing factor. Once the talks begin, there is at least some presumption that a final agreement will be fair to all affected people.' Jimmy Carter was speaking from practice, experience, and an inclination towards peace

that may have been based more on his religious beliefs than on his notions of justice in a civil society.

Negotiation studies in the academic world start from a different position. The economists who developed process models proceeded with an assumption of 'rational' actor–negotiators who were engaging in maximizing their outcome in negotiation. Another approach sought a model that would take into consideration the so-called unconscious factors, factors related to situation and individual differences, some of which were based on culture. The latter group is said to be based in social psychology (Janosik 1987), but in fact has borrowed, although in a jumbled manner, much from anthropology, and usually without attribution. Indeed, the culture-negotiation literature is quite extraordinary, mainly because it is so confused about what culture is and how important it is to negotiation. For example, one article (Rubin and Sander 1991) argues that '... attempts to resolve disagreements through negotiation increasingly require sensitivity to the possible contributing role of cultural differences' (p. 249). In the same article, culture is referred to as culture/nationality, '... the set of attitudes and behaviours that are broadly generalizable across a national or cultural grouping, and which tend to persist over time'. Yet the same authors see gender, race and age as additional factors that come into play in negotiation, and conceptually separate from cultural issues.

In another book, *The Practical Negotiator* (Zartman and Berman 1982), in a chapter on 'Structuring Negotiations', the authors observe: 'It is difficult to conclude ... that there are dominant cultural influences on negotiations ... [since] by now the world has established an international diplomatic culture that soon socialises its members into similar behaviour' (p. 227). The same authors ask 'How can cultural behaviour be used or neutralized?' (p. 227) and then note that '... there is a whole cultural area that is real but only peripheral to the understanding of the basic negotiating process, and this relates to language, cultural connotations, social rule and taboos, and other aspects of communication'. While showing that Asians are different negotiators from Germans (elastic versus zero-sum), and from English (who are non-zero sum), they conclude that it is 'still better to find a formula, it is still necessary to define details, and within those needs it is still important to communicate to the other party in signals that he understands' (ibid., p. 229). Here, then, culture is being used as an ideological tool.

A more global view is that of Victor Kremenyuk, who describes 'The Emerging System of International Negotiations' (1988). Kremenyuk observes (as did Jimmy Carter) that international negotiation attracts the attention of many interested parties at home and abroad; consequently this affects the process of international negotiation. When Kremenyuk speaks of an emerging *system* of international negotiation, he is recognizing that international negotiation is 'in the process of acquiring new and important functions' (ibid., p. 212). Kremenyuk is not referring to the mere number of international negotiations, but to the growing interaction among international forms that is occurring with increasing frequency. He attributes the growth to a number of reasons: the growing interdependence of nations and of disputable issues among them, the increasing failure of traditional conflict-resolution devices such as the military, and the realization that negotiation may be the only possible institutionalized and codified way to resolve international disputes in the absence of a real alternative (ibid., p. 213). Nowhere is there mention of the International Court of Justice. Instead the author focuses on the main function of a system of negotiation, 'that it should contribute to the stability and growth (optimization) of the system ... The more efficient the functioning of each international negotiation, the more stable and durable is the whole system of international relations' (ibid., p. 215). He concludes with the comment that the role of international negotiation is no longer a government-to-government activity, but rather an international function of government, non-governmental organizations, public figures, etc., the main goal of which is international stability. While international stability may be a good thing, it can also mean injustice and continuing inequities. It seems that the author is seeking to replace the International Court, without explicit mention being made of its replacement, by international negotiation. Stability and efficiency are prominent themes not justice.

In sum, the programmatic social science literature on negotiation is a conglomeration of disciplinary styles, concepts, and content, the total of which sometimes appears both confused and confusing. However, it is somewhat interesting as an example of interdisciplinary borrowings with an absence of the standards of any particular discipline. For example, negotiation and mediation are sometimes conflated, negotiation is equated with bargaining, power differentials are often ignored, culture is confused

with social structure, ethnocentrisms are common, and there is little consideration given to the possibility that the dispute may necessarily lead to zero-sum outcomes (especially where material resources are concerned). The overall implication in much of the literature is that anything can be negotiated, and the concepts of anthropologists such as Gulliver are being used as controlling processes.

