



State Responsibility And Resolution Of Disputes Through Mediation And Negotiation

Chatinder Singh

(Department of Laws, Panjab University, India), chatinder90@gmail.com

ABSTRACT: *Mediation and Negotiation have become preferable means of resolving international disputes rather than resorting to the tiresome conventional legal procedure. It is peaceful and harmonious mode of settlement between the conflicting parties by submitting the dispute to a neutral third-party mediator or through negotiation, wherein parties resolve their differences without interference of any third person. With growing interdependence of the States on each other they cannot afford to settle their disputes through an accusatorial system which is very time consuming and may even harm their relations; they should resort to Mediation and Negotiation, given their advantages, to amicably resolve their differences. The principle of State responsibility, if any State commits breach of its international obligations under international law and causes damage to another State it will be responsible to make reparation to the injured State, will be given necessary impetus, if States settled their disputes through mediation and negotiation rather than following the traditional way of redressing their grievance through Courts.*

Keywords: *Amicable settlement, Advantages, Mediation, Negotiation, State responsibility.*

1. Introduction

An increasing number of States are adopting mediation and negotiation process over conventional litigation process due to latter's spiralling litigation costs and dissatisfaction with the pace at which they dispense justice. Nowadays, various forms of mechanisms like mediation, negotiation, arbitration, conciliation, online dispute resolution mechanism etc. proceedings are preferred over traditional litigation process due to their beneficial nature.

Mediation and Negotiation are generally preferred to other forms of resolution due to their more advantageous nature. Mediation is favoured due to its informal, flexible and complete voluntary and non-binding nature, which makes it desirable not only to cumbersome litigation process but even over other forms of alternative dispute resolution. Similarly, the technique of negotiation is adopted due to its flexibility, its confidentiality, its formalness and voluntariness.

In this period of globalisation, the States are interconnected and interdependent on each other for their survival. No State can afford to survive or develop in isolation without interaction with outside world. Sometimes during this interaction differences arise due to their vested economic, political or geographical

Interests. To resolve these disputes the general principle of State Responsibility under international law is of significant help.

The concept of State responsibility emanates from international principles of State sovereignty and State equality. It provides that if a State make breach of its international obligations and causes injury to another State, it is required to immediately stop its illegal actions, and make reparation to the injured.¹ The Permanent Court of International Justice in the Chorzow Factory (Indemnity) case² held that it is a basic concept of international law that whenever there is a violation of an agreement, there arises a duty to pay compensation.

Relying on the above decision, the International Court of Justice in the United Kingdom v. Albania (Corfu Channel case)³ held Albania responsible under international law for the loss of human life and machinery suffered by the United Kingdom and was held liable to pay damages. In this case, Albania committed grave omission as it failed to warn about the mines fixed in its territorial waters which caused serious damages to two British warships, passing through the channel.

The laws on State Responsibility are the principles determining under what circumstances a State may be held responsible for breach of its international obligations. The International Law Commission was entrusted with the work of codification of law on “State Responsibility” in 1949. Many distinguished Special Rapporteurs have subsequently contributed to the Commission’s work on the topic, offering different views and approaches. After extensive discussions and debate for more than five decades, at last in 2001 the International Law Commission adopted the text of draft Articles on the Responsibility of States for internationally Wrongful Acts (hereinafter referred as “draft Articles,2001”). The draft Articles, 2001 reflects the continuous progress of law relating to State responsibility under international law.

The draft Articles, 2001 do not state any particular international obligations of States breach of which gives rise to its international responsibility. The international obligations of States are fixed by the ‘primary rules’ composed of major substantive customary and conventional international law. The draft Articles, 2001 are the ‘secondary rules’ determining general issues of State responsibility and the remedies available in case of breach of ‘primary rules’ or substantive law under international law. The draft Articles, 2001 are already cited by International Court of Justice in its various decisions and they are generally well received and recognised by the States all across the world. However, there is a lack of effective international mechanism imputing international responsibility on the States and to fix this, the draft Articles, 2001 has to be adopted in form of a Convention or a treaty. It is worth mentioning that since 2001 the General Assembly is holding discussing on the topic and exploring possibilities of preparing convention on ‘State Responsibility’ in its annual sessions. Hopefully, soon they would be able to reach to consensus in this matter.

At present, whenever a State violates its international obligation and cause damage to another State, the aggrieved party has to knock at the doors of International Court of Justice or some other judicial institution to seek re dresser. This conventional

form of seeking redress through accusatorial process often takes a very long time, which affects bilateral relations between States. To fix international responsibility of States the parties should adopt different methods of alternate dispute resolution mechanism, particularly, the mediation and negotiation. It will expedite the adjudication process and disputes can be resolved in an efficient manner. In fixing international responsibility of States express provision should be made in the proposed Convention on State Responsibility that it is obligatory for the States to resolve their disputes through mediation and negotiation before resorting to other traditional forms of dispute resolution.

In this article, the researcher will discuss the general principle of State responsibility under international law and then the researcher will discuss the mediation and negotiation as methods of dispute resolution mechanism in fixing international responsibility of States. Finally, the researcher will conclude this article while discussing some steps to be taken to further encourage the parties to adopt these methods of conflict resolution.

