HSST POLITICAL SCIENCE

Part V: INTERNATIONAL POLITICS

MODULE III: LIMITATIONS OF NATIONAL POWER

- **Pacific Settlement of disputes Analysis**

Chapter VI of the United Nations Charter deals with peaceful settlement of disputes. It requires countries with disputes that could lead to war to first of all try to seek solutions through peaceful methods such as "negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice." If these methods of alternative dispute resolution fail, then they must refer it to the UN Security Council. Under Article 35, any country is allowed to bring a dispute to the attention of the UN Security Council or the General Assembly. This chapter authorizes the Security Council to issue recommendations but does not give it power to make binding resolutions; those provisions are contained in Chapter VII. Chapter VI is analogous to Articles 13-15 of the Covenant of the League of Nations which provide for arbitration and for submission of matters to the Council that are not submitted to arbitration. United Nations Security Council Resolution 47 and United Nations Security Council Resolution 242 are two examples of Chapter VI resolutions which remain unimplemented.

- **The Hague Conventions**

In 1899, the Russian Czar Nicholas II convened The Hague Peace Conference to discuss the issues relating to international peace and disarmament. The conference ended with the adoption of the methods of pacific settlement of disputes like arbitration, good offices and mediation. It was decided during the proceedings of the convention that a permanent organization related to resolving the disputes and making peace settlements was mooted. Thus came into effect The Permanent Court of Arbitration (PCA) consisting of a panel of jurists designated by each country acceding to the convention. The rules and regulations relating to the conducting of arbitration were laid down and a permanent bureau was setup in The Hague. The PCA was established in 1900 and started functioning from the year1902. The convention saw the participation of some of the nations from Europe, Asia and Mexico.

The Convention was held again at The Hague in 1907 known as the second Hague Peace Conference. This time there was also participation from the Central and South American states.

- **The Permanent Court of International Justice**

The Permanent Court thus came into effect with its residence at The Peace Palace in 1913 and made a significant contribution to the development of international law.The outbreak of the First World War necessitated the establishment of a world court. Article 14 of the Covenant of the Nations allowed the League to set up an international court. An advisory Committee of jurists appointed by the League formulated the working schedule, criteria for appointing the judges and the draft constitution for a permanent court. The Statute of the Permanent Court of International Justice (PCIJ) was accepted on 13th December, 1920 in Geneva.
The Permanent Court of International Justice was closely associated to the League of Nations. It was created in 1922 after the end of the World War I and was much applauded and received positive reaction from different sections. In the very first decade of its operation, many states submitted their disputes to the court. Between 1922 and 1940, the PCIJ dealt with around 27 cases and delivered advisory opinion on 27 cases.

The Court's mandatory jurisdiction came from three sources:

- The Optional Clause of the League of Nations
- General international conventions and
- Special bipartite international treaties.

Some of the provisions of the Court are as given below:

- Cases could also be submitted directly by states though they were not bound to submit material unless it fell into those three categories.

- The Court could issue judgments or advisory opinions. While the judgments were binding, the advisoryopinionswerenot.

- The member states of the League of Nations followed advisory opinions failing which they feared that not to comply could weaken the moral and legal authority of the Court and the League

- **The United Nations Charter**

The Charter of the United Nations was signed on 26th June, 1945 in San Francisco. The outbreak of the Second World War brought to the fore the necessity of establishment of a new international organization whose decisions were binding on its members and which would lead to permanent peace and world order. It came into force on 24th October, 1945. The Statute of the International Court of Justice became an integral part of the Charter.

The purpose of the UN

- 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
- To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace
- To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion
- To be a centre for harmonizing the actions of nations in the attainment of these common ends.
- The Chapter VI of the UN Charter specifically underlines the provisions for Pacific Settlement of Disputes. Articles 33 to 38 underline these provisions.

Article 33

- 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.
- The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means.

Article 34

The Security Council may investigate any dispute, or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security.

Article 35

- Any Member of the United Nations may bring any dispute, or any situation of the nature referred to in Article 34, to the attention of the Security Council or of the General Assembly.
- A state which is not a Member of the United Nations may bring to the attention of the Security Council or of the General Assembly any dispute to which it is a party if it accepts in advance, for the purposes of the dispute, the obligations of pacific settlement provided in the present Charter
- The proceedings of the General Assembly in respect of matters brought to its attention under this Article will be subject to the provisions of Articles 11 and 12.

Article 36

- The Security Council may, at any stage of a dispute of the nature referred to in Article 33 or of a situation of like nature, recommend appropriate procedures or methods of adjustment.
- The Security Council should take into consideration any procedures for the settlement of the dispute which have already been adopted by the parties.
- 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.

Article 37

- Should the parties to a dispute of the nature referred to in Article 33 fail to settle it by the means indicated in that Article, they shall refer it to the Security Council.

- If the Security Council deems that the continuance of the dispute is in fact likely to endanger the maintenance of international peace and security, it shall decide whether to take action under Article 36 or to recommend such terms of settlement as it may considerappropriate.

Article 38

Without prejudice to the provisions of Articles 33 to 37, the Security Council may, if all the parties to any dispute so request, make recommendations to the parties with a view to a pacific settlement of the dispute.

