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ASIAN-AFRICAN LEGAL CONSULTATIVE ORGANIZATION

PRELIMINARY STUDY ON PEACEFUL SETTLEMENT OF DISPUTES

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PEACEFUL SETTLEMENT OF DISPUTES

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I. Introduction

A. Background

1. Pursuant to the proposal by the Government of Japan to introduce the topic 'Peaceful Settlement of Disputes' on the Provisional Agenda of AALCO to be discussed at the Fifty-Seventh Annual Session of AALCO, the Secretariat has prepared a Preliminary Study on the topic, so as to highlight the broad contours of the subject, which given its extensive scope and reach will have to be a selective exercise mindful of the need to retain the most relevant aspects of the topic for consideration by Member States. The endeavour aims to set in motion a continuous and long-term engagement by AALCO Member States on finer aspects of the subject in the times to come. The Secretariat is of the view that undertaking a study on peaceful settlement of disputes on the centenary anniversary of Nelson Mandela, whose iconic commitment to peace is a global legacy, enhances the topical relevance of the exercise. It is also important to mention that the coming year would also witness the 150th Anniversary celebrations of the legendary Mahatma Gandhi, the global apostle of peace and non-violence whose contribution to the cause of peace compliments the institutional efforts of the United Nations and inter-governmental organizations to strengthening the moral fabric of the world community through the peaceful resolution of disputes. It is hoped that the deliberations of the Fifty Seventh Annual Session that would chart the path forward for future work on this topic.

2. Humanity's quest for peace is a journey that has progressed admirably through the ages. While many epochs of history have witnessed bloody conflicts involving unimaginable cruelty culminating in mass killings, the desire for peace and harmony is integral to the moral nature of man. The aftermath of the Second World War was marked by a benign sense of faith in the peaceful disposition of collective humanity and its ability to discard the irrationality of armed conflicts and their accompanied horrors. The establishment of the United Nations marked a major landmark in this regard with its unflinching commitment to global peace and stability. Peaceful settlement of disputes using lawful and well-accepted channels without resorting to the use of force was a major cornerstone of this vision. The Charter of the United Nations in Chapter I highlights that the purpose of the United Nations is to maintain peace and security and to that end bring about by peaceful means the settlement of disputes which might otherwise lead to a breach of peace[1]. Members of the United Nations are required to settle their disputes by peaceful means[2]. In addition, Chapter VI, dealing with the pacific settlement of disputes lists down certain specific modes of dispute settlement, which should be adopted if a dispute is likely to endanger the

[1] **Article 1, paragraph 1** "*To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and for the suppression of acts of aggression or other breaches of the peace, and 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*."
[2] **Article 2, paragraph 3** "*All members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered*."

maintenance of international peace and security[3]. The ICJ in its judgment in the *Military and Paramilitary Activities case* has categorically stated that "[the] Court [has to] recall a further principle of international law, one which is complementary to the principles of a prohibitive nature examined above, and respect for which is essential in the world of today : the principle that the parties to any dispute, particularly any dispute the continuance of which is likely to endanger the maintenance of international peace and security, should seek a solution by peaceful means. Enshrined in Article 33 of the United Nations Charter, which also indicates a number of peaceful means which are available, this principle has also the status of customary law."[4]

3. The General Assembly on its part has strongly reaffirmed the principle of peaceful settlement of disputes through a number of resolutions including resolution 2627 (XXV) of 24 October 1970[5], resolution 2734 (XXV) of 16 December 1970[6] and resolution 40/9 of

[3] **Article 33, paragraph 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*."

[4] Case Concerning Military and Paramilitary Activities In and Against Nicaragua (*Nicaragua* v. *the United States of America*), ICJ Reports 1986, p. 145, para 290.

[5] **Resolution 2627, para 3**: "*In pursuance of the purposes of the Charter, we re-affirm our determination to respect the principles of international law concerning friendly relations and co-operation among States. We will exert our utmost efforts to develop such relations among all States, irrespective of their political, economic and social systems, on the basis of strict observance of the principles of the Charter, and in particular the principle of sovereign equality of States, the principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, the principle that* ***they shall settle their international disputes by peaceful means****, the duty not to intervene in matters within the domestic jurisdiction of any State, the duty of States to cooperate with one another in accordance with the Charter, and the principle that States shall fulfil in good faith the obligations assumed by them in accordance with the Charter. The progressive development and codification of international law, in which important progress was made during the first twenty-five years of the United Nations, should be advanced in order to promote the rule of law among nations, In this connexion we particularly welcome the adoption today of the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.*"

Para 4: "*Despite the achievements of the United Nations, a grave situation of insecurity still confronts the Organization and armed conflicts occur in various parts of the world, while at the same time the arms race and arms expenditure continue and a large part of humanity is suffering from economic under-development. We reaffirm our determination to take concrete steps to fulfil the central task of the United Nations-the preservation of international peace and security-since the solution to many other crucial problems, notably those of disarmament and economic development, is inseparably linked thereto, and to reach agreement on more effective procedures for carrying out United Nations peace-keeping consistent with the Charter.* ***We invite all Member States to resort more often to the peaceful settlement of international disputes and conflicts by the means provided for in the Charter, notably through negotiation, inquiry, mediation, conciliation, arbitration and judicial settlement, making use as appropriate of the relevant organs of the United Nations, as well as through resort to regional agencies or arrangements or other peaceful means of their own choice***."

[6]**Resolution adopted by the General Assembly 2734 (XXV) on 16 December 1970. Declaration on the Strengthening of International Security, Para 6**: *Urges Member States to make full use and seek improved implementation of the means and methods provided for in the Charter for the exclusively peaceful settlement of any dispute or any situation, the continuance of which is likely to endanger the maintenance of international peace and security, including* ***negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, good offices including those of the Secretary-General, or other peaceful means of their own choice****, it being understood that the Security Council in dealing with such disputes or situations should also take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court;*

8 November 1985[7]. However, the most comprehensive efforts in this regard were the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (resolution 2625 (XXV))[8] and the Manila Declaration on the Peaceful Settlement of International Disputes (resolution 37/10)[9]. Such efforts also include the Declaration on the Prevention and Removal of Disputes and Situations which May Threaten International Peace and Security and on the Role of the United Nations in this field (resolution 43/51) and the Declaration on Fact-Finding by the United Nations in the Field of the Maintenance of International Peace and Security (resolution 46/59).

