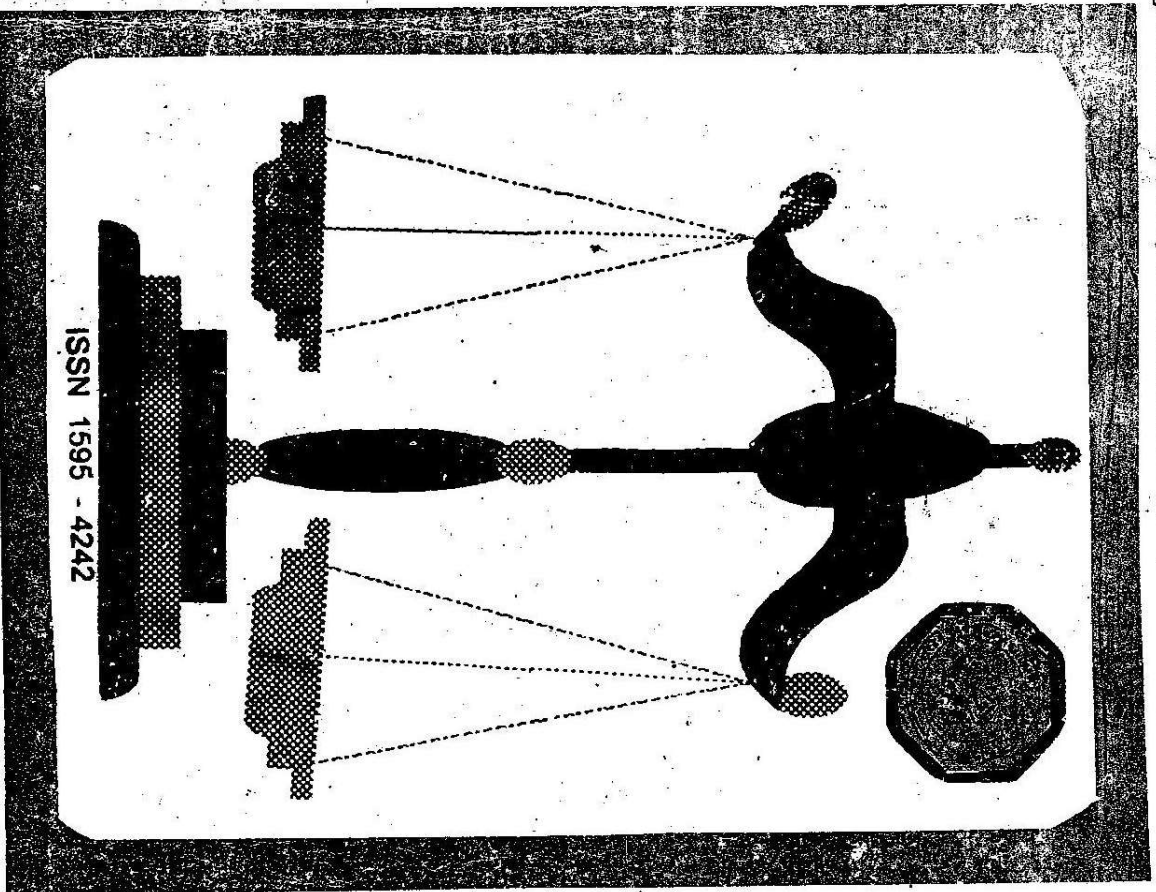


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INTERNATIONAL DISPUTE SETTLEMENT MECHANISMS AN APPRAISAL

BY

GANIAT .M. OLATOKUN (MRS)*

INTRODUCTION

Dispute between states arising from claims and counter-claims concerning matter of fact, law and policy are an inevitable part of international relations and have frequently led to armed conflict. Indeed, if the disputing parties are able to settle their differences by themselves, they will save themselves a considerable amount of time, energy and expenses. It is of course much better for the parties that a dispute does not arise between them in the first place. According to Professor Schmitthoff, - "It is a truism to state that arbitration is better than litigation, conciliation better than arbitration and prevention of the dispute better than conciliation.¹

The issue of dispute settlement between states² is the area, which needs the most careful attention in order to understand the nature of international law properly, because it is linchpin upon which the operation of all other principle and rules rests, including the central areas of state responsibility. Some deeper consideration of the matter is therefore required.

The idea of peaceful settlement of disputes developed in International Law during its "classical" period, while there was no general prohibition on the use of force. The United Nations charter³ prohibits the use of force in Article 2(4) (with certain exceptions) and requires all member states to "settle international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered" [Article 2(3)].

However, the concrete obligations following from this provision are controversial and there is no agreement on the meaning of the term, "International dispute". Indeed, one of the prime purposes of the organization is described as being "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"⁴. Chapter IV of the United Nations charter is completely devoted to this purpose, but as stated in Article 33(1), it is limited to certain types of disputes, namely, those "the continuance of which is likely to endanger the maintenance of international peace and security".

