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**ASIAN-AFRICAN LEGAL CONSULTATIVE ORGANIZATION**

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# PEACEFUL SETTLEMENT OF DISPUTES

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# Peaceful Settlement of Disputes

## I. Introduction

1. Upon a request received from the Government of Japan to prepare a preliminary study for the 57th Annual Session held in 2018 in Tokyo, Japan, the topic of 'Peaceful Settlement of Disputes' was placed on the Agenda of AALCO.

2. In 2019, the Secretariat prepared a brief on the topic 'Peaceful Settlement of Disputes' for the 58th Annual Session held in Dar es Salaam, the United Republic of Tanzania. The brief outlined the importance of pacific settlement of disputes and its position in international law while highlighting the importance of 'non-compliance measures' as a suitable mechanism for the settlement of international environmental disputes.

3. The Secretariat is of the view that the topic 'peaceful settlement of disputes' represents an inviolable principle of international law that needs to be respected by all States at all times in the best interests of cooperative multilateralism and international peace and harmony. In addition, a world order based on peace and harmony is a *sine qua non* for economic, social and cultural prosperity and the pacific settlement of disputes between States is the key for the realisation of this goal.

4. At the 59th Annual Session, the topic 'Peaceful Settlement of Disputes' will again be discussed with a specific focus on the peaceful settlement of environmental disputes in light of well-established principles of international law highlighted by AALCO in this brief.

## II. Deliberations at the Fifty-Eighth Annual Session of AALCO (Dar es Salaam, the United Republic of Tanzania, 21-25 October 2019)

5. The Secretary-General of AALCO H.E. Prof. Dr. Kennedy Gastorn delivered the introductory statement on the topic. Highlighting the importance of the topic in international law and the emphasis placed on the same by the United Nations, H.E. Prof. Dr. Kennedy Gastorn stated AALCO's approach on the topic with its special focus on diplomatic modes of dispute settlement. Pursuant thereto, H.E. Prof. Dr. Kennedy

Gastorn highlighted the importance of environmental protection and the dangers posed by unregulated anthropocentric activity and the need to regulate the same through appropriate environmental legislation. In this context, Secretary-General H.E. Prof. Kennedy Gastorn highlighted the significance of deliberating on the topic 'Peaceful Settlement of Disputes' with a special focus on the peaceful settlement of environmental disputes given its contemporary significance.

6. The first statement was delivered by the delegate from the Islamic Republic of Iran who reiterated and affirmed the importance of peaceful settlement of disputes in international law while stating the availability of a range of diplomatic and legal methods of dispute settlement mentioned in Article 33 which needs to be interpreted in light of Articles 2(3) and 2(4) of the UN Charter. The delegate highlighted the commitment of the Islamic Republic of Iran to the cause of peacefully settling disputes pointing out the lengthy and technical negotiations entered into leading to the signing of the 'Joint Comprehensive Plan of Action' (JCPOA) on 14 July 2015. The delegate also referred to the Provisional Measures ordered by the International Court of Justice to safeguard the rights of the Islamic Republic of Iran under the bilateral treaty of amity between the country and the United States of America as reflecting the country's commitment to the cause of peaceful settlement of disputes. In conclusion, the delegate called for empowering and strengthening the existing international legal tools for peaceful settlement of disputes between States.

7. The next statement was delivered by the delegate of Japan who reiterated the rationale for the country's proposal to include the topic 'Peaceful Settlement of Disputes' in the work programme of AALCO. The delegate highlighted the role that a third party could play in dispute settlement where negotiations fail to achieve the said purpose. The delegate while highlighting Japan's engagement with peaceful settlement of disputes, highlighted the peculiar problems facing the peaceful settlement of international environmental disputes in international law, which often involve large volumes of facts and evidence and the need for experts to ascertain the same. In this regard, it was suggested that the ICJ could make more use of court-appointed experts to help determine technical and scientific facts and aid the dispute settlement process.

8. The delegate of the Republic of Indonesia, who delivered the next statement, highlighted the importance of peaceful settlement of disputes for both regional and global stability and pointed out the priority accorded to this principle by the country. The delegate pointed out the importance of peacefully settling environmental disputes and encouraged the establishment of a comprehensive international mechanism for the settlement of such disputes including internationally recognized comprehensive standards of indemnity for coral reef damages as well as pollution resulting from offshore oil exploration and incorporating the contingency principle in addressing environmental damages and its recovery.

9. The next statement was delivered by the delegate of the Republic of India who highlighted the peremptory character of the norm and its importance in the international legal order. Highlighting the importance of Chapter VI of the UN Charter and the obligation it imposes on States to peacefully settle disputes through the free choice of means, the delegate emphasized the importance of sovereign equality as a principle in this context. Specifically with respect to the peaceful settlement of environmental disputes, the delegate highlighted the transboundary nature of environmental harm and the serious challenges the same poses to the international community. With multiple dispute settlement forums existing, the fragmentation and duplication of efforts to settle disputes in international environmental law is being witnessed. This according to the delegate called for an integrated approach to environmental dispute settlement and recommended AALCO to further study this subject and design a common approach keeping this problem in mind.

10. The next statement was delivered by the delegate of the Socialist Republic of Vietnam who highlighted the position of the country that all disputes between States should be settled through peaceful means. Highlighting the country's participation in two Advisory Opinion proceedings before the International Court of Justice, the delegate pointed out that dialogue should be the first option to settle disputes, failing which third party dispute resolution mechanisms should be resorted to. Thanking the Secretariat for the detailed report prepared on the subject and fully supporting the inclusion of this topic in the agenda of AALCO, the delegate encouraged further study on this topic.