4. The principle of 'Settlement of all international disputes by peaceful means, such as negotiation, conciliation, arbitration or judicial settlement as well as other peaceful means of the parties' own choice, in conformity with the Charter of the United Nations' was one of the major declarations to emerge from the historic Bandung Conference of April 1955. The Final Communiqué of the 1955 Bandung (Indonesia) Asian-African Conference provided the basis for South-South cooperation with concrete proposals for promoting economic, political, technological, cultural spheres. It declared full support of the fundamental principles of human rights as set forth in the Charter of the United Nations

[7] **A/RES/40/9, 8 November 1985**: Reaffirming the Manila Declaration on the Peaceful Settlement of International Disputes, approved by the General Assembly in its resolution 37/10 of 15 November 1982, Considering that the question of the peaceful settlement of disputes should constitute a central concern of all States and of the United Nations,

1. Addresses a solemn appeal to States in conflict to put an end to armed action forthwith and to proceed to the ***settlement of their disputes by negotiations and other peaceful means***;
2. Calls upon all States to comply fully and consistently with the obligations they have assumed, in accordance with the purposes and principles of the Charter of the United Nations***, to resolve conflicts and disputes by peaceful means and to refrain from the threat or use of force and from any intervention in the internal affairs of other States***;

[8] **A/RES/25/2625 adopted on 24 October 1970**: **The principle that States shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered**

Every State shall settle its international disputes with other States by peaceful means in such a manner that international peace and security and justice are not endangered.

States shall accordingly seek early and just settlement of their international disputes by ***negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements or other peaceful means of their choice. In seeking such a settlement the parties shall agree upon such peaceful means as may be appropriate to the circumstances and nature of the dispute***.

The parties to a dispute have the duty, in the event of failure to reach a solution by any one of the above peaceful means, to ***continue to seek a settlement of the dispute by other peaceful means agreed upon by them***.

States parties to an international dispute, as well as other States shall refrain from any action which may aggravate the Situation so as to endanger the maintenance of international peace and security, and shall act in accordance with the purposes and principles of the United Nations.

International disputes shall be settled on the basis of the Sovereign equality of States and in accordance with the Principle of free choice of means. 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.

Nothing in the foregoing paragraphs prejudices or derogates from the applicable provisions of the Charter, in particular those relating to the pacific settlement of international disputes.

[9] **A/RES/37/10 ,68th plenary meeting, 15 November 1982**

and took note of the Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations in a moment in history when many South nations were still under Western colonial rule. The topic 'Peaceful Settlement of Disputes', thus, assumes renewed relevance for the AALCO Secretariat, which owes its origin as a tangible outcome of this historic Bandung Conference. The Twenty-First Annual Session of the Asian African Legal Consultative Committee (AALCC) in 1980 in Indonesia celebrated the 25th Anniversary of the 1955 Asian African Conference (Bandung Conference).

II. General Overview and Recent Developments

A. What is a Dispute under International Law?

5. The Charter of the United Nations requires all Members of the Organization to settle their international disputes by peaceful means in such a manner that international peace and security are not endangered.

6. Provisions on the peaceful settlement of disputes, by definition, presuppose the existence of disputes for their application. Article 33 of the UN Charter is an obvious example.[10] The definition of a dispute may appear superfluous at first sight. Everyone knows the meaning of a dispute and one may presume that one will recognize a dispute when one sees it. However, in actual practice the existence of a dispute may be in doubt and may itself be disputed. At times, the existence of a dispute is denied in order to contest the jurisdiction of an international court or tribunal. The existing definitions have done little to clarify questions that arise in this context. Black's Law Dictionary circumscribes "dispute" as "a conflict or controversy, especially one that has given rise to a particular lawsuit".[11]

7. The Permanent Court of International Justice (PCIJ) and the International Court of Justice (ICJ) have addressed the issue of the existence of a dispute in several cases. In one of the cases the ICJ referred to a dispute as: "a situation in which the two sides held clearly opposite views concerning the question of the performance or non-performance of certain treaty obligations".[12] In the *Mavrommatis Palestine Concession*s case, the Permanent Court gave the following broad definition: "A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons."[13] The ICSID tribunals have

[10] Article 33:

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.

[11] Bryan A. Garner (Ed. In Chief), *Black's Law Dictionary*, 8th Edition, 2004, p. 1423.

[12] Interpretation of the Peace Treaties with Bulgaria, Hungary and Romania, Advisory Opinion of 30 March 1950 (first phase), 1950 ICJ Rep. 65, at 74.

[13] Mavrommatis Palestine Concessions (*Greece* v. *Great Britain*), Judgment of 30 August 1924, 1924 PCIJ (Ser. A) No. 2, at 11.

adopted similar descriptions of "disputes", often relying on the PCIJ's and ICJ's definitions.[14]

8. Some scholars like Prof. Gerhard Hafner, for example, have described these definitions as too wide and too narrow at the same time.[15] That is, whether a dispute in the technical sense exists is rather more complex than these definitions would suggest. Practice also demonstrates that, far from being a purely academic issue, the existence or not of a dispute can be decisive to determine a court or tribunal's jurisdiction.[16]

9. Some of the factors listed below are examples of how the existence of a dispute can be determined for the purposes of establishing a court's jurisdiction over it.

a) Existence of a Dispute

10. It is not merely sufficient for one party to a contentious case to assert that a dispute exists with the other party. That is, a mere assertion is not sufficient to prove the existence of a dispute. It must be shown that the claim of one party is positively opposed by the other. However, as has been seen in the *Mavrommatis*[17] and *Certain Property* case[18], for the existence of a dispute in terms of prior communication between the parties is fairly low. The exchanges between the parties do not require a high degree of intensity or acrimony. The formulation of opposing positions by the parties is sufficient.

11. Similarly, the absence of an overt disagreement between the parties will not negate the existence of a dispute. That is, if the respondent simply acknowledges the position of the claimant, and yet fails to provide a remedy, that may still amount to a situation of dispute between the parties. For example, in the Headquarters Agreement case, concerning the Headquarters Agreement between the UN and the United States, the ICJ in its advisory opinion stated that the lack of the UN position by the US did not negate the existence of a dispute.[19]

12. Another important factor to bear in mind in this regard is that in order to amount to a dispute capable of judicial settlement, the disagreement between the parties must have some practical relevance to their relationship and must not be purely theoretical. That is, it is not the task of international adjudication to clarify legal questions *in abstracto.* The dispute must relate to clearly identified issues between the parties and must be more than academic.

