Diplomatic Means of Dispute Settlement Between States: How Different are they from Judicial Means?

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Introduction

Our society has been forever riddled with disputes, tensions and conflicts either at the national, regional, or international level.

With wars leading to wide bloodshed and loss to economies of the States involved in the conflict it became imperative to develop some diplomatic and peaceful means of dispute resolution.

This lead to development of Peaceful methods of Dispute Settlement under International Law which with passage of time became a fundamental limb of international relations.

Methods of Peaceful Settlement of Disputes in International Law create an obligation upon the States to settle their disputes in accordance with these methods as envisaged under the International Law.

The States involved in Conflict can choose between Diplomatic, Judicial and Institutional means which comprise both of legally binding and non-binding mechanisms like Negotiation, Inquiry, Good Offices and Conciliation (as diplomatic) and Legally-binding mechanisms like Arbitration and International Adjudication (as Judicial Means)[1].

Disputes between the States can be categorized into Legal Disputes and Political Disputes. When States are involved in a Dispute involving point of law, generally such disputes are resolved by judicial means of settlement, within International Law.

While Political Disputes use Diplomatic means of dispute settlement involving Political Principles instead of International Law to settle disputes.

Arbitration as a Judicial means of Dispute Settlement is Optional, more flexible and adapted to objectives of States. An Arbitral Award is binding upon the States.

1 Elena Temelkovska-Anevska, Peaceful Means for Dispute Settlement of Inter-State Disputes: Reflection, Advantages and Disadvantages, IJASOS- International E-Journal of Advances in Social Sciences, Vol. III, Issue 7, April 2017

Through this essay different Diplomatic means of Dispute Settlement would be discussed along with their differences to the Judicial Means of Dispute Settlement.

Diplomatic Means of Dispute Settlement:

Permanent Court of Justice in the Mavrommatis Palestine Concessions case defined the term 'Dispute' as "A Disagreement on a point of law or fact, a conflict of legal views or of interests between two persons". This definition was given in the year 1924[2].

Negotiation is one of the most common diplomatic method for the States to use for settlement of their disputes.

Article 33 of United Nations Charter states:

1. "The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.
2. The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means".

I. Negotiation

Negotiation between States is one the conventional methods of Dispute Settlement. It basically involves two or more States who through their diplomatic channels which is usually their Foreign Offices which in certain cases may be assisted by other Departments due to technicalities of the Disputes enter into Negotiations.

Whether Negotiations between States would be successful or not and would eventually lead to Compromise or Agreement between the States depends upon the determination, goodwill and readiness of the Parties.

To supplement the determination and readiness of the States towards peaceful means of Dispute Settlement, Art 2(3) of the United Nations Charter, states 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".

Process of Negotiation can be divided in four phases: Pre-negotiation, Conceptualization, Bargaining and Settlement. Pre-Negotiation covers issues of identification of the parties,

2Permanent Court of Justice in the Mavrommatis Palestine Concessions (Jurisdiction) case. PCIJ, Series A, No.2, at.11

detection of mutual interests and selection of a forum for communication. Conceptualization identifies the positions of each of the parties and the subject matter of the dispute. Finally, in Bargaining Phase' parties discuss their positions and negotiate the terms and conditions which will lead to a solution. The final phase is the phase of reaching an agreement[3].

Since only States involved, Negotiation empowers the parties themselves to steer the process and shape its outcome to deliver a mutually accepted settlement[4].

In case the Parties are unable to reach an agreement through Direct Negotiations, States may decide on using Institutional Negotiations which are formed through the Mixed or Joint Commissions. In case of mixed Commissions, equal number of representatives of both States may be given either a broad brief of indefinite duration or task dealing with a specific problem.[5]

The Lake Lanoux Dispute is perfect illustration for explaining Institutional Arbitration, after being considered by International Commission for the Pyrees, a mixed commission was formed, which was followed by France-Spain Commission of Engineers, which examined the technical aspects, this was followed by Special Mixed Commission, after its failure parties decided to refer case to Arbitration.