11. The next statement was delivered by the delegate from the People's Republic of China. The delegate thanked the Secretariat for preparing a detailed and comprehensive brief on the topic. As a fundamental principle of international law, peaceful settlement of disputes should be aimed at maintaining peace and achieving win-win results and in this regard, the delegate stated that States should remain free to select the dispute settlement mechanism of their choice and no dispute settlement mechanism should be imposed on States. The delegate highlighted the importance of non-compliance procedures in international environmental law as a means of preventing disputes and facilitating implementation of MEAs and which operates as a complement to traditional means of dispute settlement mechanisms. In conclusion, the delegate highlighted the country's commitment to environmental governance including dispute settlement mechanisms and non-compliance procedures to facilitate international cooperation in addressing environmental challenges.

12. The next statement was delivered by the delegate of the United Republic of Tanzania. The delegate while highlighting the nature of Article 33 of the UN Charter and the various modes of dispute settlement provided in the said article pointed out the role of the country as a front-runner in the peaceful settlement of disputes. In this regard, the participation of the country in the dispute settlement processes of the Great Lakes Region especially with Burundi, participation in peacekeeping missions and hosting of refugees were highlighted. In conclusion, the delegate recommended the need for international coordination and support for peaceful conflict resolution processes rather than use of force or unilateralism and the need for strong internal institutions for nonviolent dispute settlement in divided societies among other aspects.

13. The final statement was delivered by the delegate from the State of Qatar. The delegate highlighted the nature of Article 33 of the UN Charter and pointed out the need to resolve disputes peacefully without resorting to pressures and dictates of other countries through the use of blockades and sanctions.

## III. Origins of the Concept

14. Historically, States have enjoyed the prerogative of settling disputes among themselves by any means deemed appropriate by them. This implied that States could either resort

to peaceful or non-peaceful means of dispute settlement as per their discretion. With the prohibition on the use of force and States losing the right to wage war as a dispute settlement mechanism pursuant to the creation of the United Nations, the settlement of disputes between States through pacific means has become the universal rule.

15. States are expressly prohibited from resorting to force (except for the purposes of self-defence or pursuant to an authorisation or imposition by the United Nations Security Council under Chapter VII of the Charter). Article 1(1) of the UN Charter explicitly highlights the purposes of the UN, which among other things includes the need to bring about the resolution of disputes that might lead to a breach of peace through peaceful means[1]. This development heralded a new era in international law where peaceful settlement of disputes was established as a fundamental principle of international law, though the seeds of the principle were laid much before the establishment of the United Nations.

16. The International Convention for the Pacific Settlement of International Disputes, 1899 (also known as the 1899 Hague Convention I) was the first international treaty to codify the principle of peaceful settlement of disputes. This Convention was one of the three treaty instruments that were tangible outcomes of the 1899 Hague Peace Conference, which was organised at the behest of Czar Nicholas II of Russia to reduce and limit the use of armaments in warfare and create a broader framework of peace between nations[2].

17. While many of the broader goals of the Conference did not materialise, one of the lasting contributions of the Conference was the adoption of the Convention for the Pacific Settlement of International Disputes, which created the Permanent Court of Arbitration (PCA). This was followed by the 1907 Hague Peace Conference, which saw the attendance of 44 states, adopted the 1907 Hague Convention and reiterated the principle of peaceful settlement of disputes[3]. Though neither of the two Conventions imposed a binding obligation on States to settle disputes through peaceful means, the

[1] "The Purposes of the United Nations are:
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 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]https://www.britannica.com/event/Hague-Conventions, accessed on 21/01/2021.
[3] Supra n. 2.

1899 and 1907 Hague Conventions were the first international efforts in modern times to institutionalise the cause of peaceful settlement of disputes.

18. In the wake of widespread destruction caused by the First World War, the League of Nations was formed to address the question of war. While outlawing war as a policy tool was not achieved, there appeared to an agreement on the need to minimise the possibility of nations resorting to war. This was sought to be done in two ways. Firstly, by encouraging States to disarm or commit themselves to the policy of disarmament and secondly, to institutionalise the principle of peaceful settlement of disputes in international law and relations. In addition, the League also created a collective security mechanism to safeguard the territorial integrity of its members from aggression[4].

19. Article 12 of the Covenant of the League of Nations obliged States to submit their disputes to judicial or arbitral settlement or enquiry by the Council and prohibited resort to war until three months after the judgment, award or report was made. In addition to the said article, Articles 13, 14, 15 and 17 of the League Covenant were also concerned with dispute settlement[5].

20. The Geneva Protocol for the Pacific Settlement of International Disputes of 1924 attempted to institutionalise judicial and arbitral methods of dispute settlement and the Kellogg-Briand Pact 1928 outlawed war as a State policy[6]. In addition, the League also envisaged the creation of a permanent judicial dispute settlement mechanism in the form of the Permanent Court of International Justice (PCIJ), which was ultimately established outside the League framework through an independent Statute. The PCIJ dealt with 29 contentious cases between States, and delivered 27 advisory opinions between 1922 and 1940[7].While the League was unable to prevent the Second World War, its efforts in strengthening the edifice of peaceful settlement of disputes created by the 1899 and 1907 Hague Peace Conferences is noteworthy. These measures laid the basis for the United Nations Charter to expressly prohibit the use of force (except

[4]Lorna Lloyd. "The League of Nations and the Settlement of Disputes." *World Affairs* 157, no. 4 (1995): 160-74. Accessed January 22, 2021. http://www.jstor.org/stable/20672432.
[5]https://history.state.gov/historicaldocuments/frus1919Parisv13/ch10subch1, accessed on 22 January 2021.
[6] League of Nations, *Protocol for the Pacific Settlement of International Disputes*, 2 October 1924, available at: https://www.refworld.org/docid/40421a204.html [accessed 22 January 2021] and https://www.britannica.com/event/Kellogg-Briand-Pact, accessed on 22 January 2021.
[7]https://www.icj-cij.org/en/pcij, accessed on 22/01/2021.

to the extent permitted) and establish peaceful settlement of disputes as a binding principle of international law in the near future.