[14] For example, Maffezini v. Spain, Decision on Jurisdiction of 25 January 2000, 40 ILM 1129, at paras. 93, 94 (2001); Tokios Tokelės v. Ukraine, Decision on Jurisdiction of 29 April 2004, at paras. 106, 107.
[15] G. Hafner, "The Physiognomy of Disputes and the Appropriate Means to Resolve Them", in United Nations (ed.), *International Law as a Language for International Relations: Proceedings of the United Nations Congress on Public International Law* (1995).
[16] Christopher Schreuer, "What is a Legal Dispute" in ….
[17] Mavrommatis Palestine Concessions (*Greece* v. *Great Britain*), Judgment of 30 August 1924, 1924 PCIJ (Ser. A) No. 2.
[18] Certain Property (Liechtenstein v. Germany), Preliminary Objections, Judgment of 21 December 1962, 1962 ICJ Reports, p. 328.
[19] Applicability of the Obligation to Arbitrate under Section 21 of the UN Headquarters Agreement of 26 June 1947, Advisory Opinion of 26 April 1988, 1988 ICJ Reports, para 28.

13. For example, in *Enron* v. *Argentina*, some provinces of Argentina had assessed taxes that the Claimants described as exorbitant and sufficient to wipe out the entire value of their investment. Argentina argued that the claim was hypothetical since the taxes had been assessed but not collected. Claimants pointed out that the taxes had not been collected only because the Supreme Court ordered a temporary injunction. The Tribunal refused to accept, under these circumstances, that the dispute was merely hypothetical.[20]

14. However, in investment jurisprudence some of the cases demonstrate that disputes will not be found hypothetical and unfit for judicial resolution because actual damage has not yet occurred. For example, in *Pan American* v. *Argentina*, the respondent complained that the damages claimed were hypothetical, conjectural and speculative. The Tribunal found that a certain degree of uncertainty about the quantum of damages was inevitable at the jurisdictional stage. This did not affect its jurisdiction, provided the claimants were able to demonstrate prima facie that some damage had occurred.[21]

15. Lastly, as regards proper parties to the dispute, what matters for the establishment of a dispute for purposes of jurisdiction is the formulation of claims by one side that are opposed by the other side. Therefore, at the stage of jurisdiction, an international court or tribunal will be disinclined to entertain arguments as to the true parties to the conflict underlying the case. Whether these claims should be directed at another person will be decided at the merits stage of proceedings.

b) Nature of the Dispute

16. If dispute settlement is to be achieved by judicial means, such as the ICJ or investment arbitration, the use of these means is conditioned on the existence of a 'legal dispute'. Article 36(3) of the UN Charter states that legal disputes should, as a general rule, be referred to the ICJ.[22]Similarly, the ICSID Convention in Article 25(1) refers to legal disputes that may be resolved by conciliation or arbitration.[23]However, even where the existence of a dispute is admitted, its legal nature may be contested. Some respondents have argued that the nature of the dispute at issue was not legal and that hence the court or tribunal lacked jurisdiction.

17. The legal nature of disputes is sometimes described in terms of factual situations and the consequences engendered by them. Examples are the use of force, application of a treaty, expropriation or breach of an agreement. But fact patterns alone do not determine the legal or non-legal character of a dispute. Rather, it is the type of claim that is put forward and the prescription that is invoked that decides whether a dispute is legal or not. The

[20] *Enron v. Argentina*, Decision on Jurisdiction of 14 January 2004, 11 ICSID Rep. 273 (2007).
[21] *Pan American and BP Argentina Exploration Company v. Argentina*, Preliminary Objections, Judgment of 27 July 2006.
[22] UN Charter Art. 36(3):
"In making recommendations under this Article the Security Council should also take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court."
[23] 1965 Convention on the Settlement of Investment Disputes between States and Nationals of other States (1965 ICSID Convention).

dispute will only qualify as legal if legal rules contained, for example, in treaties or legislation are relied upon and if legal remedies such as restitution or damages are sought. Consequently, it is largely in the hands of the claimant to present the dispute in legal terms.

18. The ICJ has looked unfavourably upon the argument that disputes before it were of a political rather than legal nature and were hence outside its jurisdiction. It has stated repeatedly, both in contentious proceedings and in proceedings leading to advisory opinions, that it will not abdicate its function, merely because a case before it has political implications. For example, the ICJ restated its dismissal of a "political questions doctrine" in 2004 in an advisory opinion. In the Israeli Wall case[24], it rejected the view that it had no jurisdiction because of the political character of a question put before it. The fact that a legal question also has political aspects was not sufficient to deprive it of its character as a legal question.

B. Political Settlement of Disputes

19. Peaceful settlement of disputes in International Law can imply one of the two possibilities: either political procedures or adjudication. Political procedures involve an attempt to resolve differences by the parties themselves without resort to judicial/adjudicatory modes of dispute settlement. Adjudication on the other hand involves the determination of factual and legal issues by a neutral third party either through arbitration or through a recognized international judicial body. This part will discuss some of the major political methods of dispute settlement.

a) Negotiation

20. Negotiation is widely believed to be the most fundamental method of dispute settlement. Apart from being the most simple it is also the most employed form of dispute settlement. Usually it involves a face to face interaction between the contending parties with the aim of reconciling conflicting opinions by way of a mutual appreciation of the concerns expressed by the other side. It does not envisage the role of a third party and in this regard is much different from other modes of dispute settlement. Also, it is the precursor to other modes of dispute settlement since it could pave the way for other modes of dispute settlement. Negotiations offer many advantages to the parties which makes it the primary mode of dispute settlement. Of all things, it helps clarify the exact points of disagreement that exists between mutually opposed parties in addition to throwing light on the diverse solutions possible for the settlement of the dispute. While there is no necessary guarantee that negotiations may succeed in all cases or even in most cases, it can rightfully claim to be the oldest mode of dispute settlement and one that tops the scale for its flexibility, empathy and the sensitivity to the aspirations of the parties involved. Certain treaty provisions like Article 283 (1) of the Convention on the Law of the Sea provide that

[24] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004, 2004 ICJ Rep. 136.

'the parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means[25].'

21. Where an obligation to pursue negotiations as a means of dispute settlement exists, it is clear that best efforts should be taken in this regard to arrive at a peaceful result using this method. In the *North Sea Continental Shelf Case*, the Court held that "the parties are under an obligation to enter into negotiations with a view to arriving at an agreement, and not merely to go through a formal process of negotiation as sort of a prior condition… they are under an obligation so as to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it."[26]

22. While an obligation to negotiate does not necessarily imply an obligation to arrive at a conclusion, it does require the employment of all serious efforts to settle the dispute. The ICJ in the *Pulp Mills Case* (*Argentina v. Uruguay*) was of the view that best efforts should be exerted by both parties to arrive at a settlement through negotiations[27]. In the *Lac Lanoux* arbitration, it was mentioned that negotiations should not be mere formalities but genuine efforts taken in good faith. The ICJ in *the Legality of the Threat or Use of Nuclear Weapons* noted in the context of Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons that the obligation to take effective measures in disarmament is an obligation to arrive at a precise result, namely the disarmament of nuclear weapons by adopting a particular course of conduct-the pursuit of negotiations in good faith with the aim of arriving at the said result.

b) Good offices and Mediation

23. Unlike negotiation, good offices and mediation involves the employment of a third party for the settlement of disputes. The third party may be a State, individual or an international or non-governmental organization who motivates the disputing parties to arrive at a mutually beneficial settlement. It differs from other modes of dispute settlement on account of its persuasive nature offering flexibility and manoeuvrability on the parameters of dispute settlement. While good offices and mediation are used synonymously there are slight differences between the two. Good office involves a scenario where an

[25] Article 283 of UNCLOS: 1. When a dispute arises between States Parties concerning the interpretation or application of this Convention, the parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means.
2. The parties shall also proceed expeditiously to an exchange of views where a procedure for the settlement of such a dispute has been terminated without a settlement or where a settlement has been reached and the circumstances require consultation regarding the manner of implementing the settlement.