The literature gets truly interesting when the analyst deals with the detail of empirical instances. It is in these specific cases that all mention of 'civilized' conduct drops away, and is replaced by phrases like 'mutual learning', 'information-sharing', 'harmonizing', and 'co-operation'. Zero-sum settlements become 'hostile', and information, analysis and solution get in the way of 'constructive dialogue'. Under such conditions, mind-games become a central component of the negotiation process, and toxic poisoning is transformed into a 'perception of toxic poisoning'.

In the following section, some of the water-resource disputes surveyed are indicative of the transition of dispute-resolution forums that was suggested earlier, away from adjudication/arbitration and towards negotiation. The progression is best reported in the case of the Danube River Basin, and moves from (1) procedures of international adjudication/arbitration, to (2) basin-wide planning where river basin commissions deal co-operatively, to (3) bilateral agreements resulting from international bargaining, to (4) non-governmental organizations operating across political and bureaucratic boundaries and working towards the institutionalization of international co-operation (Linnerooth 1990). The transition found in these Danube cases illustrates the progression from third-party adjudication/arbitration, to informal bilateral arrangements, to 'institutionalized' co-operation through negotiation. Such a transition mirrors the 'privatization' of justice through ADR centres in the United States in a genuinely striking manner (see Nader 1989: 282–5).

In the next section, on international river disputes, the progressions noted above become apparent. As we see, many of the authors writing on international negotiation imply that there exists a 'universal diplomatic culture' of negotiators, a common culture of national governmental administrators, the international 'scientific community', and environmental groups (Linnerooth 1990: 637; see also Zartman and Berman 1982: 226). What is claimed to be universal is, I claim, a hegemonic perspective on

disputing, one developed in the United States during the seventies and exported world-wide, a hegemony that I refer to as 'harmony ideology', and whose primary function is pacification (Nader 1990).

International River Disputes

In a manuscript written in the 1960s and published in 1978, Lon Fuller, then Professor of Jurisprudence at Harvard Law School, wrote about 'The Forms and Limits of Adjudication'. Fuller discussed adjudication in the broadest sense: 'As the term is used here it includes a father attempting to assume the role of judge in a dispute between his children over possession of a toy. At the other extreme it embraces the most formal and even awesome exercises for adjudicative power' (Fuller 1978: p. 1). He asks, 'What if any, are its proper uses?' Fuller argues that disputes that can be reasoned through logical argument are appropriately adjudicated, thereby becoming an issue of infringed rights or an accusation of guilt (ibid.: pp. 368–9).

Only a very few international water disputes have been settled by adjudication. The *Lake Lanoux* case between France and Spain is the classic example from the late 1950s. When John Laylin and Rinaldo Bianchi wrote about 'The Role of Adjudication in International River Disputes' (1959), both authors were engaged in resolving two international river disputes by negotiation. At the same time, they believed that adjudication could play a useful role in finding solutions for such disputes. They point out what is peculiar to sharing waters of an international river. Firstly,

> the geographical position of one riparian often is such that it can adversely affect the rights of others without acting outside its own boundaries. A lower riparian has for instance, certain advantages, not enjoyed on the high seas, over the shipping interests of an upper riparian or non-riparian; similarly an upper riparian has an advantage over, say, the irrigation interests of a lower riparian.

Although their paper was written over forty years ago, it addresses the issue being raised in this paper – that without the possibility of third-party decision-makers, the more powerful disputant can use ADR negotiation to greater advantage. There is a most striking parallel to the argument I was making in 1979 in

discussing disputes between producers and consumers. 'Disputing without the Force of Law' (Nader 1979) biases the decision in the favour of the more powerful. Laylin and Bianchi make the same argument in their concluding section, and set a standard for debate about the choice of forum in what follows:

> At a time when the forces of law and order need ever increasing recognition in the international arena, the notion that states willing to submit international river disputes to adjudication are ill advised has a strange ring indeed. For those who are bent on promoting the rule of law in international relations, the cry of inadequacy of courts in this field betrays a nostalgia for a fast-fading conception of international law in which naked power holds greater sway than recognised principles of justice (ibid., p. 49).