- **Traditional Means**

The means of Pacific Settlement of Disputes is divided into two categories -one, the diplomatic and political means and two, legal-adjudication means. While the diplomatic-political means

seek to reconcile interests, the legal-adjudication means apply international law and determine the rights. The judgments are not binding in the case of diplomatic-political means unless the parties reach an agreement upon it; in the case of legal means, the decision is binding on the parties and cannot be evaded.

- **Negotiation**

Negotiation, basically a communication process without a third-party intervention, aims at achieving a joint decision. They are the basic means to any dispute settlement and are incorporated in all the dispute settlement conventions and treaties. The result of this means is usually a consensual decision of the parties involved in the dispute. Negotiation is a process where individuals with shared and opposed interests, work out a settlement in order to come to a consensual agreement. There are only two choices while negotiating (a) a win-lose situation wherein one person will win while the other will lose (b) a mutual problem solving wherein both the individuals or groups will try to maximize a joint outcome which will result in a win-win situation. The latter approach is opted if the disputing individuals or groups have a stake in maintaining the ongoing positive relationship with one another. Communication is to be effective during the course of negotiation as it involves paying attention to each other and address each other respectfully. Focusing on interests and not positions is necessary as positions are more conflicted than interests. One also needs to generate multiple alternatives for resolving the dispute.

- **Inquiry/Fact-Finding**

The aim of Inquiry or fact-finding is to facilitate the solution of disputes that rise basically from a difference of opinion on 'facts' by clarifying of the facts. The parties, who have not been able to come to an agreement by means of diplomacy, should institute an International Commission of Enquiry to facilitate a solution of these disputes by elucidating the facts by means of an impartial conscientious investigation. The fact-finding or inquiry has been, of late, much applauded for its efficacy and has been appraised. In some cases, there are even compulsory cases of fact-finding in case of a dispute as enshrined in the United Nations Convention on the Law of the Non-Navigational uses of International Watercourses of 1997. Commissions of enquiry have been set up in cases of the collapse of the illegitimate regimes. The Hague Convention dealt exclusively with the provisions related to the commissions of enquiry.

- **Mediation and Conciliation**

Mediation is one of the early international agreements as recognized under The 1856

Declaration of Paris that encouraged member states to settle their disputes through mediation. The Hague Conference of 1907 recognized the right of neutral states to act as mediators in international disputes and reaffirmed by the League of Nations.

Article 33

UN Charter has named Mediation as one of the preferred methods of dispute settlement. Mediation is a process through which a neutral third person facilitates integrative negotiation between disputing individuals and groups. Although mediation is facilitated by a third person, it is a voluntary process where the disputing individuals or groups work out their own solutions, and make informed decisions to resolve their own disputes; the mediator does not make decisions for them. Even if the mediator suggests a solution, it is not binding on the disputing parties. Most mediators however are professionals who are unknown to the parties. The job of the mediator is to reconcile the opposing claims and appease the feelings of resentment that may have arisen between the states.

Another alternative means is the Good Offices which is similar to mediation but is not specifically mentioned in the Article 33 of the UN Charter. According to Article 2, Part-II of the Hague Convention of 1907, in case of serious disagreement or dispute, the Contracting Parties agree to have recourse, as far as the circumstances allow, to the Good Officer or mediation of one or more friendly powers. The decisions are not binding on the disputing parties and have only advisory value.

Conciliation differs from mediation only by a few degrees. But it is widely agreed that the mandate of the conciliator is more limited than the mediator in that the conciliator too cannot offer solutions to the parties in dispute. The conciliator can only reconcile the disputing parties towards the resolution of their conflict and does not have the power to impose solutions. Conciliation is not resorted to frequently; the parties would like to externalize their responsibility so as to earn credibility from their own citizens. Rather, they would prefer a binding judgment in order to appear that they have tried their best to solve the problem. Mediation and conciliation are the most preferred methods of alternative dispute resolution (ADR). These offer a more constructive and more flexible solutions to the parties in dispute. Somewhere the ADR brings in some benefits even to the loser whereas in arbitration and adjudication it comes down to ‘the winner takes it all’ situation. Since the erring parties too would like to draw some benefits, the ADR provides them a perfect platform to solve their problems partially.

- **Legal Means**

Arbitration

In arbitration, the disputants take their dispute to an impartial third party, who provides them with a decision to end their conflict. It may take varied forms depending on whether or not arbitration is freely chosen by the parties and whether or not parties have agreed to be bound by the arbitrator's decision. It can be applied to different kinds of circumstances (public or private arbitration). Arbitration has some of the advantages of mediation such as privacy and flexibility while on the other there is a prospect of an authoritative decision. Arbitration hearings can be formal or informal depending on the nature and seriousness of the dispute. States usually perceive arbitration as a more flexible process than adjudication because the sovereignty issue is given precedence.

- **Adjudication**

Adjudication refers to a settlement by a court. In civil cases, one party (petitioner) goes to court to demand something from another (defendant). The court then makes a decision on the issues in dispute, unless a negotiated settlement occurs first. Here the framework for considering cases is adversarial, court procedures are highly formal and lawyers are an essential part of this process. Moreover, this is an expensive way of resolving disputes. In the post-Second World war era, adjudication was resorted to only after the failure of the negotiations. But since 1989, the reluctance to accept binding adjudication has decreased. There are obligations to cooperate and with the growing number of problems, states are obliged to solve their disputes through peaceful means.