[26] North Sea Continental Shelf Cases (Federal Republic Of Germany/Denmark; Federal Republic Of Germany/Netherlands) Judgment of 20 February 1969, accessed from http://www.icj-cij.org/files/case-related/51/051-19690220-JUD-01-00-EN.pdf on 31st July, 2018.

[27] CASE CONCERNING PULP MILLS ON THE RIVER URUGUAY (ARGENTINA v. URUGUAY) JUDGMENT OF 20 APRIL 2010, accessed from http://www.icj-cij.org/files/case-related/135/135-20100420-JUD-01-00-EN.pdf, on 31st July, 2018.

individual third party seeks to influence the opposing sides to enter into negotiations. Mediation on the other hand involves the active participation of a third party in the negotiation process[28]. However, given the practical difficulties of differentiating between the two modes of dispute settlement, the differences between them are increasingly getting blurred. The role played by the US President in 1906 in concluding the Russian-Japanese War or the role played by France in initiating the US-North Vietnamese negotiations in Paris are illustrations of good offices[29]. The role played by Pope John Paul II in the Beagle Channel dispute between Chile and Argentina has always been hailed as a successful resort to mediation as a procedure for dispute settlement[30]. The Office of the UN Secretary-General has historically played a strong role in dispute settlement. The Geneva Agreements of 1988 noted the positive contribution of the Secretary-General's representative in this regard.

24. The Hague Conventions of 1899 and 1907 contain many rules pertaining to good offices and mediation. Among other aspects, it was noted that treaty signatories had a right to offer good offices or mediation; even during hostilities and that the exercise of the right is not to be regarded as an unfriendly act by any of the sides. Like other modes of diplomatic settlement, good offices and mediation proceedings are technically not binding on the parties[31].

c) Inquiry

25. Of all modes of dispute settlement, inquiry is used to settle difference of opinions on factual matters. A commission of inquiry is normally resorted to in such scenarios. Provisions pertaining to inquiry were first elaborated in the 1899 Hague Conference as a suitable alternative to arbitration. Fact-finding by inquiry commissions can go a long way in the peaceful settlement of disputes. By delivering authoritative opinions on certain factual positions, they can enhance the conflict resolution process, though in the process they may go beyond strict fact-finding to the determination of legal questions.

26. The Dogger Bank incident of 1904 which involved an accidental firing on British fishing boats by Russian naval ships was an instance when an inquiry was successfully resorted to. The Hague Provisions were put into effect and the report of the international

[28] See *Good Offices as a Peaceful Means of Settling Regional Differences* by Sompong Sucharitkul, Golden Gate University School of Law GGU Law Digital Commons, accessed from https://digitalcommons.law.ggu.edu/cgi/viewcontent.cgi?article=1549&context=pubs on 30 July, 2018

[29] http://russojapanesewar.com/TR.html, accessed on 30th July, 2018 and France' Mediatory role in the Paris Peace Negotiations to end the Vietnam War, 1963-1973 by Anouk Lodder, accessed from file:///C:/Users/secretariat3/Downloads/Dans%20les%20Coulisses%20A.M.F.%20Lodder.pdf, on 30 July, 2018.

[30] Dispute between Argentina and Chile concerning the Beagle Channel 18 February 1977 VOLUME XXI pp.53-264, accessed from http://legal.un.org/riaa/cases/vol_XXI/53-264.pdf on 31 July, 2018

[31] CONVENTION (I) FOR THE PACIFIC SETTLEMENT OF INTERNATIONAL DISPUTES (HAGUE I) (29 July 1899), accessed from http://avalon.law.yale.edu/19th_century/hague01.asp on 29 July, 2018 and the 1907 Convention for the Pacific Settlement of Disputes accessed from https://pca-cpa.org/wp-content/uploads/sites/175/2016/01/1907-Convention-for-the-Pacific-Settlement-of-International-Disputes.pdf on 29 July, 2018

inquiry commission contributed to the peaceful settlement of the issue[32]. However, practice has shown us that commissions of inquiry in accordance with the Hague Convention of 1907 are in practice extremely rare. The *Red Crusader* inquiry of 1962 concerning an incident between a British trawler and a Danish fisheries protection vessel followed an interval of some forty years since the previous.[33].

27. A peculiar issue with inquiry as a mode of dispute settlement is the increasing possibility of the inquiry commission making certain judicial determinations beyond the factual aspects of the case. The *Red Crusader* case mentioned above and the *Letelier and Moffitt* case that involved a determination of compensation to be paid by Chile for an alleged assassination carried out by it in Washington DC were two cases where the inquiry commissions made certain judicial determinations. It has been argued that contemporary approaches of inquiry commissions differ a great deal from older commissions, which were more conciliatory and pacific in nature. The trend today is to ask complex question and move beyond the strict pale of fact-finding[34]. Thus determining the application of the exact branch of law, scope of the issues involved and determining the violations of laws have also been the function of various inquiry commissions[35]. The United Nations has also resorted to the use of inquiry on many occasions. However, it needs to be mentioned that since the substantive of inquiries is limited to ascertaining factual position it cannot per se guarantee the resort to this mechanism by States. The reasonably active involvement of a third party may determine the attitude that States have towards this mode of dispute settlement.

d) Conciliation

28. The process of conciliation involves a third-party investigating a dispute and submitting a report that could form the basis of a settlement of the conflict. It is many ways a hybrid of inquiry and mediation and like other diplomatic methods of dispute settlement the proposals embodied in conciliation reports do not constitute binding decisions distinguishing them from arbitral awards which are binding in nature. The Chaco Commission of 1929 that conciliated the Chaco dispute between Bolivia and Paraguay and the Franco-Siamese Conciliation Commission, 1947 were a couple of key Conciliation Commissions that set in the earlier half of the century which has been highlighted as the

[32] Report of the Commissioners, drawn up in accordance with Article VI of the Declaration of St. Petersburg of the 12th (25th) November, 1904, accessed from http://www.worldcourts.com/ici/eng/decisions/1905.02.26_doggerbank.htm, on 30th July, 2018.