They continue to argue that adjudication can play a constructive role in removing obstacles to agreement, something that has been overlooked by those who strongly oppose reference of river disputes to impartial third-party determination. Those who oppose third-party determination focus on the positive advantages of agreement, as if negotiation is the *only* desirable means to settlement.

Laylin and Bianchi make their case for the usefulness of adjudication in reference to the *Lake Lanoux* case. Lake Lanoux lies within French territory and is fed by waters rising in France. It empties into a tributary which crosses into Spain. France contemplated utilizing the waters of Lake Lanoux in projects that would affect the flow of water to Spain. From 1917 to 1929 France and Spain were unable to come to agreement over French development plans. In 1929, 12 years after the beginning of the dispute, both countries signed an agreement under which they agreed to submit unresolved disputes either to arbitration or to adjudication by the World Court, an agreement which they have since utilized. Laylin and Bianchi's description of the conflicting rights of upstream vs. downstream nations, as well as the more obvious right of a downstream nation to enjoy an adequate supply of water, seems to point to a disagreement that was framed in terms of rights. After being cast in these terms, the dispute was successfully adjudicated by a regional tribunal consisting of judges from several European nations. As Lon Fuller (1978) has noted, adjudicated disputes frequently become either issues of violated rights or accusations of guilt. In the *Lake Lanoux* case, the dispute was

presented as a question of infringed rights, and consequently lent itself to settlement by adjudication.

When cases that should be adjudicated are negotiated, as illustrated in Laylin and Bianchi's vignette (ibid., pp. 39–41) about a 1940s dispute between the US and Mexico over the Colorado River, the explicit connections between international law and the World Court, water rights, and the advantages of negotiation become obvious. The authors indicate that many US Senators, in a debate over whether or not to act unilaterally, were emphatic about the desirability of negotiating a rapid settlement: one senator states, 'I say that we should be advised thereby and not lose one day in stopping Mexico from building up any future right [to Colorado River water]' (ibid., p. 40). Here we see that 'efficiency' in negotiation can really mean minimizing losses. Interestingly enough, Senator Tom Connally (an active participant in the US Senate debate on the World Court) instructs the stenographer to keep *this* debate off the record: 'Lift your pen, Mr. Reporter' (ibid., p. 40). Connally must have realized how cynical the process of friendly negotiations might appear in the *Congressional Record*.

The tone of the Danube River Basin case as synthesized by Joanne Linnerooth (1990) is in complete contrast to Laylin and Bianchi's reasoning. Her article links the issues of negotiation (using the formulaic language common to contemporary writings on negotiation) to international water rights, with special reference to pollution in the Danube. Linnerooth recognizes the power imbalances between upper- and lower-riparian countries, but takes the view that the more powerful upstream nations are at a disadvantage if they agree to negotiate 'cooperative [water quality] policies', while weaker nations are at an advantage. Linnerooth does not acknowledge the possibility that the opposite may be true – namely, bilateral negotiation may put the stronger nation at a bargaining advantage *vis-à-vis* the weaker nation. Indeed, she argues that 'some compensating advantage or incentive for the upper riparian states is a prerequisite for co-operation' (p. 643). She seems unaware of other cases where no enticements to negotiate were necessary. In these kinds of cases upstream nations often simply wish to minimize their losses by avoiding a trial (or third-party involvement) that would prove them to be in the wrong, as was for example the cases of India in 1977 (Begum 1988) and the US in the 1940s Colorado River dispute with Mexico (Laylin and Bianchi 1959).

Linnerooth, like many other international negotiating 'professionals', implies that there is a 'universal negotiating culture' or what she calls a 'common culture' composed of national government administrators, international scientific communities, and emerging environmental groups (ibid., p. 637). The language Linnerooth uses in describing how conflicting, adversarial interests might be negotiated is revealing: 'mutual learning' and 'information-sharing', as my research assistant notes, sounds more like marriage counselling, not unravelling conflicts over river pollution. Therapy talk is a strong influence in ADR. Her 'negotiating culture' gives little consideration to disputes that *are* in fact zero-sum. Linnerooth does not seem to be looking for the limits of negotiation, because in her view anything can be negotiated, even if 'perceptions' must first be moulded: '... among groups with different perceptions of the problem ... a fundamental shift will be necessary to orient negotiation support away from "information, analysis, and solution" to providing the very mechanisms necessary for a constructive dialogue' (ibid., pp. 658–9). The literature on dispute resolution in fact gives us little reason to believe that the stronger nation is going to exert the patience or consideration to 'learn' or 'share' without the force of law, the threat of litigation, or the presence of mutually recognized authority.