2. Mediation and its Advantages

Mediation is an informal process in which an impartial third person or entity helps in resolution of dispute between two or more parties. In this process conflicts are resolved in a non-hostile environment. The function of the mediator is to guide the parties to resolve their differences in an amicable manner by encouraging them to focus on real issues of the conflict. The mediator does not enforce his opinion on the parties, his only task is to create an environment where parties can reach to a mutually accepted settlement.

The mediators are the individuals who may be engaged or come forward to help in facilitating the mediation process. They should be uninterested in the result and should not have any power to give a decision. The mediator is to ensure that both the parties should have an adequate opportunity to be heard and comprehend. Although mediator is in control of proceedings, he should not enforce decisions on the parties. So, it can be seen that the parties are the final arbiters in the mediation process.

2.1 Advantages of Mediation

Mediation is of great importance in resolving international conflicts between nations, particularly in fixing responsibility of States under international law. The mediator can be a private individual of international repute, an academic scholar, a government representative, an international organization like the World Bank or the United Nations, or some other entity, depending on the nature of the dispute.

Mediation provides opportunities to the parties to discuss matters, resolve disagreements, and come to a settlement which is not possible to reach in an indictment. It is a voluntary exercise where mediators do not have the power to make their decisions binding on the parties unless they are expressly empowered to do so.

In mediation the parties are final arbiters of the whole process and the mediators only play the role of a facilitator.

Mediation is preferred to a lawsuit as a form of dispute resolution as it provides the parties an opportunity to involve in the whole process in an interactive manner which is not possible in a traditional lawsuit. Consequently, mediation has certain advantages over a conventional law suit, including the following:

- **Quicker and Cost Effective:** Mediation resolves a dispute in a faster manner than the traditional judicial process. It does not follow the technical legal procedures and doctrines which are main hindrance in resolving a conflict in an expedite manner. Mediation gives the parties a much wider scope to put forward his case in more effective manner. It promotes communication between the parties and preserves their relationship from being affected. It is cost effective method as comparatively it took a much lesser time in resolving a conflict, and parties can again resume their relationship.
- **Voluntary and Non-Binding:** the most significant advantage of mediation is that it is completely a voluntary and non-binding process. Both the parties to dispute are free to decide whether they want their conflict to be resolved by mediation process or not. The parties are in full control throughout the mediation process. If at stage during the process any party is dissatisfied he can withdraw from it. The non-binding nature of mediation process is one of its significant feature that makes it a preferable method of alternative dispute resolution mechanism.
- **Informal:** it is an informal process where parties are not required to follow technical rules of evidence or other rules. It promotes free exchange of information and arguments on a particular dispute in more participative way than the conventional judicial process. In this process the parties can decide rules and procedure they want to follow giving way to formality that defines judicial process.
- **Adaptability:** The mediation process is flexible to fulfil the required needs of the parties to come to an agreeable solution. The parties are free to fix time, location and person or organization they want to incorporate in settlement of dispute through mediation process. It is this degree of flexibility that makes mediation a preferable method of resolving a wide variety of disputes.
- **Preserve relationships:** With the help of mediation an international conflict can be resolved in an amicable manner and without affecting relationship between the parties. This method of settlement gives the parties an opportunity to resume their business as usual after coming to terms of settlement. The non-adversarial nature of mediation protects damaging of relationship between the parties and maintains cordialness of it. It can improve their future relationship also as both the parties came to know about interests and desires of each other, which can be taken care of by them in future.

2.2 Mediation through the United Nations

The United Nations is playing a significant role in resolving international conflict between States. According to the UN Charter mediation is one of the major means for settlement of international conflicts and disputes. The parties to dispute can make request to the UN to settle their differences through mediation process. And, the United Nations through its “Good Offices” helps amicable resolution of disputes by keeping in view the principles of its Charter. Under Article 99 of the UN Charter, if the Secretary General is of opinion that any matter is of danger to the international peace and security, it may bring it to notice of the Security Council.⁴ The Secretary General of UN is using its good offices in resolving disputes at initial stages itself and in this regard the department of political affairs is worth mentioning.

The UN Department of Political affairs, created in 1992, is playing significant role in prevention and resolving of international conflicts. It provides logistic and other forms of support to the UN in its mediation initiatives. The mediation process of UN is available at different stages of conflict as it can be resorted to before any actual conflict has arisen or in anticipation of conflict or it can be reached during existence of conflict and after that in enforcing of resolution of conflict.

Preventive diplomacy prevents arising of disputes between parties and avert turning of existing disputes into conflicts. In preventive diplomacy envoys are sent to areas where disputes have arisen to encourage the parties to resolve the matter amicably or in a peaceful manner and in doing so the help of General Assembly or the Security Council can be taken. When conflict has arisen or during existence of conflict peace-making activities of UN can be utilised to resolve conflict. The United Nations peace-making efforts have brought to an end various international armed conflicts through political negotiations. Similarly, it can be utilised to implement the agreements entered into between parties in resolving of their conflicts.