[33] Investigation of certain incidents affecting the British trawler Red Crusader Report of 23 March 1962 of the Commission of Enquiry established by the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Kingdom of Denmark on 15 November 1961, accessed from http://legal.un.org/riaa/cases/vol_XXIX/521-539.pdf on 28 July, 2018.

[34] Larissa J. van den Herik, 'An Inquiry into the Role of Commissions of Inquiry in International Law: Navigating the Tensions between Fact-Finding and Application of International Law' 13 Chinese Journal of International Law (2014), 507–537.

[35] https://www.ejiltalk.org/international-commissions-of-inquiry-a-new-form-of-adjudication/, accessed on 10 August, 2015.

glorifying period of Conciliation as a dispute settlement mechanism[36]. The 1928 General Act on the Pacific Settlement of International Disputes which were revised in 1949 contain rules dealing with Conciliation. The function of the Commission was broad-based to include inquiry and mediation techniques, were composed of five individuals, one appointed by each opposing side and other three to be appointed by an agreement from among the citizens of third States. While the proceedings were not to be public they were supposed to be completed within six months dealing with scenarios of a mixed factual-legal nature to be handled in a sensitive manner requiring a measure of ad-hoc ness coupled with necessary speed[37].

29. A number of multilateral treaties provide for conciliation as a dispute resolution mechanism. The 1948 American Treaty of Pacific Settlement; 1957 European Convention for the Peaceful Settlement of Disputes; the 1964 Protocol on the Commission of Mediation, Conciliation and Arbitration to the Charter of the law of Treaties; the 1981 Treaty Establishing the Organization of Eastern Caribbean States and the 1985 Vienna Convention on the Protection of the Ozone Layer contain provisions incorporating conciliation as a dispute settlement mechanism.

30. One of the most notable conciliation proceedings to have taken place in recent times was the Iceland-Norway dispute over the continental shelf delimitation between Iceland and Jan Mayen Island. The Conciliation Commission proposed a joint development zone which was remarkable given its intention to meaningfully engage both parties as opposed to a verdict based on strict legality alone[38].

31. The United Nations sponsored Conciliation Commissions in Palestine and Congo are strongly believed to have strengthened the edifice of dispute settlement in international law[39].

C. International Judicial Actors and Peaceful Settlement of Disputes

a) International Court of Justice

32. The International Court of Justice (ICJ), the principal judicial organ of the United Nations (UN), established in June 1945 by the Charter of the United Nations started working

[36] Report of the Chaco Commission, accessed from https://biblio-archive.unog.ch/Dateien/CouncilMSD/C-154-M-64_EN.pdf on 24 July 2018 and Report of the French-Siamese Conciliation Commission, 27 June 1947, accessed from http://legal.un.org/riaa/cases/vol_XXVIII/433-450.pdf on 25 July 2018.
[37] GENERAL ACT OF ARBITRATION (PACIFIC SETTLEMENT OF INTERNATIONAL DISPUTES) Geneva, 26 September 1928, accessed from https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/LON/PARTII-29.en.pdf, on 25 July, 2018.
[38] Conciliation Commission on the Continental Shelf area between Iceland and Jan Mayen: Report and recommendations to the governments of Iceland and Norway, decision of June 1981, accessed from http://legal.un.org/riaa/cases/vol_XXVII/1-34.pdf on 27 July, 2018.
[39] United Nations General Assembly Resolution 194 (III), 1948 and the United Nations General Assembly Resolution 1474 (ES-IV) of 1960.

from April 1946[40]. While the ICJ was not the first instance of the International Community creating an institutional mechanism of like nature, with the PCIJ preceding the ICJ, the difference between the two courts require mention. The PCIJ was not a formal part of the League of Nations, whereas, the ICJ is an integral part of the UN Framework. All UN Member States are parties to the ICJ Statute. The Court essentially serves two purposes: to settle in accordance with international law the legal disputes submitted to it by States, and to give advisory opinions on legal questions referred to it by duly authorized international organs and agencies. Over the years, the World Court has played a commendable role in advancing the cause of global peace and justice. Its numerous landmark judgments and advisory opinions proudly constitute the corpus of judicial international law which are today considered as seminal contributions of international law. Importantly, the Court over the decades had the opportunity to decide cases arising from all parts of the world reflecting the diversity of global civilization and the major legal systems of the world. This is testimony to the acceptance of the Court as being a truly international court that is free from bias and regional or parochial prejudice of any sort. Countries of Asia and Africa in particular have never shied away from resorting to the jurisdictional reach of the ICJ in attempting to settle disputes thus contributing to the harmonious evolution of international peace and order. 193 States are party to the Statute of the Court, whereas 72 countries have accepted the compulsory jurisdiction of the court (with varying reservations) within the meaning of Article 36 paras 2 and 5 of the ICJ Statute. Furthermore, more than 300 bilateral or multilateral treaties or conventions provide for the Court to have jurisdiction *ratione materiae* in the resolution of various types of disputes between States.

33. The UN General Assembly in its resolution 71/148 of 13 December, 2006 mandated the Court to promote the Rule of Law, a goal that has always constituted the moral foundations of the Court[41]. The General Assembly also emphasized in this resolution "the important role of the International Court of Justice, the principal judicial organ of the United Nations, in adjudicating disputes among States and the value of its work, as well as the importance of having recourse to the Court in the peaceful settlement of disputes", and recalled that "consistent with Article 96 of the Charter, the Court's advisory jurisdiction may [also] be requested by the General Assembly, the Security Council or other authorized organs of the United Nations and the specialized agencies". It is interesting to mention that the General Assembly called upon "States that have not yet done so to consider accepting the jurisdiction of the International Court of Justice in accordance with its Statute". According to Rosalyn Higgins, former President of the ICJ, everything that the Court has been doing has strengthened the Rule of Law and nurtured its strong foundational basis[42].

34. Among other modes of dispute settlement, resort to the ICJ affords States unique advantages. Chief among them is the cost-effective manner of adjudication of grievances which is a proposition that is naturally attractive to many states. Since the basis of ICJ's

[40] http://www.icj-cij.org/en/history accessed on 1 August 2018
[41] A/RES/71/148 adopted on 20 December 2016.
[42] Peaceful Settlement of Disputes address by Rosalyn Higgins , April 6, 1995

jurisdiction is State Consent, the verdicts of the Court in most cases are accorded utmost respect and followed in the true essence of international rule of law. While recent years have witnessed the emergence of numerous international courts having jurisdiction over specific matters, the ICJ continuous to remain the only global court that has permanent general jurisdiction over the broad spectrum of international law.