The Danube River Basin is an interesting example because it is one of the most international river basins in the world. The Danube is Europe's second largest river, with eight riparian countries bordering (including Germany, Austria, Czechoslovakia, Hungary, the former Yugoslavia, Romania, Bulgaria, and the former Soviet Union). The Danube also transfers water from the non-riparian countries of Albania, Italy, Switzerland, and Poland. Eight countries spanning Eastern and Western Europe have declared the need to co-operate on confronting the mounting problems of water pollution. The Danube Declaration is non-binding, a step towards a more co-operative ecosystem approach to the management of the river. The contemporary central issues are the deteriorating quality of the water and demands for exploitation of the river for the generation of electrical energy. The Danube River Basin is home to over 70 million people, people of different cultures and economic prosperity who have different standards on water quality. The rich upper riparian countries use the Danube primarily for industrial and

waste disposal and energy purposes. The lesser-developed lower riparian countries use the river for drinking water, irrigation, fisheries, and tourism (ibid., p. 636). As Linnerooth notes, there is a 'mismatch between countries which would benefit from pollution control and those with the resources for providing this control' (ibid., p. 636).

Recognizing the power asymmetry between upstream and downstream nations and recognizing also the poorly defined issue of water pollution, Linnerooth nevertheless proposes co-operation through bilateral, stepwise negotiations. She believes that it is 'unlikely that mini-governments with the power to legislate and implement river basin policies across national boundaries will emerge. The role of transboundary commissions in defining negotiating agendas, linking issues, and facilitating the negotiating process may, on the other hand, have considerable potential promise' (ibid., p. 648). Yet forums do not just 'work' or 'emerge' naturally. They work because forces behind them want them to work. Nevertheless, she continues to argue that in the absence of an international river basin authority, mechanisms for collaboration are most likely to be mainly bilateral agreements and international bargaining, which are increasingly influenced by non-governmental organizations operating across political and bureaucratic lines. 'Win–win' bargaining is to be accomplished by those who share 'a certain professional rationality and thus a common overall frame of the issue' (ibid., p. 657), or what she calls 'limited-authority committees' (ibid.). Negotiating participants may 'translate the border' – its imagery, social expectations, jurisdictional responsibilities and processes, as well as the differences in resources (ibid., p. 659, note 108). In short, what Linnerooth proposes is the transition from third-party litigation/arbitration and enforcement, through informal bilateral arrangements, to the non-governmental institutionalization of international co-operation (in other words the 'privatization' of international justice), arguing that expanding the authority of the Danube Commission will not work in the absence of an international river basin authority.

Within Spain and Portugal, the allocation of water is a less involved case than the Danube, but nevertheless raises some of the same questions regarding asymmetry of power and upstream–downstream issues. In the *Lake Lanoux* decision, France was the stronger nation, yet Spain succeeded in the

arbitration. In the current situation between Spain and Portugal, Spain is stronger than Portugal, and has the advantage of having learned a lesson (as the weaker party) from the *Lake Lanoux* case: if you are an upstream nation, do not agree to adjudicate a water dispute.