Article 33(1) of the United Nations charter gives a list of the usual methods of the peaceful settlement of disputes between states in international law:

"Negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their choice"

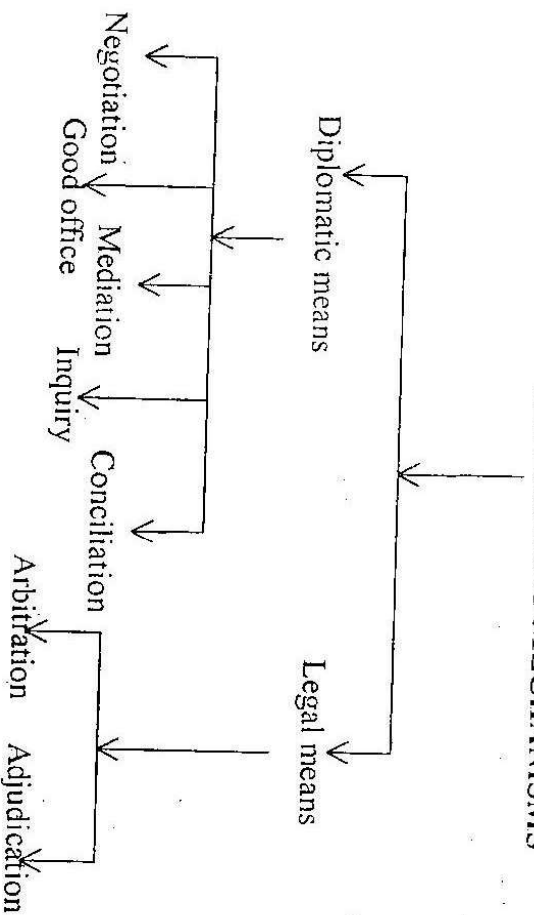
These methods can be categorized into: (i) diplomatic means of dispute settlement which consists of negotiation, good offices, mediation, inquiry and conciliation; and (ii) legal (or judicial) means of dispute settlement which in effect consists of arbitration and adjudication. It must be noted however, that as a normative concept, the idea of the peaceful settlement of dispute through the aforementioned methods, evolved since the peace of Westphalia, although the origins are much older.

This present study, apart from dealing with mechanisms of international dispute settlement, also attempts at pin-pointing the advantages and disadvantages attached to each of the methods or mechanisms afore-mentioned, with the sole aim of guiding nation states in choosing the best method to opt for in resolving international dispute whenever it arises, while of course putting the words of Professor Schmitthoff⁵ at the back of our minds.

DISPUTE SETTLEMENT MECHANISMS

Putting it in a chart therefore, the dispute settlement mechanisms, can be summarily put thus:

DISPUTE SETTLEMENT MECHANISMS



(a) Negotiations

The vast majority of disputes between states are settled by direct diplomatic negotiation.⁶ It must however be pointed out that international law is not unique in this respect. The reason being that the vast majority of disputes in any legal system are settled by negotiations. A duty of states to enter into negotiations may be implied from the general obligation of states to settle their disputes peacefully according to Art.2(3) United Nations charter and from the duty listed in the friendly relations declaration of 1970 to select such "means as may be appropriate to the circumstances and the nature of the dispute."⁷

As noted by the International Court of Justice (ICJ) in the *North Sea Continental Shelf cases*,⁸ the parties to a dispute may even be under an "obligation so to conduct themselves that the negotiations are meaningful". Specific obligations may even arise under a treaty e.g. Article 283 of the 1982 law of the Sea Convention, which aims at keeping the disputing parties in the contact and require them to exchange views at any stage of the

dispute and even thereafter to implement the final settlement or decision. The parties to the dispute may negotiate directly either through regular officials or officials specially designated.⁹

Negotiation involves the process of reaching an agreement on a matter or resolving a dispute between two parties. From this attempted definition, the nature of negotiation is captured i.e. either a dispute or transaction involves negotiation in order to reach an agreement in one way or the other. Even in contentious cases, it is possible for parties to resolve the dispute between them, and opt to settle out of court. Furthermore, by negotiation it implies the coming together of the parties to present their claims and observation on the matters in dispute and discussion will commence on the subject possibly leading to an agreement.

However, it is worthy at this juncture to note that, consultation, though different from negotiation, is difficult to distinguish from negotiation. But, mention must be made of the fact that, the prime objective of both is to prevent a dispute from arising in the first place. Dispute is suffice to say, can be prevented if parties are able to harmonize their views by exchange of views and ideas, before they form position or make decision. Consultation therefore, is an attempt to mutually influence the other party's perception of the factual or legal aspect of a common problem and to mutually shape the other's preferences.