- **Negotiation and Judicial Means of Dispute Settlement**

Negotiation allows the parties to retain maximum control over their dispute while in case of adjudication of dispute via Judicial Means, the dispute is entirely out of the hands of the States, as the decision would be rendered by Court or the Arbitrator.

The Process of negotiation is less formal and cumbersome than Court process thus is often a lot faster than litigating. Cost involved in Negotiation is much less than litigation as the expenses of Attorney and other logistical expenses are avoided. In Negotiation the Parties are are involved actively in resolving their dispute, and are not leaving it up to a Judge, so you can control and decide the outcome.

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3 Elena Temelkovska-Anevska, Peaceful Means for Dispute Settlement of Inter-State Disputes: Reflection, Advantages and Disadvantages, IJASOS- International E-Journal of Advances in Social Sciences, Vol. III, Issue 7, April 2017

4 Rama Mani and Richard Ponzio, Peaceful Settlement of Disputes and Conflict Prevention

5 J.G Merrils, International Dispute Settlement, 6th Edition, Cambridge University Press

II. Good Offices

When parties reach a saturation point while negotiating a dispute with each other where they refuse to negotiate with each other, the role of Good Offices comes in.

The term, "Good Offices" basically refers to a Third Party which encourages the parties in a dispute to resume the negotiations or do provide the parties to the dispute a additional channel of communication. The Function of Third Party in such a situation is termed as providing "Good Offices".

The essential requisite for this mechanism is mutual consent of both the parties. If parties to the dispute cannot reach agreement by direct negotiation, they may jointly seek the good offices by a third party, but it does not mean that there is an obligation for parties to submit their dispute to this method. The Third Party which provides services of its Good Offices can be a State, International Organization (United Nations), or a prominent person, such as the UN Secretary-General[6].

Third Party providing its services of Good Offices should be a neutral, impartial and trustworthy, with an ability to resume favorable atmosphere between the parties.

One of the leading example of successful 'Good Offices' is Peace Agreement between Russia and Japan, which was signed on 5th September 1905. US President Theodore Roosevelt played a role of a Third Party in 'Good Offices'. He was awarded with Nobel Peace Prize in the year 1906 was awarded for having negotiated peace in Russo-Japanese war in 1904-1905.

III. Mediation

After States to a Dispute fail to reach a settlement through Negotiations, the next alternative apart from Good Offices is Mediation.

In Mediation, the Mediator plays an active role in helping parties reach a settlement. The Mediator acts as an active participant between the parties to the dispute and is authorised, expected to advance fresh proposals to the other party[7].

Mediation can be performed by representatives of a State or an NGO, by an International Organization or its functionaries, such as Secretary-General of the UN and its representative,

6 Ruth Lapidoth. Some reflections on peaceful means for the settlement of inter-state disputes. Georgetown University Law Center
7 J.G Merrils, International Dispute Settlement, 6th Edition, Cambridge University Press

or by respected and distinguished person. A person can be designated as a mediator only by consent of parties[8].

Mediation can be be initiated by one of the parties.

The Mediator's role in a Mediation is can be described by words like objectivity, neutrality, discretion, impartiality and independence. Mediators one of the most important duty is to discreetly transmit proposals of one party to the other, on separate meetings while also maintaining the confidentiality of information shared with Mediator. This helps parties when the relations between reached an impasse: in such a case the mediator will continues to communicate with both the parties to work out a compromise[9].

Consent of parties is necessary at all points of Mediation in order to lead to successful dispute resolution[10].

There are few examples where Mediation successfully led to settlement of dispute between the States like Soviet Union acted as Mediator in dispute between India and Pakistan in 1966 and Mediation of Algeria in dispute between USA and Iran in relation to the hostage crisis in 1980-1981 wherein Algeria as a mediator suggested Ayatollah Ruhollah Khomeini to make "a gesture of goodwill" towards Algeria as a Third party, and not towards USA.