## IV. UN Charter and Peaceful Settlement of Disputes

21. It is today universally accepted that the obligation to settle disputes peacefully is a legally binding one without exceptions. The obligation is one of conduct, wherein, all States are required to settle their disputes peacefully with the appropriate choice of method to be freely decided by themselves. As a core principle of international law, peaceful settlement of disputes has been codified in Article 2 (3) of the UN Charter, which provides as follows: "*All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered*". This article establishes that peaceful settlement of disputes between States is imperative for the maintenance of international peace and security the realisation of which can only happen if States resort to dispute settlement mechanisms that ensure the respect of international peace and security forgoing the resort to force or violence of any kind.

22. In addition, Article 33 of the UN Charter specifies the appropriate modes of dispute settlement that States may adopt. The article provides as follows: *"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*[8]. Article 33 establishes no hierarchy between the means of peaceful dispute settlement laid down in the article. Thus, States are free to adopt any means specified in Article 33 to settle their disputes including a combination or mixture of these methods to settle their disputes, though Tomuschat has argued that negotiations occupy a special place in the hierarchy of dispute settlement mechanisms. While Article 33 lists the modes of peaceful settlement of disputes, States remain free to adopt or accept a mechanism not specifically listed.

[8]https://www.un.org/en/sections/un-charter/un-charter-full-text/, accessed on 18 January 2021.

Thus, Good Offices are recognised as a mode of peaceful settlement of disputes though it does not find a specific mention in Article 33 of the UN Charter[9].

23. A combined reading of Articles 2 (3) and 33 clearly brings out an obligation in international law for States to peacefully settle disputes. With States remaining duty-bound to settle their disputes peacefully, they are given the freedom to settle such disputes using peaceful means that they may find appropriate. The International Court of Justice in the case of Aerial Incident of 10 August 1999 (*Pakistan v. India*) affirmed this principle after the Court did so in the Military and Paramilitary Activities in and against Nicaragua Case of 1984 (*Nicaragua v. United States of America*)[10]. It should be noted that the ICJ highlighted the customary law nature of this principle in the latter case and according to Alain Pellet, if rightly interpreted denotes a *jus cogens* norm of international law[11].

24. A key aspect of peaceful settlement of disputes in international law is the free choice of means afforded to States to settle their disputes. It is established without doubt that States cannot be compelled in international law to submit a dispute to settlement by means that they have not consented to. The consent of States has to be obtained freely and could either be an obligation freely undertaken or one arising independent of any existing obligation provided that in all cases the consent so given should be free from coercion of any sort.

25. Thus, post the creation of the United Nations and more specifically the incorporation of Articles 2 (3) and 33 two fundamental principles have been established in international law. Firstly, States have an obligation under international law to freely settle their disputes and secondly, States enjoy the freedom to select the appropriate peaceful means to settle the said disputes without any external influence. Additionally, both these imperatives are essential for the maintenance of peace, harmony, security

[9]Ruth Lapidoth, 'Good Offices by Ruth Lapidoth'(2006), Max Planck Encyclopedia of International Law, Oxford Public International Law.
[10]https://www.icj-cij.org/en/case/119 and https://www.icj-cij.org/en/case/70/judgments, accessed on 19 January 2021.
[11] Alain Pellet, 'Peaceful Settlement of Disputes' (2013), Max Planck Encyclopedia of International Law.

and goodwill among States cohabiting in diversity and form the legal base for a world order based on multilateralism and international law.

26. The Declaration of Principles of International Law concerning Friendly Relations and Cooperation among States, 1970 and the Manilla Declaration on the Peaceful Settlement of Disputes, 1982 have been instrumental in strengthening the soft law framework for the peaceful settlement of international disputes and have been major initiatives of the General Assembly in this regard[12].

## V. Means of Peaceful Settlement of Disputes

### a. Negotiation

27. Negotiation is unarguably the oldest dispute settlement mechanism known to man. According to Dupont, it is understood as a process where two or more parties interact with each other to accommodate their conflicting interests with the aim of finding a mutually acceptable solution[13]. It is one of the means of dispute settlement mentioned in Article 33 of the UN Charter and is usually considered to be the first stage of any dispute settlement exercise. As a cost-effective method of dispute settlement, negotiation also affords considerable flexibility to the parties at the same time assuring them of control of the process as well while remaining the least technical of all dispute settlement mechanisms.

28. In international relations, the concept of negotiation is understood in three senses. Firstly, to discuss issues of mutual interest. Secondly, as a means for the codification and progressive development of international law and lastly, as a means for the settlement of disputes[14]. In this brief, the term negotiation is being used in the last context. The United Nations General Assembly Resolution 53/101 on Principles and

[12] https://www.un.org/ruleoflaw/files/3dda1f104.pdf and UN General Assembly, Manila Declaration on the Peaceful Settlement of International Disputes, 15 November 1982, A/RES/37/10, available at: https://www.refworld.org/docid/3b00f4782.html [accessed 22 January 2021].
[13]Valerie Rosoux, 'Theories of Negotiation and International Adjudication' (2019), Max Planck Encyclopedias of International Law, Oxford Public International Law.
[14]Kari Hakapaa, 'Negotiation' (2013), Max Planck Encyclopedia of International Law, Oxford Public International Law.

