

Adjudicative Methods of Dispute Settlement

The major disadvantage of the diplomatic methods of dispute settlement is that the parties to them are under no legal obligation to accept the proposals of settlement suggested to them. Thus, the adjudicative methods of dispute settlement are preferable because they provide the issuance of binding decisions, rather than mere recommendations as in cases of diplomatic methods. It is this binding force of the decisions rendered at the end of the adjudicative methods that distinguishes these methods from other methods of dispute settlement.

Adjudicative methods of dispute settlement consist of two types of procedures, “arbitration” and “judicial settlement”. Arbitration and judicial settlement are two methods involve the determination of differences between States through legal decisions of tribunals. Whereas in case of judicial settlement the decision is made by an established court, permanent (such as the International Court of Justice) or *ad hoc*, in case of arbitration it is made by a single arbitrator or arbitral tribunal. The major characteristic of these two methods is that a judicial decision or an award is binding on the parties and must be carried out in good faith.

It is not until the establishment of the League of Nations that the terms “arbitration” and “judicial settlement” became distinguished. Under the Covenant of the League “judicial settlement” meant settlement by the Permanent Court of Justice (PCIJ), whereas “arbitration” meant settlement by other tribunals. This same distinction is carried over by the Charter of the United Nations, but with the International Court of Justice (ICJ) substituting for the Permanent Court of International Justice (PCIJ).

Arbitration was defined in the 1899 Hague Convention for the Pacific Settlement of Disputes as “the settlement of differences between states by judges of their choice and on the basis of respect for law”; this same definition was repeated in the 1907 Hague Convention. The procedures of arbitration grew

to some extent out of the processes of diplomatic settlement and represented an advance towards a developed international legal order.

Arbitration is considered the most effective and equitable means of dispute settlement. It combines elements of both diplomatic and judicial procedures. However, it is much more flexible than judicial settlement. It gives the parties to a dispute the choices to appoint the arbitrators, to designate the seat of the tribunal, and to specify the procedures to be followed and the law to be applied by the tribunal. Moreover, the arbitration proceedings can be kept confidential.

Arbitration cannot be initiated without the agreement of the parties to a dispute. An agreement of arbitration may be concluded for settling a particular dispute, or a series of disputes that have arisen between the parties. It may be in the form of a general treaty of arbitration.

The usual pattern in arbitration agreement as regards the appointment of arbitrators is that each of the two parties has to appoint one arbitrator or more, and the appointed arbitrators have to appoint the arbitrator, who is known as an "umpire". Usually, the arbitral tribunal consists of three arbitrators, who can decide by majority vote. The parties may agree to refer their dispute to a single arbitrator, who may be a foreign head of a State or government, or a distinguished individual.

Judicial settlement is a settlement of dispute between States by an international tribunal in accordance with the rules of International Law. The international character of the tribunal is in both its organization and its jurisdiction. International tribunals include permanent tribunals, such as the International Court of Justice (ICJ), the International Tribunal for the Law of the Sea (ITLOS), the European Court of Justice, the European Court of Human Rights and the Inter-American Court of Human Rights, and include *ad hoc* tribunals, such as the United Nations Tribunal in Libya.

The ICJ is the most important international tribunal, because of its both prestige and jurisdiction. It is the principal judicial organ of the United

Nations. All members of the United Nations are *ipso facto* parties to the Statute of the Court. The judges of the ICJ are appointed by the United Nations, not by the parties to a dispute. The ICJ has to apply the rules and principles of International Law, which are enumerated in Article 38 of the Statute of the Court; the parties have no choice in specifying the rules to be applied by the Court. The jurisdiction of the Court includes all disputes between States concerning the interpretation of a treaty, any question of International Law, the existence of any fact constituting breach of international obligations, and the nature or extent of the reparation to be made for the breach of an international obligation.

The Charter of the United Nations refers to “arbitration” and “judicial settlement” in Article 33(1) as two methods among other methods of pacific settlement that States are encouraged to utilize in seeking a solution to their international disputes. It also provides in Article 36(3) a guidance to the Security Council requiring it “to take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice”. Despite this provision, the Charter does not impose on members of the United Nations the obligation to submit any dispute, even legal one, to the Court. Moreover, the Charter provides that nothing in it “shall prevent Members of the United Nations from entrusting the solution of their differences to other tribunals by virtue of agreements already in existence or which may be concluded in the future”.