According to Joseph Dellapenna (1992) the surface water in the Iberian peninsula may be an opportunity for co-operation or a source of conflict. Basically the situation is this: approximately 70 per cent of Portugal's surface fresh water comes from rivers that arise in Spain, while Spain receives virtually none of its surface fresh water from Portugal (Dellapenna 1992: 807). Thus, Portugal is at a severe disadvantage *vis-à-vis* Spain, with limited means of persuading Spain to take its interests into account. Exacerbating the problem are the increased pollution of waters coming from Spain and the Spanish plan to place their only nuclear waste disposal site along the Duero/Douro river just above the Spanish–Portuguese border. The proposed nuclear waste facility at Aldeadávila will be less than one kilometre from Portugal, and any contamination of the river will end up in Portugal. Given that Spain has the worst record of non-compliance with European Community environmental directives of any nation in the Community, Portugal has a right to ask why they must share the risk of disposing of another country's nuclear wastes. Furthermore, the Portuguese construction of the Algueva Dam on the Guadiana River to provide irrigation, hydroelectric generation, and urban and industrial water-supply is threatened by Spanish activities upstream. The Guadiana River rises in Spain, where the Spanish have developed their own irrigation project. Spanish plans would undoubtedly deplete the waters before they reach the reservoir for the Algueva Dam. Portugal has been unwilling to challenge Spain, although the 1927 convention provides for recourse to the International Court of Justice should the parties fail to agree. However, thus far, there has been no implementation of a judicial award.

The profile from Dellapenna's writing emerges as follows: the European Community (of which both Portugal and Spain are members) seems reluctant to get involved, and advises bilateral negotiation (ibid., pp. 806, 823). But Portugal's weak approach in dealing with Spain would not bode well for a fair bilateral settlement, literally because of the freshwater power differential between the two nations (ibid., pp. 806, 812, 822). Although a

1927 convention signed between Portugal and Spain provides for recourse to the World Court, this has not been a considered option. In fact, Dellapenna does not advocate the World Court as a solution, because he sees for a fact that Spain is in clear violation of customary international law; rather, he believes that a legal regime should be created to manage the common waterways (ibid., pp. 813–25). It is law rather than negotiation that he recommends.

ADR recommendations are almost never rule of law. Two articles that were featured in the Fall 1991 issue of *Natural Resources Journal* both deal with southern California water agencies and the plan to line proportions of the All-American Canal with concrete in order to reclaim water that currently leaks from the canal into a transboundary groundwater aquifer. However, the Valle de Mexicali, one of the richest agricultural regions in Mexico, relies on this groundwater to support its crops. The Mexicans are protesting against the lining project as a violation of the 1944 Colorado River Treaty. Douglas Hayes, the first author, implores both the US and Mexico to negotiate, and turn the dispute into a 'win–win' solution (ibid., p. 816). Hayes chides Mexican officials for threatening international litigation in the World Court or the International Court of Justice at the Hague (p. 824). He continues: 'Such a development goes against the grain of ordered, controlled, international management of resources' (p. 824). His main argument is that the international tribunal 'would "force" the litigants to equitably apportion these waters anyway. The United States and Mexico should seek to co-operate ... without the coercion of an international tribunal' (p. 824). Hayes assumes that 'equitable apportionment' would be interpreted in the same way in negotiations as it would in an international tribunal. He concludes that the dispute 'provides both countries the opportunity to act rationally, logically, and humanely' by negotiating. There is no hint that international tribunals might follow substantive notions of justice embodied in *law*. Thus the contempt for law here is total.

The second author, J. Roman Calleros, a researcher from Mexico's El Colegio de la Frontera Norte, wants to pursue the problem by advocating the equity issue. He does not take a procedural approach, and he does not advocate litigation. He is simply insistent on Mexico's right to its share of the water. He estimates monetary damage, and notes that calls for solutions

'from president to president as is the custom in these recurring controversies along the northern Mexico border' (p. 834), are a rather fragile and temporary method of resolution. Calleros believes that an information base is 'extremely important for our representatives' because it will allow them to negotiate on the basis of objectively verifiable data – a long way from Linnerooth's suggestion that perceptions of conflict should be altered.

In an article to which reference has already been made Dellapenna (1992) points out that even clearly dominant states hold back in taking all the water needed for fear of retaliation against the state's own water facilities, and he cites the instance of the Jordan Valley. Even in the midst of various phases of Middle East conflicts and wars over the last fifty years 'tacit cooperation has been the almost unbroken rule between Israel and its neighbours, particularly Jordan' (ibid., p. 805). Israel and Jordan are the primary users of the waters of the Jordan, which satisfies one-half of their combined demands (Neff and Matson 1984). The other riparian states are Lebanon and Syria, whose use of the Jordan waters is minor in comparison to that of the others, satisfying about 5 per cent of their total water demand. Conflict over the Jordan River results from a complex hydrological structure shared by four states, and from the hostilities between these four states. The Arab–Israeli conflict has overshadowed efforts to reach agreement on joint utilization of the waters.