Guidelines for International Negotiations provides a generic, non-exhaustive framework for the conduct of negotiations useful for the suitable conduct of the process in line with Articles 2 (3) and 33 of the UN Charter. Among other aspects, the resolution highlights that negotiations should be carried out in good faith while underscoring the importance of maintaining a constructive atmosphere during the negotiation process and the need for parties to refrain from engaging in conduct detrimental to the progress of the exercise.

29. Consultation and exchange of views are similar to negotiations and involve deliberate negotiated efforts in arriving at a solution to disputes and the avoidance of disputes[15]. Exchange of views can be viewed as being part of the broader process of negotiation or a stepping stone for the resort to other dispute settlement mechanisms as with Article 283 (1) of the United Nations Convention on the Law of the Sea, 1982 which provides that the parties to a dispute shall proceed expeditiously to an *exchange of views* (emphasis supplied) regarding its settlement by negotiation or other peaceful means. While Article 33 imposes no binding obligation on State parties to begin a dispute settlement process by negotiation or even resort to negotiation as a means of dispute settlement at any stage of the conflict, it is inconceivable as to how any meaningful dispute settlement process can take place without a framework for negotiations at some stage of the dispute. The PCIJ clarified the point in the Mavrommatis Case by stating that before a dispute is subject to resolution through legal means, the terms of the subject matter of the dispute should have been defined by diplomatic negotiations[16].

30. However, there exist provisions in treaties, which provide for binding negotiation. Article 4 (3) of the Dispute Settlement Understanding of the World Trade Organization (WTO) provides for binding consultations to be carried out in good faith on the requirement of the other party. In this regard, a specific time framework for consultation is also provided for the process. In addition, Article 41 of the Vienna Convention on the Succession of States in respect of Treaties, 1978 provides that upon request by one of the parties, the resolution of a dispute shall take place 'by a process of consultation and negotiation'[17]. Article 35 (1) of the United Nations Convention against

[15]Supra n.14.
[16]http://www.worldcourts.com/pcij/eng/decisions/1924.08.30_mavrommatis.htm, accessed on 18 January 2021.
[17]https://legal.un.org/ilc/texts/instruments/english/conventions/3_2_1978.pdf, accessed on 22 January 2021.

Transnational Organized Crime provides States Parties shall endeavour to settle disputes concerning the interpretation or application of this Convention through negotiation. Under such circumstances, the parties to a dispute are normally required to engage in negotiation before resorting to arbitration or judicial settlement. However, despite of this, the imposition of negotiation as a sole binding dispute settlement mechanism is generally not the norm in international law and parties mostly remain free as regards the choice of means to settle disputes. It is also possible for International Courts to mandate the need for negotiations in certain scenarios. Thus, the International Court of Justice (ICJ) in the *North Sea Continental Shelf* case stressed that the delimitation of the Continental Shelf between two neighbouring States should be arrived at in accordance with 'equitable principles'[18]. Similarly, in the *Pulp Mills* case (*Argentina v. Uruguay*), the Court highlighted the importance of States settling their disputes through negotiations[19].

31. The importance of negotiations as a dispute settlement mechanism was highlighted in the Manila Declaration adopted by the UN General Assembly in 1982. The resolution mentions the flexible and effective nature of negotiations as a dispute settlement process[20]. The PCIJ in the case of *Free Zones of Upper Savoy and Gex Case* highlighted that judicial settlement of international disputes is an alternative to friendlier and direct methods of dispute settlement and it is for the Court to facilitate such measures of dispute settlement wherever feasible and compatible with the Statute[21]. Equally significantly, the ICJ has encouraged parties to resort to negotiations even during the pendency of proceedings in what stands testimony to the importance and lasting relevance of negotiations as a primary dispute settlement mechanism between States[22].

**b. Inquiry**

32. The importance of inquiry as a dispute settlement mechanism lies in the fact that most disputes are ultimately based on facts and the need to objectively ascertain facts

[18]https://www.icj-cij.org/public/files/case-related/51/051-19690220-JUD-01-00-EN.pdf, accessed on 15 January 2021.
[19] https://www.icj-cij.org/public/files/case-related/135/135-20100420-JUD-01-00-EN.pdf, accessed on 15 January 2021.
[20] Supra n. 12.
[21]http://www.worldcourts.com/pcij/eng/decisions/1932.06.07_savoy_gex.htm, accessed on 18 January 2021.
[22] Supra n. 14.

becomes essential for their pacific settlement. To this extent, inquiry is a distinct mode of dispute settlement as it is concerned with objectively identifying facts the knowledge of which will ultimately aid the dispute settlement process. The process of inquiry may be carried out by an independent body or could comprise an arrangement with appropriate representation from both sides of a dispute. The body conducting the inquiry may in addition to identifying facts evaluate the evidence with the aim of delivering a legal assessment of the issue subject to the consent of all sides to a dispute[23]. This would essentially imply that the Inquiry Commission adopts both an executive as well as judicial role. An example of such a body would be the International Commission of Enquiry in response to the *Dogger Bank Incident* (*Great Britain v. Russia*), which was tasked with the responsibility of fact-finding in accordance with the provisions of Convention I in the Final Act of the First Hague Peace Conference[24] .

33. The 1899 and the 1907 Hague Conventions in Article 9 required that an International Commission of Inquiry be constituted to settle differences of opinion on factual matters. In addition, the Bryan Treaties (1913-14) and the Gondra Treaty of 1923 provided for a permanent body for inquiry, which was an advancement over the ad-hoc ones provided by the two Hague Conventions.

34. Under Article 33 of the UN Charter, inquiry is provided as a means of peaceful settlement of disputes. The UN General Assembly mandated the Secretary-General to conduct a study on the role of fact-finding in international law and progressive developments on this front. The Report of the Secretary-General, which came out in 1964 comprehensively, outlined State practice and practice of international organisations on the subject while locating fact-finding as a dispute settlement mechanism in diverse treaties[25].