- **Mediation and Judicial Means of Dispute Settlement**

Mediation and Judicial Means of Dispute Settlement like Arbitration are completely different from each other. While Mediation-based settlement is not a legally binding settlement, but the Arbitral Awards made by an legally binding award. Thus Mediation is non-binding process while Arbitration is a Binding Process.

Difference between Arbitration and Mediation is that in Arbitration, arbitrator hears evidence and then proceeds makes a Arbitral Award. Arbitration is similar Court proceedings as Parties provide testimony and give evidence similar to a Trial but it is usually less formal.

While Mediation process is a negotiation with assistance of a Neutral Third Party. Parties do not reach a resolution unless all sides agree.

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8 Bernier, Ivan and Latulippe, Nathalie. The International Convention on the protection and promotion of the diversity of cultural expressions: Conciliation as a dispute resolution method in the cultural sector.
9 Ruth Lapidoth. Some reflections on peaceful means for the settlement of inter-state disputes. Georgetown University Law Center
10 Elena Temelkovska-Anevska, Peaceful Means for Dispute Settlement of Inter-State Disputes: Reflection, Advantages and Disadvantages, IJASOS- International E-Journal of Advances in Social Sciences, Vol. III, Issue 7, April 2017

Mediators do not issue orders or awards or find faults, or reach any conclusions. Instead, Mediators assist the parties to reach a settlement by assisting with the communications where there is impasse between the parties, by obtaining relevant information, and developing options to reach a mutually beneficial settlement.

IV. Inquiry

Inquiry as a Diplomatic means of Dispute Resolution is a specific institutional arrangement between the parties which is resorted to by the parties, when they wish to have the dispute to be investigated independently alternatively to the judicial means of settlement like Arbitration or other Diplomatic means.

Basic purpose of Inquiry Commission is to facilitate solution of the Dispute that occur from difference of opinion on the facts by clarifying such facts, it is for this reason it is termed as "Fact-Finding Commission"[11].

'Commission of Inquiry' as a mechanism was established in 1899 and 1907 by Hague Conventions for Pacific Settlement of International Disputes. Later the convention introduced functioning and procedure for establishment of the commission of inquiry. The commission does not explain or resolve question of legality.

Inquiry mechanism was used in few cases only, Dogger Bank in 1904, Tavignano case in 1912, Tiger case in 1918, Tubantia case in 1922 and Red Crusader in 1961.

On of the most famous Inquiry Commissions, was in "Dogger Bank case" between United Kingdom and Russia. Case was about attacks by Russian Warships on British Fishing Vessels in North Sea in October 1904. Russian Warships were engaged in war with Japan and attacked British fishing trawlers because they thought they were Japanese torpedo[12].

Dogger Bank incident almost led to war between Russia and Britain. The incident was dangerous due to Anglo-Japanese alliance. Russian and the British governments signed a joint agreement in November 1904 in which they agreed to submit the case to an international commission of inquiry. In 1905 Russia voluntarily paid a compensation of 66,000 British pounds to the fishermen.

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11 Anne Peters, Anne. (2003). International Dispute Settlement: a network of cooperational duties. *EJIL*, Vol.14, No.1

12 United Kingdom vs. Russia. 1905. Incident in the North Sea. 1 Hague Court Report 403

Inquiry as a Mechanism for Dispute Resolution is rarely used as an exclusive mechanism for dispute settlement, but it is more often used as a part or an addition to some of the other mechanisms.

Inquiry and Judicial Means of Dispute Settlement

Inquiry as a means for Dispute Resolution is completely poles apart from the Judicial Means of Dispute Resolution like Courts and Arbitration. As in Inquiry the decision rendered by the Commission is non-binding in nature unless it agreed by the parties earlier while in Arbitration and Courts the Arbitral Award and Decision taken is binding upon the parties.