Latest Developments

35. As per the latest Annual Report available on the website of the ICJ, the Court had the occasion to deal with 19 contentious cases and 1 advisory proceeding[43]. The contentious cases have involved disputes surrounding various treaty interpretations, conduct of armed activities, alleged territorial incursions and land boundary claims, sovereign access to the Pacific Ocean, delimitation of continental shelves and other maritime title claims, alleged violations of maritime space in the Caribbean Sea, obligations concerning negotiations relating to cessation of the nuclear arms race and to nuclear disarmament, maritime delimitation in the Indian Ocean, use and status of the Silala waters, immunities and criminal proceedings and consular access. The lone advisory proceeding pertains to the Chagos Archipelago. It is worth noting that the ICJ along with its judges has advocated States to subscribe to the compulsory jurisdiction of the Court under Article 36 (2) given its potential to truly internationalize the functioning of the World Court, it needs to be mentioned that such a measure, while most welcome, should not be thrust upon States but must be based on the principle of consent. It is significant that the number of States accepting the compulsory jurisdiction of the Court is steadily growing and notwithstanding the reservations made to such measure, it signifies the healthy growth and development of international law and the strong global quest to settle disputes in the most amicable and peaceful manner.

b) International Criminal Court

36. On 17 July 1998, 120 States adopted the Rome Statute of the International Criminal Court establishing the International Criminal Court. For the first time States accepted the jurisdiction of a permanent international criminal court for the prosecution of the perpetrators of the most serious crimes committed in their territories or by their nationals after the entry into force of the Rome Statute on 1 July 2002. The establishment of the Court was widely heralded as a victory for global human rights and the Rule of Law[44].

37. The International Criminal Court (ICC) investigates and, where warranted, tries individuals charged with the gravest crimes of concern to the international community: genocide, war crimes, crimes against humanity and the crime of aggression. The

[43] http://www.icj-cij.org/files/annual-reports/2016-2017-en.pdf
[44] https://www.icc-cpi.int/about accessed on 1 August 2018

significance of the Court lies in its mandate to hold individuals accountable for the worst violations of humanitarian law in sharp contrast to the principle of State Responsibility.

38. The ICC has till date carried out 26 cases with some cases having more than one suspect. Having issued 32 arrest warrants it has detained 9 people in its detention centre and they have appeared before the Court. 15 individuals remain at large. Charges have been dropped against 3 people due to their deaths. ICC judges have also issued 9 summonses to appear. The judges have issued verdicts in 6 cases: 8 convictions and 2 acquittals[45].

39. One of the key features of the ICC system is the importance given to victim's participation in the proceedings of a case.

Recent Developments

40. On 17th August, 2017, Trial Chamber VIII of the International Criminal Court (ICC) issued a reparations order in the case of *The Prosecutor v. Ahmad Al Faqi Al Mahdi* holding Mali militant Al Mahdi liable for 2.7 million euros in expenses for individual and collective reparations for destruction of cultural property in Timbuktu, Mali, the second time in the history of the Court where orders for reparations have been made, the first being in Germain Katanga's case[46]. A number of principles were laid down for awarding reparations and the verdict was widely welcomed by the international community as advancing the field of protecting cultural property amidst clarifying the concept of 'harm' in international criminal law.

41. On 8 June, 2018, in a landmark ruling, the Appeals Chamber of the ICC acquitted former Congolese Vice-President Jean-Pierre Bemba Gombo from charges of war crimes and crimes against humanity[47]. The Appeals Chamber's Judgment reversed the 21 March, 2016 verdict of the Trial Chamber which held Mr. Bemba criminally liable pursuant to Article 28 (a) of the ICC Rome Statute for the crimes against humanity of murder and rape and the war crimes of murder, rape and pillaging committed by the *Mouvement de liberation du Congo* (MLC) troops in the Central African Republic from on or about 26 October 2002 to 15 March 2003[48].

42. The Appeals Chamber found, by majority that Trial Chamber III had ruled incorrectly on two issues:

1. It had wrongfully convicted Mr. Bemba for specific criminal acts that were outside the scope of the confirmed charges.

[45] https://www.icc-cpi.int/about accessed on 1 August 2018.
[46] https://www.icc-cpi.int/mali/al-mahdi/Documents/Al-MahdiEng.pdf accessed on 1 August, 2018.
[47] https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/05-01/08-3636-Red accessed on 1 August, 2018.
[48] https://www.icc-cpi.int/courtrecords/cr2016_02238.pdf accessed on 1 August, 2018.

2. It made an incorrect assessment of Mr. Bemba's role in preventing, repressing or punishing his subordinates for crimes within the scope of the case in light of possible mitigating circumstances.

43. On the above basis, the Appeals Chamber set aside the conviction of Mr. Bemba with Judge Sanji Mmasenono Monageng and Judge Piotr Hofmanski appending a joint dissenting opinion differing with the majority.

44. On 17th July, 2018, the jurisdiction of the Court was expanded to include the crime of aggression. This development was a significant one for international law as it was the first time since the Second World War that a judicial body was granted jurisdiction over the crime. While the exact impact of the development will only be known in due course, the activation of the aggression jurisdiction of the court is of tremendous symbolic value to the global value. The definition of aggression and the jurisdiction of the Court have been narrowly defined, which can be explained by the need to secure maximum agreement on the substantive framework of the crime. These fourfold limitations are as follows: *Firstly*, aggression only applies to "manifest" violations of the UN Charter measured by scale, gravity and character. *Secondly*, only individuals in senior leadership positions can be held to account for the crime. *Thirdly*, except for a Security Council referral, a Court will have jurisdiction over the crime only when committed by a State Party against another State Party.
45. *Fourthly*, the Court's jurisdiction is limited only to those State Parties that have specifically ratified the aggression amendment and not to every ICC Member State. Given these limitations, it is argued by critics that the activation of the ICC's jurisdiction will only have symbolic value at least in the current context. However, despite the narrow framework, the activation of the crime marks a significant advancement for international law[49].

c) Dispute Settlement Understanding (DSU)

The General Nature of Dispute Settlement under WTO

46. Dispute settlement is the central pillar of the multilateral trading system, and the WTO's unique contribution to the stability of the global economy. Without a means of settling disputes, the rules-based system would be less effective because the rules could not be enforced. WTO's Dispute Settlement Mechanism (DSM) is based on clearly-defined rules, with timetables for completing a case.