The Jordan River is a complex system: the Dan River, which originates in pre-1967 Israel, discharges into the upper Jordan; the Hasbani River, which originates in south Lebanon, discharges into the upper Jordan; the Banias River, which originates in the Syrian Golan Heights, discharges into the upper Jordan; the Yarmouk river, which forms the border between Syria and Jordan, discharges into the lower Jordan. In the first half of the 1950s a number of water allocation plans were devised with the active involvement of a third party, US ambassador Eric Johnston, leading to the Unified Plan. The Plan was accepted by the technical committees from both Israel and the Arab League, although neither of the groups was able formally to commit itself to the Plan for domestic political reasons. In the absence of 'impartial monitoring' these water allocation plans deteriorated.

A series of unilateral actions followed. Both countries began development projects, and Israel completed the National Water

Carrier project in the mid-1960s. In 1967 and by means of war Israel occupied the Golan Heights and the West Bank, which effectively gave them control of the Jordan headwaters and the Yarmouk River. Thus the situation went from mediated negotiations to unilateral action to violent conflict, without any consideration of an adjudicated settlement – this in spite of the success of the *Lake Lanoux* case during this time-period. Neff and Matson (ibid., p. 45) discuss 'secret negotiations' mediated again by the US between Jordan and Israel. Apparently a series of such meetings took place in the early 1970s as well.

The statistics that Neff and Matson present (ibid., pp. 45, 47–8) indicate the gross inequities present in the consumption of water by Israel and by the settlers on the West Bank. As the authors indicate, these inequities border on the infringement of human rights. According to one source, the Palestinian average in some areas of the West Bank has gone down since the beginning of the *Intifada* to less than 44 litres per caput per day – 'less than the United Nations reckons is necessary for maintaining minimal health standards' (Lowi 1992: 43). Like the *Lake Lanoux* case, this issue can be presented in terms of violated rights, specifically of human rights. For this reason, the Jordan River dispute would seem to be an appropriate case for adjudication.

A final case (see Begum 1988) refers to the long-standing Ganges River dispute between East Bengal/Bangladesh and India, and gives a clear example of the politics of international negotiation, and the advantages of bilateral negotiation for the stronger party. The Ganges river flows from India into East Bengal, and the Ganges River Basin supplies it with much of its fresh water. In the early 1950s the Indian government began planning the construction of the Farakka Barrage, a dam which would divert water from the Ganges River into the Bhagirathi–Hooghly River via a feeder canal. Pakistani officials wanted to be included in the process of developing the Ganges River, but the Indian government continued its unilateral planning. Finally, in 1957 and 1958, Pakistan proposed forming a joint development committee, and also proposed that the United Nations should be involved in the process. The Indian government flatly rejected all proposals. In 1960 they finally agreed to begin bilateral negotiations with Pakistan, but by 1961 India had already begun construction of the Farakka Barrage, justifying their unilateral action by publicly stating that the waters of the

Ganges belonged exclusively to India. East Bengal during this period was marginalized.

The Ganges water dispute had long been a concern of the primarily agrarian people of East Bengal (which became Bangladesh in 1971). After a series of failed negotiations, the government of Bangladesh brought the case before the General Assembly of the UN in September of 1976. The United Nations seemed very reluctant to get involved in this case. The situation became entirely focused on the increased stability of the Bangladeshi government and on the unilateral action of India to withdraw the Ganges water at Farakka. The Bangladesh Supreme Court Bar Association expressed a deep concern at the unilateral and arbitrary withdrawal of waters of an international river by India. This action was followed by protests from all parts of the country.

At the United Nations, Bangladesh's request to include the Farakka Barrage in the agenda of the General Assembly was opposed by India, who argued that it was a 'bilateral issue of [an] "essentially economic" nature' (ibid., p. 169). The UN did clarify both positions at an international forum: India could not get moral support for pursuing a policy of unilateral action, while Bangladesh, being one of the poorest countries of the world and heavily dependent on foreign assistance, had little clout to use in the international arena. However, as India had adhered to the principle of 'bilateralism', India had to prove that such negotiations could bring about a solution without third-party mediation (ibid., p. 172). Ultimately, it seems that a change of government in India made a difference. Although a five-year agreement was reached in 1977, a final resolution has not been achieved.