35. In recent times, fact-finding as a dispute settlement mechanism is being employed in international commercial arbitration and international trade disputes. The ICSID Additional Facility Rules enacted by the Secretariat of the International Centre for

[23]AgnieszkaJachec-Neale, 'Fact Finding' (2011), Max Planck Encyclopedia of International Law, Oxford Public International Law.
[24]http://www.worldcourts.com/ici/eng/decisions/1905.02.26_doggerbank.htm, accessed on 22 January 2021.
[25]file:///C:/Users/abraham.AALCO/Downloads/A_5694-EN.pdf, accessed on 19 January 2021.

Settlement of Investment Disputes (ICSID) contains provisions for fact-finding[26]. Similarly, the Dispute Settlement Understanding of the WTO provides for Panel Procedures, which are broadly akin to fact-finding procedures[27].

### c. Mediation

36. As a means for the peaceful settlement of disputes, mediation is concerned with aiding the parties in arriving at a solution to the dispute at hand with the help of a third party known as a 'mediator'. It is one of the 'diplomatic' means of settling disputes mentioned in Article 33 and as with other dispute settlement avenues mediation requires the mandatory consent of the parties, which may be accorded on an ad-hoc basis or be pursuant to a treaty provision that provides for the same.

37. The aim of mediation is to help the parties arrive at an amicable solution to the dispute at hand. To this extent, the mediator is an independent third party who actively engages with the parties to ascertain and clarify the facts of the issue and in the process advances appropriate proposals for settling the dispute. The active and pro-active engagement of the mediator as a third party to settle the dispute in a manner acceptable to all sides of the dispute distinguishes mediation from other modes of dispute settlement[28].

38. The specific role of a mediator may vary depending on the facts and circumstances of each case. In most cases, the mediator helps the parties come together and set the stage for a negotiation process. The mediator may also act as a facilitator who helps to reduce political tensions between parties while ensuring their engagement with the settlement process in a manner conducive to the interests of both parties. In addition, the mediator may also try to understand the position of both parties by actively engaging with them thus making it easier for him/her to suggest solutions that may be acceptable to all sides. Given the diplomatic or political nature of mediation, any solution proposed by the mediator is a non-binding one and parties retain absolute control over the settlement

[26]https://icsid.worldbank.org/resources/rules-and-regulations/additional-facility-rules/arbitration, accessed on 19 January 2021.
[27]https://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm, accessed on 19 January 2021.
[28] Francisco Orrego Vicuña, 'Mediation' (2010), Max Planck Encyclopedia of International Law, Oxford Public International Law.

process. Confidentiality is a key aspect of the mediation process and any statement or view adopted during the mediation process is normally not admissible in arbitration and judicial processes that may be subsequently entered into[29].

**d. Conciliation**

39. Conciliation is a diplomatic/political means of dispute settlement mentioned in Article 33. It refers to a formal process where a panel or a commission appointed by the parties aims to understand the dispute at hand and offer concrete solutions aimed at its resolution. While not binding as a dispute settlement mechanism, what distinguishes conciliation from other dispute settlement mechanisms is the effort of the conciliation body to arrive at a specific solution to the dispute, which can be offered to the parties. In this sense, conciliation as a process falls between pure political modes of dispute settlement like negotiation and mediation and binding forms of dispute settlement like arbitration and judicial settlement and can even involve the application of law in the formulation of the 'report', though it remains non-binding on the parties[30]. Additionally, in conciliation the parties generally agree to maintain the *status quo* without aggravating the situation and agree to cooperate with the conciliation panel and its efforts in arriving at a settlement. The 1961 Resolution of the Institute of International Law and the 1995 UNGA Resolution on Conciliation have elaborated the importance of conciliation as a dispute settlement process[31].

40. Conciliation is provided as a means of dispute settlement in various multilateral treaties including but not limited to the Vienna Convention on the Law of Treaties, 1969, Vienna Convention on the Representation of States in their Relations with International Organisations of a Universal Character, 1975, Vienna Convention on Succession of States in Respect of Treaties, 1978 and the Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations, 1986 among others[32].

[29] Supra n. 28.
[30] Jean-Pierre Cot, 'Conciliation' (2006), Max Planck Encyclopedia of International Law, Oxford Public International Law.
[31] https://www.idi-iil.org/app/uploads/2017/06/1961_salz_02_en.pdf, accessed on 19 January, 2021.
[32] Supra n. 30.

41. While it may appear similar to mediation, there are significant differences between the two approaches. Conciliation is an exercise based purely on the will of the States actually engaged in the dispute wherein they generally agree to refrain from acts that would aggravate situation during the process. In other words, the *status quo* is generally preferred until the outcome is clear. This is in contrast to mediation, which may be driven by a third party, neutral States or significant players in the international community who may be keen to assist States engaged in a dispute to amicably settle the same, though the final output of the mediation process like other political means of dispute settlement remains non-binding. In this sense, mediation which is largely a bilateral affair between the concerned States, may be more 'political' than conciliation.

**e. Good Offices**

42. Good Offices is a unique mode of dispute settlement given the fact that it does not find explicit mention in Article 33. Nonetheless, its value as a dispute settlement mechanism is universally acknowledged. Good offices refers to a method of settling disputes where a neutral third party of high standing and respectability on account of his/her credibility seeks to influence the parties to strive towards a negotiated settlement of the dispute without participating in the process itself. Among other diplomatic modes of dispute settlement having third party involvement, good offices is one where the third party plays a very modest role. While not binding in any form, it has a strong impact on the parties given the moral force that comes with the third parties' credibility and efforts in engaging with the parties to the conflict[33].