The United Nations mediation is also not binding on the parties and it depends on mutual commitment and understanding of the parties. However, in some cases the Security Council of United Nations can enforce the agreement if there is danger to maintenance of international peace and security. The United Nations mediation is being widely utilised by States since the end of cold war and it truly shows how international conflicts are being resolved peacefully through alternative dispute mechanism rather approaching traditional juridical process.

3. Negotiation and its Advantages

Negotiation is one of the simplest and most utilised methods of alternative dispute resolution mechanism. It is a discourse between two or more parties who endeavour to solve their dispute amicably. It is a communication between two or more interested parties who intended to resolve their issues a peacefully and amicable manner. It is different from other forms of resolution as it does not involve any neutral third person or entity and it is for parties to resolve their conflict the way they want it to be.

Nowadays, more and more States are adopting negotiation to resolve their differences as parties are directly engaged in this process and there are chances of compliance to final outcome. However, it does not always succeed, as it depends on mutual understanding of interests and needs of each other. Sometimes vested interests of the parties or hostile public opinion may prevent State parties to come to an agreement.

The Parties may resort to negotiation to settle pending conflict or to the foundations to resolve any conflict that may occur in future. However, under certain international agreements the parties are under obligation to negotiate to resolve their differences.⁵ For instance, Article 283(1) of the United Nations Convention on the Law of the Sea, 1982 obliges the State parties to settle their disputes regarding the interpretation or applicability of the convention, by exchanging their opinions quickly through negotiation or other by some other peaceful method.⁶

In *Cameroon v. Nigeria (preliminary objections) (1998)*⁷ the International Court of Justice made it clear that there is no rule under international law which mandate parties to exhaust diplomatic negotiations before going to the Court. However, parties may be directed by tribunals to negotiate in good faith and may even suggest measures to consider by the parties.

In *Germany v. Denmark and the Netherlands (North Sea Continental Shelf cases)* the Court held that parties are under obligation to get into negotiation to come to a settlement and not just undergo it as a kind of pre-condition. They are required to enter into negotiation in a significant manner which is not possible, if the parties are reluctant to change their attitude.⁸

Similarly, if there is likelihood of danger to maintenance of international peace and security, Article 33 of the UN Charter provides that the parties should try to resolve it by negotiation, inquiry or mediation, and if they fail to reach to an agreement then more complicated forms of resolution can be resorted to.

Under international law while fixing international responsibility a State, parties at first instance tries to resolve their disputes through traditional judicial process without making any effort to resolve it with the help more efficient methods of alternative dispute resolution, particularly the mediation and negotiation. As these methods are being frequently used in resolving various sorts of international disputes, in fixing international State responsibility too these methods have to be followed for mutual benefits of the States.

3.1 Advantages of Negotiation

•**Voluntary and Non-binding:** it is a voluntary process and no party can be compelled to follow it, unless it wishes to do so. The parties are not bound to accept the outcome of negotiations and can withdraw from the process at any time if it goes against its interests. Though, in some cases parties are under an obligation to follow methods of alternative dispute resolution mechanism before resorting to some other adjudicative process.

- **Flexibility:** In negotiation, there is great flexibility as only interested parties are involved and they are free to follow their own rules and procedure according to their needs. The parties can reach to an agreement in quick time if they respect their mutual goodwill and follow the Cooperative or Interest-based negotiation, where common interests or values are stressed rather than following the competitive or positional based negotiation, where parties try to maximize their interests at the cost of other.
- **Cost Effectiveness:** the other advantage of negotiation is its cost effectiveness as no third adjudicatory person or institution needs to be hired or involved for dispute resolution. Through mediation disputes can be resolved in an efficient manner as the technical evidentiary rules and procedures are not followed.
- **Preserve relationships:** As in case of meditation, the negotiation method also preserves the relationship between the parties from being affected and may enhance mutual cooperation and understanding.

4. Conclusion

The law relating to State Responsibility is in its developing stage, however, the International Law Commission has done extensive work on the codification of rules on State responsibility and prepared the text of draft Articles on Responsibility of States for internationally wrongful Acts. The draft Articles, 2001 are recognized by the States world over and even cited by the ICJ in its various decisions. However, there are some deficiencies in these Articles and the foremost challenge is the lack of international mechanism imputing responsibility on States. The proposed 'Convention on the Responsibility of States for Internationally Wrongful Acts' based on the draft Articles, 2001 is the need of the hour and must be adopted by the member States of the United Nations, to effectively implement the rules of State responsibility under international law. The Convention should incorporate the express provisions where in States should be under obligation to meaningfully follow mediation and negotiation in fixing international responsibility of States. The methods of mediation and negotiation are generally not preferred by the States in fixing international responsibility due to lack of willingness on their part. However, various advantageous features of mediation and negotiation over traditional litigation process including its efficiency, its cost-effective nature, informality, its flexible nature, its application to variety of disputes, and its completely voluntary and non-binding nature has made them preferable methods of resolving different kinds of international disputes. Similarly, in fixing international responsibility of States also the parties should not be reluctant to adopt these emerging forms of dispute resolution. The risk involving in following it is minimal and its potential for success is very high given its advantages.

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