One of the most advantageous position in negotiations is the readiness and willingness of the parties to give and take i.e. both parties are eager to reach amicable decision. An example which comes to mind here is the conflict or dispute between Netherlands, France and Libya, where, because of the countries immunity, it's properties were not to be able to be attached by Netherlands and France. At the end, negotiation was arrived at, and each party gave away some, and took away others. Furthermore, it can be said that, negotiation is perhaps the cheapest way of setting disputes and possibly, the fastest way too. All the parties need do is to find a convenient forum to rub minds and reach a decision. Economically

therefore, negotiation is cheap. Negotiation is also the most confidential way of settling international dispute.

But negotiations is not always a good method of settling international disputes. Neutral third parties seldom take part in negotiations and this means that, there is no impartial machinery for resolving disputed questions of fact. It also means there is little to restrain a disputing state from putting forward extreme claims, especially where its bargaining power is very strong. States can also deny that a dispute exists and often demand that certain preconditions are fulfilled before entering into negotiations, thereby taking the advantage of the willingness and readiness of the other, to adhere to strict position, and consequently, giving room for the negotiation to end in a deadlock.

Furthermore, negotiation might after all, be an exercise in futility, since there is no binding force of authority. Either party might fail to carry out or fulfill the resolution or decision arrived at. It must of course be stressed at this juncture that the United Nations negotiating process is however fraught with excessive publicity and power politics.

All said and done, it is important to note that, dispute settlement clauses in treaties often provide for negotiation only as a step of a dispute settlement procedure and allow for the omission of the quarrel to other means of peaceful settlement such as mediation, inquiry, conciliation, arbitration or adjudication, if the negotiations fail within a certain time limit.

(b) **Good Office and Mediation**

Sometimes, third state or international organisation, or often even an eminent individual, may try to help the disputing states to reach agreement. Such help can take two forms, namely, good offices and mediation.¹⁰ A third party (as a "go between") is said to offer its good offices when it tries to persuade disputing states to enter into negotiation; it passes messages and suggestions back and forth and when the negotiation starts, its functions are at an end.

Switzerland, with its "permanent neutrality",¹¹ for example, has often acted as a protecting power in times of war or peace such as representing the United State in Cuba. A third party helps to elucidate the facts through investigation and report on the fact which enable the disputants to settle their differences.¹²

A mediator on the other hand, by comparison (to the use of good office), is more active and actually takes part in the negotiation and may even suggest terms of settlement to the disputing states (which is often seen as a characteristic of conciliation). Under the Conciliation Rules of the International Chamber of Commerce (ICC) (which deals with commercial dispute and do not apply to inter-state disputes), however, the much discussed distinction between "mediation" and "conciliation" makes no practical difference, for the rules leaves it to the conciliator whether or not make settlement proposal.¹³

Obviously, a mediator has to enjoy the confidence of both sides, and it is often difficult to find a mediator who fulfills this requirement. In the dispute between Argentina and Chile over the implementation of the BEAGLE CHANNEL AWARD¹⁴ both sides accepted CARDINAL ANTONIO SAMORE as a mediator, upon the proposal by the Pope.

Good offices and mediation can be combined and are also always easy to distinguish in practice. Such was the role of Algeria in 1980 in the diplomatic hostages dispute between Iran and the United States, in which both sides were not speaking directly to each other. With the assistance of Algeria, they concluded the Algiers Accords, leading to the establishment of the Iran-US claims tribunal in the Hague in 1981¹⁵ which has been described as the most significant body in the history of International Arbitration.

Noteworthy, is the fact that, the consent of parties to mediation is not necessarily required initially, but one wonders whether any-effective assistance can be provided without it. General rules of procedure for the mediation of dispute¹⁶ between states do not exist, unless there is a clear treaty basis for them. Mediation

thus, takes the form of flexible negotiations with the participation of third party.

A mediator can also provide financial support and other valuable assistance in the performance of the solution agreed upon. In the dispute between India and Pakistan on the waters of the Indus basin between 1951 and 1961, the World Bank mediated successfully by granting financial aid. Examples of successful mediations by states, usually by a great power are initiatives taken by Germany at the 1878 Berlin Congress; by the USSR in 1966 in the conflict between India and Pakistan, and by the United States in the Arab-Israeli conflict in the 1978 camp David Peace Negotiation between Israel and Egypt and in the recent agreements between Israel and the PLO.

An old Chinese proverb says, "the go-between wears out a thousand scandals". Mediation in conflict between states is not easy and has it draw back also for the mediator, because taking an active role endangers the relations of the mediator with one or all of the disputing parties. A truly neutral stance is often not possible without favouring one side or the other, especially in armed conflict. Third-party involvement in the settlement of international disputes has also frequently failed due to lack of sufficient influence of the third party.