**f. Arbitration**

43. Arbitration is an adjudicative dispute settlement mechanism, which is one of the means of peaceful settlement of disputes mentioned in Article 33. Along with judicial settlement, it is the only other mode of dispute settlement stipulated in Article 33 that is binding on the parties. Thus, arbitration is not a political or a diplomatic means of

[33] Supra n. 9.

settling disputes, it is an adjudicative or a legal means of dispute settlement where the outcome is binding on the parties and is arrived at strictly on the basis of law and its application to the dispute. It is quasi-judicial and private in nature and parties are afforded a great deal of confidentiality notwithstanding the binding nature of the process. While conciliation may involve an element of law application, negotiation, inquiry and mediation are strictly non-legal and political/diplomatic. Even in the case of conciliation despite the application of law that may inform the panel's report, the nature of the proceeding continues to remain political/diplomatic as it can be accepted, rejected or modified by the parties as per their discretion. This is in sharp contrast to arbitration, which is binding on the parties provided the parties wilfully submit their dispute to arbitration and take part in the proceedings without any objections to the nature or status of the proceedings.

44. While both arbitration and judicial settlement are binding means of dispute settlement, there are significant differences between them. In arbitration, the tribunal empowered to give the award is selected mutually by the parties, with an agreement on the law to be applied. The tribunal so created may be an ad-hoc one or created for a specific class of disputes, in contrast to judicial settlement where the parties mostly appear before permanent tribunals created by multilateral treaties and represent their cases before full-time permanent judges elected by Member States who are parties to the concerned multilateral treaty. In addition, in arbitral proceedings, the proceedings are *in camera* and absolutely outside the control of third parties who have practically no influence over the proceedings. This is in contrast with judicial decision making where the interests of third parties may assume importance and a verdict may be delivered where such interests are taken care of or given serious consideration[34].

45. The Jay Treaty of 1794 concluded between Great Britain and the United States is widely believed to be the first treaty in modern times to provide for arbitration as a means of pacific dispute settlement. According to Charles H. Brower, the treaty was the first major impetus for the recognition of arbitration as a dispute settlement mechanism[35]. This was followed by the creation of the Alabama Claims Tribunal and its award, which

[34]Charles H Brower II, 'Arbitration' (2007), Max Planck Encyclopedia of International Law, Oxford Public International Law.
[35] Supra n. 34.

infused a new sense of energy into the concept of arbitration as a means for settling inter-State disputes and finally the Hague Conventions of 1899 and 1907 which institutionalised arbitration as a dispute settlement mechanism in modern times. With the 1899 Hague Convention I forming the Permanent Court of Arbitration (PCA), the ear of modern arbitration began in full earnest.

**g. Judicial Settlement**

46. Judicial settlement is a means of peaceful settlement of disputes mentioned in Article 33. The advent of modern judicial settlement in international law began with the establishment of the Permanent Court of International Justice (PCIJ) and subsequently its replacement by the International Court of Justice (ICJ) also known as the "World Court" with the signing and ratification of the UN Charter. Judicial settlement of inter-State disputes in international law is always based on the consent of States. As highlighted earlier, the distinguishing trait of arbitration and judicial settlement from other political/diplomatic modes of dispute settlement is the binding nature of their awards/decisions. However, no State can be forced to submit a dispute for judicial settlement without its consent and the same is true for the jurisdiction of the International Court of Justice.

47. The compulsory jurisdiction of the ICJ is based strictly on the consent of the parties. The only true instance of a general acceptance of judicial settlement of international disputes at the international level is the WTO dispute settlement framework, which creates a compulsory dispute settlement mechanism under the auspices of the WTO Agreement. Other branches of international law like law of the sea, international environmental law and international investment law among others have various dispute settlement mechanisms in line with Article 33. However, none of the mechanisms so provided vests "compulsory jurisdiction" in an international judicial body, without the free consent of the States to join such a mechanism.

48. The ICJ, located in the Hague, is the principal judicial organ of the United Nations as codified in Article 92 of the UN Charter. The ICJ was broadly created on the lines of the PCIJ. As a creation of the United Nations, the ICJ is an integral part of the UN

framework and works in line with its Statute, which itself is part of the UN Charter[36]. Thus, the Court in its judicial role is bound by the UN Charter and is required to give effect to the provisions of the UN Charter and the Purposes and Principles of the United Nations[37]. Article 36 (1) of the ICJ Statute vests the Court with the competence to decide all cases referred to it by parties. As with all international adjudicatory bodies, the jurisdiction of the court is based on the consent of the parties.

## VI. Freedom to Choose Peaceful Dispute Settlement Means

49. States are obliged to settle their disputes peacefully. Article 33 of the UN Charter and international law have provided various means of peaceful dispute settlement. Apart from the WTO dispute settlement framework which creates a compulsory dispute settlement mechanism under the auspices of the WTO Agreement, there is no other compulsory dispute settlement mechanism. So States are free to choose the various peaceful dispute settlement means to settle their disputes. Once States have chosen a specific peaceful means to settle their disputes, they should employ that specific peaceful dispute settlement means unless the parties to the dispute have mutually agreed otherwise.

## VII. Peaceful Settlement of Environmental Disputes

50. Protection of the environment is a concern that has transnational dimensions and is universally acknowledged as a global imperative. With environment pollution, effects of climate change and impact of sea level rise being felt worldwide and its effects not limited to national frontiers alone there is an increasing consensus that the protection of the environment is a global concern requiring worldwide cooperation based on accepted principles of international law. In this regard, the settlement of international environmental disputes has assumed natural significance with a growing proliferation of mechanisms requiring bilateral and multilateral cooperation in settling such disputes all of which seek to give effect to the principles laid down in Article 33.