47. However, the DSM is not judgment oriented. That is, the priority is to settle disputes, through consultations if possible. For example, only about less than half of the cases reach the full panel process. Most of the rest have either been notified as settled "out of court" or remain in a prolonged consultation phase.[50]

48. The WTO dispute settlement system serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those

[49] https://www.icc-cpi.int/Pages/item.aspx?name=pr1350 accessed on 1 August, 2018.
[50] https://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm.

agreements.[51] As part of the results of the Uruguay Round, the DSU introduced a significantly strengthened dispute settlement system. It provided more detailed procedures for the various stages of a dispute, including specific time-frames. Arguably, its most important innovation is that the DSU eliminated the right of individual parties, typically the one whose measure is being challenged, to block the establishment of panels or the adoption of a report. Now, the DSB automatically establishes panels and adopts panel and Appellate Body reports unless there is a consensus not to do so.[52]

49. The Dispute Settlement Body (DSB) was established to administer the rules and procedures under the Dispute Settlement Understanding. Recommendations and rulings of the DSB, however, cannot add to or diminish the rights and obligations provided in the covered agreements.

50. The DSU provides for a parallel process of binding arbitration if both parties agree to arbitrate their dispute instead of submitting it to a DSB panel. In addition, a party subject to an adverse decision by the DSB may seek arbitration as a matter of right.

A Brief Assessment of the DSM Thus Far

51. The WTO DSM is one of the rare areas in public international law where there is in existence a mechanism that provides binding third-party adjudication of disputes between sovereign States. With close to six hundred cases in its twenty-two years of existence[53], it is also probably the busiest international dispute settlement system in the world. On the one hand, the wide use of the WTO dispute settlement system no doubt reflect its success and the fact that the Member States have confidence in it to resolve their trade disputes. On the other hand, the system is far from perfect, and has drawn criticism both from within and without the ranks of its users.

52. Already at the Marrakesh Ministerial Conference in 1994, when the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) was adopted, the Ministers decided to review the DSU and complete the review by 1999. Accordingly, the review of the DSU system was initiated in the Dispute Settlement Body (DSB) of the WTO in 1997. In 2001, the Ministers at the Doha Ministerial Conference once again took up the need to complete the review of the DSU in order to improve and clarify the mechanism, and decided that this should be done by May 2003. Informal efforts outside the DSB to reach agreement on amendments to the DSU were continued. By that time, Member States had

[51] Article 3.2 of the DSU.
[52] Negative Consensus.
[53] In May 2017, the total number of cases brought to the WTO dispute settlement system stood at 580, made up of 524 regular cases, and 56 DSU Article 21.5 cases (compliance disputes). The figures are based on statistics collected by the commercial website Worldtradelaw.net : http://worldtradelaw.net/databases/basicfigures.php.

made proposals on several improvements and amendments to the system[54], and a draft legal text had been prepared by the Chairman of the Special Session of the DSB.[55]

53. This work eventually culminated in the so called "Chairman's Text", issued on 16 May 2003. The "Chairman's Text" contained proposals for reform on a significant number of issues, including: a) the extension of third party rights; b) improved conditions for Members seeking to be joined in consultations; c) the introduction of remand and interim review in appellate review proceedings; d) the "sequencing" issue and other problems concerning the suspension of concessions or other obligations; e) the enhancement of compensation as a temporary remedy for breach of WTO law; f) the strengthening of notification requirements for mutually agreed solutions; and g) the strengthening of special and differential treatment for developing country Members.[56] In the absence of a sufficiently high level of support, other proposals by Members were not included in the "Chairman's Text". These "rejected" proposals included proposals on: a) accelerated procedures for certain disputes; b) a list of permanent panelists or a permanent panel body; c) increased control of Members over panel and Appellate Body reports; d) the treatment of amicus curiae briefs; and e) collective retaliation and monetary retaliation.[57] However, in spite of a number of amendments, Members were eventually unable to agree to the proposals for reform it contained. Members were thus unable to meet the May 2003 deadline for the DSU negotiations provided for in the Doha Ministerial Declaration.

54. In Hong Kong, Ministers further instructed us to "continue to work towards a rapid conclusion" of these negotiations. The negotiations are now evolving on the basis of the July 2008 Legal Draft. This covers many issues, such as third party rights, panel composition, remand authority, mutually agreed solutions, strictly confidential information, sequencing, post-retaliation, transparency and *amicus curiae* briefs, timeframes, developing country interests, including special and differential treatment, flexibility and Member control and effective compliance.[58]Since 2010 the DSB initiated a more intensive process, building on earlier work.

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[54] Proposal to Amend Certain Provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) pursuant to Article X of the Marrakesh Agreement Establishing the World Trade Organization, Submission by Bolivia, Canada, Chile, Colombia, Costa Rica, Ecuador, Japan, Korea, New Zealand, Norway, Peru, Switzerland, Uruguay and Venezuela for Examination and Further Consideration by the General Council, WT/GC/W/410/Rev. 1, dated 26 October 2001.

[55] While the prevailing view of Members was that "the DSU has generally functioned well to date", in total 42 proposals for clarifications and amendments to the DSU were submitted. These proposals touched on almost all DSU provisions and were submitted by developed country as well as developing country Members. *See* Special Session of the Dispute Settlement Body, Report by the Chairman to the Trade Negotiations Committee, TN/DS/9, dated 6 June 2003.

[56] Special Session of the Dispute Settlement Body, Report by the Chairman to the Trade Negotiations Committee, TN/DS/9, dated 6 June 2003, para 5.

[57] Ibid.

[58] After the July 2008 text, the DSB was close to an understanding on draft legal text on sequencing, identified key points of convergence on post-retaliation, and conducted constructive work on third-party rights, time-savings and various aspects of effective compliance. It has also discussed certain aspects of flexibility and Member-control, and in that context, made substantial progress towards draft legal text on the suspension of panel proceedings. See Special Session of the Dispute Settlement Body, *Report by the Chairman Ambassador Ronald Soto to the Trade Negotiations Committee*, TN/DS/25, 21 April 2011.

d) Investor-State Dispute Settlement Mechanism

General Understanding of the Investor-State Dispute Settlement Mechanism

55. The protection of foreign property has occupied a position at the core of public international law, since its very inception. Disputes between States resulting from alleged violations of a national's property rights can be traced to the end of the 18th century.[59] Post colonization, the European empires ensured their business interests in foreign lands through either imperial submissions or the establishment of capitulation systems. In the absence of these, the foreign investment disputes were international disputes between the home State and the host State based on diplomatic protection, which was the traditional means of obtaining redress for foreign investors harmed by breaches of international law. A protection of this kind could mean "consular action, negotiation, mediation, judicial and arbitral proceedings, reprisals, etc."[60]

56. However, the law on foreign investment, despite being one of the oldest, was characterised by the International Court of Justice as a relatively underdeveloped area of international law.[61]

57. The first investor-State arbitration under a BIT took place in 1987,[62] and prior to this most of the investment disputes that referred to the international tribunals were either brought in pursuance to contractual agreements by the private parties or were State-to-State arbitrations.