Another crucial distinction is that, the Inquiry Commission does not decide upon any issues pertaining to Law, it only after investigation clarifies the issues of facts which are in dispute between the States while Courts and Arbitral Tribunal render a decision on both Points of Law as well as Facts.

V. Conciliation

Conciliation as a mechanism for settlement of disputes was first established the 1920s with General Act for Pacific Settlement of International Disputes from 1928. First Treaty to provide for Conciliation was concluded between Sweden and Chile in 1920 but it only had a reference to conciliation as an Optional Procedure[13].

Conciliation as a Diplomatic Means of Dispute Settlement comprises of an Institutionalized and Impartial Commission which investigates dispute and recommends the possible solutions for settlement.

Each Party to the dispute specifies whether it accepts or rejects Conciliation Commissions proposal. If parties accept the proposal, Commission drafts an agreement, called *Procés Verbal,* which includes conditions of the settlement.

Conciliation Commission can be established as a Permanent Commission or on Ad-Hoc basis and its proceedings are confidential. Decision which type of commission will be engaged depends on various factors, such as attitude of opposing parties, contents of instrument that created commission, perception of Conciliators about their function, etc[14].

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13 J.G Merrils, International Dispute Settlement, 6th Edition, Cambridge University

14 Elena Temelkovska-Anevska, Peaceful Means for Dispute Settlement of Inter-State Disputes: Reflection, Advantages and Disadvantages, IJASOS- International E-Journal of Advances in Social Sciences, Vol. III, Issue 7, April 2017

The Treaty between France and Switzerland which was signed in the year 1925 contained functions of Permanent Conciliation Commission, which later on became Model Treaty for future treaties.

The Treaty stated that, *"The Duty of the Permanent Commission shall be to elucidate the questions in dispute, to collect with that object all the information by inquiry or otherwise, and to endeavour to bring the parties to an agreement. It may after examining the case, intimate to the parties the terms of settlement which seems to it suitable and lay down time limit within which they are to reach their decision".*

This was followed by what came to be known as "Locarno Treaties" which were signed between Belgium, France, Czechoslovakia and Poland, wherein except the parties agreed to refer legal disputes judicial settlement, all the disputes between them should be subject to Conciliation.

One of the examples of Conciliation is of between between Finland and Norway from 1980 regarding boundaries of Continental Shelf in Jan Mayen sector (a Norwegian volcanic island situated in the North Arctic Ocean). Report of Conciliation Commission included recommendations which were accepted by parties and led to an agreement in October 1981.

Conciliation and Judicial Means of Settlement

One of the critical difference between Conciliation and Judicial Means of Dispute Resolution like Courts and Arbitration is that the report of Conciliation Commission is not binding upon the parties while the decision arrived at by the Arbitrator in Arbitration and Judges in Courts is binding upon the parties.

The decision arrived at by the Arbitrator i.e Arbitral Award is enforceable in the National Courts, while the Report of Conciliation Commission which is not enforceable in National Courts.

Arbitration is a formal process, follows similar procedures to Court proceedings wherein witnesses can be called and evidence can be presented to arrive at a decision while Conciliation is an informal process and normally involves discussions between Conciliator and Parties to arrive at a negotiated settlement.

Conclusion:

In Diplomatic means of Dispute Settlement, Negotiation is one of the first means to which the States resort to and in case of failure to arrive at a settlement the parties move forward to other diplomatic means of Dispute resolution like Mediation, Conciliation or Good Offices with consent of the opposite party.

Differences between all Diplomatic means for Dispute Resolution is not clearly defined and fixed, there are different modes which have shade of each other in them.

It is possible for parties to create a new mechanism by combination of the several techniques. Firstly, there is lack of obligation to choose them, except in cases of prior commitment by parties; secondly, Conclusions and reports have non-binding effect on opposing parties; finally there is a possibility to take into consideration all relevant elements.