[36]Mahasen M. Aljaghoub, 'The Absence of State Consent to Advisory Opinions of the International Court of Justice: Judicial and Political Restraints, Reflections on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory', Advisory Opinion of 9 July 2004, Arab Law Quarterly 24 (2010) 191-207.
[37] Supra n. 7.

51. In recent times, there has been an increase in disputes between States concerning environmental and natural resource protection and with it the means of dispute settlement. This has led to concerns pertaining to fragmentation of international environmental law and the adverse fallouts of such a phenomenon. The first major problem facing international environmental dispute resolution in international law is identifying what exactly constitutes an "environmental dispute". In this regard, it is often accepted that there are very few pure "environmental disputes" which can be characterised as such in international law and environmental disputes mostly occur in the context of trade, investment, human rights and law of the sea conflicts where environmental issues are a part of broader substantive issues within the domains of these sub-disciplines. Even where they occur on a stand-alone basis, it is often mixed with other "non-environmental" questions like State responsibility and application of customary international law among others and the judicial approach to these questions are more from conventional international law perspectives.

52. In addition, questions of environmental liability often involve complex scientific and technical questions presenting unique problems for international judges who in almost all cases lack specific expertise in the area. Even where experts adduce scientific evidence, they may run into hundreds of pages appreciating the complexities of the same which may not be easy for generalist judges who lack specialised knowledge in the field. The United Nations General Assembly Resolution 44/228 and the Agenda 21: Programme of Action for Sustainable Development highlighted the importance of dispute settlement in international environmental law while endeavouring to broaden the scope of such measures.

53. The history of modern environmental dispute resolution in international law can be traced to the Fur Seal Arbitration of 1893 between the United States and the United Kingdom. This was followed by the Trail Smelter Arbitration in 1941 between Canada and the United States in a case involving transboundary sulphur pollution. The Lake Lannoux Arbitration between France and Spain was the next major international environmental dispute, which involved an interpretation of the Treaty of Bayonne of

1866[38]. While each of these cases involved the use of arbitration as a dispute settlement mechanism, political or diplomatic means of dispute settlement appear to be more popular for the settlement of environmental disputes. The Snoqualmie river mediation, which involved the decision to dam a flood prone area, was an instance where mediation was successfully employed to settle an environmental dispute. Treaties like the Antarctic Convention on Marine Living Resources and the Rotterdam and Stockholm Conventions provide mediation as a dispute settlement mechanism for the resolution of environmental disputes between States[39].

54. With respect to other modes of dispute settlement, the 1992 Biodiversity Convention provides for conciliation as a dispute settlement mechanism in Article 27 and envisages the creation of a Conciliation Commission to settle disputes that may arise in addition to other avenues of dispute settlement[40]. In addition, the Convention on the Protection and Promotion of the Diversity of Cultural Expression, 2005 provides for conciliation as a dispute settlement mechanism where other means of dispute settlement have failed to resolve the dispute in Article 25 of the Convention[41]. The 1997 United Nations

[38] Michael Aondona Chiangi, 'Application of the Dispute Resolution Mechanisms of International Law to Environmental Disputes' (December 15, 2019). Available at SSRN: https://ssrn.com/abstract=3504227 or http://dx.doi.org/10.2139/ssrn.3504227.

[39] Supra n. 38.

[40] Article 27. Settlement of Disputes.

1. In the event of a dispute between Contracting Parties concerning the interpretation or application of this Convention, the parties concerned shall seek solution by negotiation.

2. If the parties concerned cannot reach agreement by negotiation, they may jointly seek the good offices of, or request mediation by, a third party.

3. When ratifying, accepting, approving or acceding to this Convention, or at any time thereafter, a State or regional economic integration organization may declare in writing to the Depositary that for a dispute not resolved in accordance with paragraph 1 or paragraph 2 above, it accepts one or both of the following means of dispute settlement as compulsory:

(a) Arbitration in accordance with the procedure laid down in Part 1 of Annex II;

(b) Submission of the dispute to the International Court of Justice.

4. If the parties to the dispute have not, in accordance with paragraph 3 above, accepted the same or any procedure, the dispute shall be submitted to conciliation in accordance with Part 2 of Annex II unless the parties otherwise agree.

5. The provisions of this Article shall apply with respect to any protocol except as otherwise provided in the protocol concerned.

[41] If good offices or mediation are not undertaken or if there is no settlement by negotiation, good offices or mediation, a Party may have recourse to conciliation in accordance with the procedure laid down in the Annex of this Convention. The Parties shall consider in good faith the proposal made by the Conciliation Commission for the resolution of the dispute.

International Water Courses Convention provides for the parties to have a conciliatory forum for dispute settlement where negotiations fail to solve the issue[42].

55. With respect to arbitration, the Permanent Court of Arbitration adopted the Optional Rules for Arbitration of Disputes Related to Natural Resources and/or the Environment in 2001[43]. The PCA is a permanent framework offering its services for the settlement of disputes through arbitration with ad hoc tribunals performing this function.

56. The jurisprudence of the ICJ in environmental law cases, especially the case of Gabčíkovo-Nagymaros Project (*Hungary v. Slovakia)* which concerns a hydroelectric dam project on the river Danube, involved a high degree of scientific complexity in what exemplifies the general nature of international environmental dispute settlement[44]. For the settlement of environmental disputes, the Court in 1993 created a seven-member chamber for Environmental Matters, though no cases were ever referred to the body. Reluctance of States to settle environmental disputes through an adjudicative mechanism and the difficulties in characterising an international dispute as an 'environmental' one are chiefly believed to be the reasons for this.