Institutional Methods of Dispute Settlement

Institutional methods of dispute settlement involve the resort to international organizations for settlement of international disputes. These methods have come into existence with the creation of the international organizations. The most eminent organizations, which provide mechanisms for settling dispute between their member States, are the United Nations and the regional organizations, such as the European Union, the Organization of American States, the Arab league and the African Union.

1. Peaceful Settlement of Dispute by the United Nations

The Settlement of international disputes is one of the most important roles of the United Nations. The Charter of the United Nations stipulates that it is the task of the United Nations “to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.” To this end, the Charter provides a system for the pacific settlement or adjustment of international disputes or situations under which the wide competence of the United Nations in this matter is established, and the corresponding obligations of the members of the United Nations are imposed. This system is delineated mainly in Chapter VI of the Charter.

Chapter VI of the Charter contains the United Nations mechanism for the pacific settlement of disputes. Article 33 obliges the parties to a dispute, the continuance of which is likely to endanger the maintenance of international peace and security, to settle such a dispute by any of the enumerated peaceful means therein, or by any peaceful means of their choice. When the parties fail to observe their obligations or their efforts are not successful, the United Nations will intervene to consider the dispute and give its recommendations on the matters. The Security Council is given the primary responsibility in this regard. It is entitled to intervene either on its own initiative, upon invitation of any member of the United Nations, upon invitation by the General Assembly, or upon a

complaint of a party to a dispute. The Security Council may follow three courses of action.

First, it may call upon the parties to a dispute to settle their dispute by any of the peaceful means listed in Article 33(1).

Second, it may recommend to the parties appropriate procedures or method of settlement.

Third, it may recommend terms of settlement, as it may consider appropriate.

Although under the Charter the Security Council is given the primary role for maintaining international peace and security, the General assembly is not excluded from doing so. Under Articles 11, 12 and 14, the General Assembly may discuss and make recommendations for procedures or methods of adjustment, or for terms of settlement, with regard to any dispute or situation brought before it. The disputes or situations may be brought before the General Assembly by the Security Council, any member of the United Nations, or any State party to such dispute.

2. Peaceful Settlement of Dispute by Regional Organizations

Article 33(1) of the Charter of the United Nations requires the parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, to seek, first of all, a solution by any of the peaceful methods enumerated therein. Among these enumerated methods is the “resort to regional arrangements or agencies”.

Article 52 of the Charter recognizes the right of the members of the United Nations to establish regional arrangements or agencies “for dealing with such matters related to the maintenance of international peace and security”. Paragraph 2 of this Article requires the member States that are members of regional arrangements or agencies to “make every effort to achieve pacific settlement of local disputes through such regional arrangements or by such regional agencies before referring them to the Security Council.

It seems that the obligation imposed upon the member States by Article 52(2) is consistent with their obligation under Article 33(1). However, paragraph 1 of Article 52 imposes two explicit limitations with regard to the utilization of regional arrangements and agencies. First, it requires that the matters dealt with must be “appropriate for regional action”. Second, it requires that the “arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations”. Moreover, a third explicit limitation is imposed by Article 54 which requires that the Security Council should “at all times be kept fully informed of activities undertaken or in contemplation under regional arrangements or by regional agencies for the maintenance of international peace and security”. No similar explicit limitations are imposed with regard to the utilization of other procedures for pacific settlement.

Article 52 is not only confined to legitimizing regional arrangements or agencies and imposing an obligation upon the member States, but goes beyond such legitimization and obligation by placing a duty on the Security Council itself. Paragraph 3 of this Article requires the Security Council to “encourage the development of pacific settlement of local disputes through such regional arrangements or by such regional agencies either on the initiative of the states concerned or by reference from the Security Council”.

This provision is in harmony with the general approach of the Charter related to the pacific settlement of disputes which requires the parties themselves to seek a solution to their dispute by any peaceful means of their own choice, and that the Council should give every opportunity to the parties to do so. If the parties have referred their local dispute to the Security Council before making any effort to achieve a settlement through the regional arrangements or agencies, then the Council is under a duty to remind them of their obligation, or to refer such dispute at its own initiative to such arrangements or agencies.