Each nation has its own preferred solution to the problem. Bangladesh's solution would involve Nepal's participation, while India would like to keep the issues of water strictly between itself and a weaker Bangladesh. As described by Khurshida Begum (ibid., pp. 204–14), 'peaceful' negotiations, strictly bilateral, are a hegemonic tool for India. Over the course of the negotiations a series of 'discrepancies' between the facts reported by India and Bangladesh reveals exactly the purpose for which court trials are used – disagreements of fact. As Laylin and Bianchi have noted (1959) these could be resolved through a third party, or experts independent of the disputants. Also, the serious effects of water shortage claimed by Bangladesh would seem to put this case on the level of human rights violation rather than

merely a political tug-of-war in the process of hammering out these agreements. Once again, we are reminded of Laylin and Bianchi's arguments for 'The Role of Adjudication in International River Disputes' (1959) as a means of balancing power discrepancies, while recognizing that adjudication cannot be simply equated with a better outcome for weaker parties.

Concluding Comments

In 1991 the *American Journal of International Law* published an editorial titled 'The Peace Palace Heats Up: The World Court in Business Again?'. The author, Keith Highet, announces that the Hague is busier than ever. Its docket is jammed. Nobody forecast such activity. The voices against the Court have been strident, particularly amongst those supporting the policies of the United States in Central America in the 1980s. The author lists nine new cases brought before the full court in the previous two years, only about half of which are clearly between unequal powers. Furthermore, even 'unpopular' states like Libya and Iran are resorting to World Court adjudication, since this is probably one of the few ways of settling an international dispute without the risks of power play.

In the same editorial the author notes that the United Nations Law of the Sea has a provision for the formation of a specialized tribunal – the so-called Hamburg Court. Such a duplicative tribunal, the author continues, might not be necessary in the light of the fact that the World Court will be undertaking a large number of these cases soon and setting precedents for future Law of the Sea cases. However, the Hamburg Court has strong proponents – the five permanent members of the Security Council – who support this 'alternative solution to existing litigation before the full tribunal' of the World Court (ibid., pp. 653–4). These powerful states are, according to Highet, 'as ever uncomfortable with the [World] Court's activities' (ibid.).

The editorial concludes with the idea that perhaps the developed nations are in support of The Hamburg Court because they would have a stronger hand in it. He believes that the real work of the World Court over the next decade 'will be the reconciliation of the interests of developing countries with those of the developed countries ...; however, in the nine recent cases, the litigants have represented a wide range of middle-level powers, not the greater powers' (ibid.). Thus the piece is hardly reassuring on the role of the World Court as power-equalizer.

In a recent journalistic piece W. T. Anderson (1993) speaks about 'Governing the World without Governments', noting that there is a 'demand for a new system of governance', as national governments, inter-governmental organizations and the United Nations fail. 'Global governance' he calls it. The strong interest in alternative systems suffers from a lack of introspection about the alternative experiments to date, experiments biased towards the powerful. Words like 'global civilization' sound grand; but, as I have indicated in this paper, the 'civilized' – the network of global intellectuals, businessmen, and activists that Anderson speaks about – have a way of diminishing institutions that may function as power-equalizers.

What is so powerful about professional cultures is their built-in protection against participating professionals examining the underlying assumptions of their trade. In the literature on 'modern negotiation' there is little to indicate that 'modern negotiators' are critically examining their trajectories or assessing the broader significance of their work. They write more like 'true believers', avoiding controversy even at the cost of self-reflection, which would necessarily involve understanding the historical and socio-cultural context in which a newly re-civilized negotiation serves as hegemonic power. P. Gulliver could afford to focus on the process of negotiation to the exclusion of broad cultural contexts and social situations as long as the subject-matter was intra-societal and micro in scope. However, in the arena of international power-brokers the purpose of negotiation may not be problem-solving, but control.

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