57. Scholars like Alan Boyle have opined that adjudicative methods of resolving international environmental disputes have had a very limited role in the development of international environmental law[45]. It can work suitably in the case of bilateral disputes where there is an agreement to that effect and specific rules on the issue. The Trail Smelter and Lake Lanoux arbitrations took place in such contexts and reflected a specific desire to settle transboundary environmental disputes between two States in an amicable manner. As regards the ICJ, the Pulp Mills on the River Uruguay Case (*Argentina v. Uruguay*) was also adjudicated in the backdrop of a similar approach. Even where treaties clearly lay down the applicable rules to be applied, the possibility

[42]Article 33 (2): If the parties concerned cannot reach agreement by negotiation requested by one of them, they may jointly seek the good offices of, or request mediation or conciliation by, a third party, or make use, as appropriate, of any joint watercourse institutions that may have been established by them or agree to submit the dispute to arbitration or to the International Court of Justice.

[43] https://docs.pca-cpa.org/2016/01/Optional-Rules-for-Arbitration-of-Disputes-Relating-to-the-Environment-and_or-Natural-Resources.pdf.

[44]https://www.icj-cij.org/public/files/case-related/92/092-19970925-JUD-01-00-EN.pdf, accessed on 21 January 2021.

[45] Alan Boyle, 'Environmental Dispute Settlement' (2009), Max Planck Encyclopedias of International Law, Oxford Public International Law.

of the subject matter straddling two or three different subject matter domains cannot be ruled out. In such a scenario, a judicial or arbitral body seeking to assume jurisdiction of a case may not be in the interest of the international community given the possibility of these institutions laying down unwanted precedents. Thus, overall there is a broad view that international environmental law matters are best settled through a negotiated or conciliatory framework without resorting to adjudicative methods unless the State parties were to agree otherwise.

## VIII. Non- Compliance Procedures

58. The emergence of non-compliance procedures in international environmental law came about in the backdrop of an understanding that adjudicative modes of settling environmental disputes come with many limitations and may not be the preferred mode of settling disputes, unless the concerned States were to agree otherwise.

59. According to Maas M. Goote, there are five reasons as to why State responsibility, which forms the basis of adjudicative dispute settlement in international law, may not work well in international environmental law[46]. Firstly, States may not always be keen to settle inter-State environmental disputes through an 'adjudicative process', especially so where there is no unanimity that an adjudicative settlement is the best answer to a specific case of non-compliance.

60. Secondly, it is extremely difficult to establish a causal link between a specific act of omission and environmental damage in which case holding a particular State accountable under an arbitral/judicial mechanism becomes imprudent and difficult to ascertain.

61. Thirdly, most environmental disputes are concerned with issues of common interest and a bilateral adjudicative process may not do justice to the interests of the global community. In such a scenario, only a diplomatic mode of dispute settlement involving a broader community of States would serve the purpose.

[46] Maas M Goote, 'Non-Compliance Procedures in International Environmental Law: The Middle Way between Diplomacy and Law' (1999) 1 I nt ' l L F D I nt'l 82.

62. Fourthly, the question of responsibility in international law arises only after an international wrongful act has been committed. In the case of international environmental law, where the objective is more preventive and precautionary, the rationale of holding a State accountable through an adjudicative process after the commission of an alleged wrongful act may serve little purpose if suitable action is taken in the first place to prevent a non-compliance from taking place in the first place.

63. Fifthly, since many environmental treaties have broad or general policy objectives, it becomes extremely difficult to assess State conduct based on such ambiguous standards. In such a scenario, holding States accountable comes with its own set of problems and only a consensual framework of addressing questions of non-compliance can work effectively.

64. To deal with these concerns, the international community came up with the concept of non-compliance procedures, which strive to strike a balance between flexibility and stability and affords a diplomatic method of addressing non-compliance and dispute settlement. The Montreal Protocol of 1987 established the first non-compliance procedure with the second Meeting of the Parties to the Protocol establishing the Implementation Committee. The Implementation Committee with ten seats seeks to address non-compliance in an amicable and non-confrontational manner seeking to arrive at a solution acceptable to everyone. Measures proposed by the Implementation Committee have to be sanctioned by the Conference of the Parties[47].

65. From a procedural perspective, there are broadly three phases in a non-compliance framework. At the first phase, the Committee would review the national report of the parties to understand if any non-compliance has taken place in the first instance. At the second phase, where a national report has not been submitted or if a specific non-compliance has been detected, the question of understanding the reasons for the same are undertaken and States are given an opportunity to comply with their compliance requirements in line with proposals to this effect made by the Committee. If non-compliance continues beyond this phase, a third phase where the Committee takes

[47] Supra n. 46.

harsher measures mandating compliance like suspension of specific rights and privileges under the treaty may follow[48].

66. While State practice of the effectiveness of non-compliance measures in international environmental law is yet to fully emerge, there appears to be a growing understanding that such procedures may afford a suitable non-confrontational method of peacefully addressing questions of non-compliance and dispute settlement in international environmental law within the four walls of implementation committees established for this purpose while giving effect to the mandate of Article 33.

## IX. Observations and Comments of the AALCO Secretariat

67.The AALCO Secretariat places on record its appreciation and acknowledges the efforts taken by its Member States in promoting 'Peaceful Settlement of Disputes' as a topic of prime consideration by the Afro-Asian international legal community.

68. The AALCO Secretariat urges all Member States to strengthen cooperation on all matters pertaining to environment protection especially the study of the subject from a scientific, legal and policy point of view and strengthen the edifice for peaceful settlement of environment disputes in line with Article 33 of the UN Charter.

[48] Supra n. 46.