58. The two related developments that were involved in the evolution of investor-State dispute resolution from diplomatic protection: a) the establishment of forums for direct claims and b) the growth in the use of treaties (breaches of which could be pursued either in those forums or sometimes in domestic courts). The emergence of BITs was, thus, primarily a response to the uncertainties and inadequacies of the customary international law of State responsibility for injuries to aliens and their property.[63]

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[59] See the statement of the US Secretary of State John Adams in 1796: "There is no principle of the law of nations more firmly established than that which entitles the property of strangers within the jurisdiction of another country in friendship with their own to the protection of its sovereign by all efforts in his power. This common rule of intercourse between all civilized nations has, between the United States and Spain, the further and solemn sanction of an express stipulation by treaty."

[60] ILC, "First Report on Diplomatic Protection" (2000), UN Doc A/CN.4/506.

[61] The ICJ made the following remarks in 1970 about the state of development of the law of foreign investment in the Barcelona traction case: "Considering the important developments of the last-half century, the growth of foreign investments and the expansion of international activities of corporations, in particular of holding companies, which are often multinational, and considering the way in which the economic interests of states have proliferated, it may at first sight appear surprising that the evolution of the law has not gone further and that no generally accepted rules in the matter have crystallized on the international plane." Barcelona Traction, Light and Power Co (*Belgium* v *Spain*) [1970] *ICJ Rep 3*, 46-7.

[62] A Hong Kong investor using a UK BIT for losses arising out of a conflict between security forces of Sri Lanka and the Tamil rebels groups brought a case against the Government of Sri Lanka. *Asian Agricultural Products Ltd* v *Sri Lanka* (registered in 1987), ICSID Case No ARB/87/3.

[63] A.P. Newcombe and L Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Wolters Kluwer Law & Business 2009), pp. 18-39.

Drawbacks, Current Reforms and Scope for Improvement in the ISDSM

59. By the end of 1980s developing countries deviated a great deal from the Calvo doctrine[64], and giving up on the "four safety valves"[65] they had adopted earlier, accepted the highly protective dispute settlement provisions in their BITs. However, in recent times, the number of cases against developing nations by foreign investors and the amount of compensation paid by the host government has increased manifold and consequently many nations are either withdrawing from or re-negotiating their BITs with ISDSM provisions. The reasons for this new trend, as per many scholars is also because the experiences of the past three decades have shown that the expected benefits from the ISDSMs did not materialise.

60. There are some distinct disadvantages to the present ISDS mechanism. For example, one of the foremost ones being that once an investment arbitration is at the International Centre for the Settlement of Investment Disputes (ICSID), or a similar forum, the nature of the ISDS that follows is profoundly different from normal "private" arbitration, in that one of the parties (the State) is constrained by public interest considerations that do not affect the other.[66]Arbitration was developed for private investors as a relatively swift alternative to contentious litigation. The rules of natural justice, due process, *stare decisis* and the requirements of transparency (i.e. justice being seen to be done), therefore, are secondary considerations.

61. There has also been criticism that interpretation by the tribunals of concepts such as national treatment and most-favored nation treatment has been inconsistent, if not contradictory, depending on the perspective of arbitrators in each ad hoc tribunal. Also, costs of arbitrations are expensive and the amount contributed to an arbitral case has increased due to the increasing complexity of disputes in recent years.

62. A proposal by the ICSID Secretariat, perhaps drawing inspiration from the World Trade Organization (WTO') appellate review system, outlined the merits of establishing an appellate framework within the ICSID system.[67] However, any such attempts are bound to face certain hurdles as Article 53 of the ICSID Convention clearly lays down that ICSID awards 'shall be binding on the parties and shall not be subject to any appeal.' Thus, the proposal failed to garner support.

[64] Calvo Doctrine, which named after the Argentine scholar Carlos Calvo, is based upon the idea of equal treatment between nationals and foreigners and thus proposed that foreign investment disputes had to be resolved through national adjudication and by applying national law. The foreign investors, however, doubted whether developing countries had enough unbiased experts to settle investment disputes.

[65] The four safety valves included, a) exhaustion of local remedies, b) consent to arbitration on a case to case basis, c) law of the host country as the governing law, and d) State sovereignty and national security. Se generally, Sachet Singh and Sooraj Sharma, "Investor-State Dispute Settlement Mechanism: The Quest for a Workable Roadmap", *Utrecht Journal of International and European Law*, Vol 29(76), 2013, pp. 88-101.

[66] Caroline Foster, "A New Stratosphere? Investment Treaty Arbitration as 'Internationalized Public Law'", *64 Int'l & Comp L.Q. 461*, 462 (2015).

[67] ICSID, "Possible Improvements of the Framework for ICSID Arbitration", Discussion Paper of the ICSID Secretariat, (2004).

63. Lately the European Commission (EC) has announced a departure from this old-style system, as its ad hoc nature does not sufficiently guarantee impartiality and predictability, and further claimed that a court-like institution is essential to remedy deficiencies in the existing ISDS mechanism. It has not only proposed the idea of but also made significant progress in the direction of the establishment of a **permanent Investment Court System**. The multilateral investment court would be an **international court** empowered to hear disputes over investments between investors and States that will have accepted its jurisdiction over their bilateral investment treaties.[68] It is too early to assess the possibility of establishing a multilateral investment court as the EU has promoted, and unclear whether a consensus on the need for this has been formulated among States which is strong enough to start any negotiation in the coming years.

III. Conclusions

64. There is no doubt that peaceful settlement of disputes is a global imperative for the world community today. This imperative is reasonably structured to factor in State sovereignty as evidenced by the wide latitude enjoyed by States in selecting the appropriate mode of dispute settlement. States' likewise have appropriately selected differing modes of dispute settlement on various occasions always reposing faith in the settlement of disputes through peaceful means. While diplomatic modes of dispute settlement are always preferred as the primary means of settling discords between states, a failure of these mechanisms should naturally lead to the adoption of judicial means of dispute settlement. It is precisely for this reason that both modes of dispute settlement are widely encouraged and supported by the global fraternity. The preliminary study has given an overview of diverse aspects in the subject, notably, the meaning of dispute, diplomatic and judicial modes of dispute settlement including the ICJ, WTO, ICC and the ISDS with current developments and issues being addressed by these dispute settlement mechanisms. The current work of these dispute settlement mechanism promises to lay down the future contours of the subject.

[68]EU first introduced the concept of the investment court system (ICS) in its TTIP proposal texts, and now EU's trade agreements with Canada and Vietnam already include such a mechanism. See "A Multilateral Investment Court", European Commission, State of the Union, 2017.