Great powers have more chances of success due to their resources and weight, but on the other hand, they tend to pursue their own interest at the same time. Small states or international organisations are less prone to such temptation, but they also have less leverage in persuading the parties to a dispute to reach a compromise. Mediation has most chances in the settlement of smaller issues or local conflict, in stalemate situations where escalation threatens to occur, or when the dispute has in fact already been decided (i.e. by the military victory of one side) and the consequence have to be drawn.

In summary therefore, one can identify the following advantages:-

- (i) Normally, a mediator can assist financially in order to settle the dispute at hand. The solution is therefore provided easily, since finance will be no problem.
- (ii) The use of good offices and mediation in settling dispute implies active participation and the mediator is always abreast with the issues in dispute. This enables him to make useful contribution as well as suggest terms for settlement.
- (iii) This method is cheaper in the sense that the disputing parties need not contribute anything before mediation or good office commences.
- (i) The disadvantages amongst other are:-
- (i) The presence of third party or negates or removes the feeling of confidence in both parties, because, experience has shown that it is difficult to find a neutral third party.
- (ii) The mediator suffers an injured reputation, because either party has the feeling that the mediator favours the other party.
- (iii) Equal ground of participation is denied to smaller state, because they lack the resources required. Consequently greater powers (states) are more recognised.

(c) **Fact-finding and Inquiry**

"Fact-finding and inquiry" as method for establishing facts in international law can be used for a variety of purposes, including the practice of decision-making of international organizations¹⁷. In the settlement of international disputes, the two terms are more or less interchangeable. Many international disputes turn solely on disputed questions of fact, and an impartial inquiry is a good way of reducing the tension and the area of disagreement between the parties. After some negotiations, disputing states may sometimes, agree to appoint an impartial body (mostly ad hoc, but sometimes, also consisting of a permanent body established in advance by agreement for certain kinds of disputes) to carry out an inquiry.

The object of the inquiry, it suffice to say, is to produce an impartial finding of disputed facts, and thus to prepare the way for a negotiated settlement. The parties are not obliged to accept the findings of the inquiry, but almost always do accept them. The task of establishing the facts may also be combined with their legal evaluation and that of making recommendations for the settlement of disputes, which then makes a clear distinction between fact-finding or inquiry and conciliation and mediation; not always possible.

Fact-finding is also mentioned in treaty instruments. The 1907 Hague Convention, for example, describes the task of a commission of inquiry as, "to facilitate a solution by means of an impartial and conscientious investigation." and limits its report "to a statement of facts" which "has in no way the character of an award." More recent instruments, however, also give "fact-finding commission" powers to evaluate the facts legally and to make recommendations, such as the 1977 Additional Protocol I to the 1949 Geneva Red Cross Conventions, or in the 1982 Law of the Sea Convention.

The advantage of resorting to inquiry and fact finding lies in the fact that, it may be easier for the parties to accept the proposals of a third party and make concession than when a party deals directly with his opponent. The third-party listens to both sides to gather the true fact of the situation and present it to the parties to make suggestions. This, it must be noted, is similar to the use of good office.

But with the presence of third-party, and better still, without any legal backing whatsoever, a disadvantage stands out clear, and that is, that, the parties are not obliged to accept the findings of the inquiry, even though there are instances where the findings are accepted.

(d) Conciliation

The institute de droit International in 1961 defined conciliation as follows:

"A method for the settlement of international disputes of any nature according to which a commission set up by the parties, either on a permanent basis or an adhoc basis to deal with a dispute, proceeds to the impartial examination of the dispute and attempts to define the terms of a settlement susceptible of being accepted by them or of affording the parties, with a view to its settlement, such aid as they may have requested."

The definition is generally accurate, but fails, however, to recognize that sole conciliator may also be appointed, although this is not the rule in practice.

The conciliator, who is appointed by agreement between the parties, investigates the fact of the dispute and suggests the terms of the settlement, which represents his own perception, a fair compromise of the dispute¹⁸. But, conciliation is more formal and less flexible than mediation, if a mediator's proposals are not accepted, he can go on formulating new proposals whereas, a conciliator usually, only issues a single report. However, the conciliator usually has discussions with each of the parties behind the scene, with a view to finding an area of agreement between them, before issuing his report. The parties are not obliged to accept the conciliator's terms of settlement (they are only recommendations).

The practical significance of conciliation in international law depends on the area of study. Generally speaking, it seems that conciliation is most desired where the dispute is a minor one and its central issues are of a legal nature, but the solution should reflect an equitable compromise in the eyes of the parties.

Advantages of Mediation and Conciliation are:

- (i) It is flexible than arbitration or adjudication because, it leaves more room for wishes of the parties and initiatives of third party.
- (ii) "Package deals" can be made more easily. Parties can avoid losing face and prestige by voluntarily accepting the third party proposals.

Identified disadvantages, amongst others are:

- (i) Both procedures are difficult to start without the consent of the other side. It also requires the good will of the opponent.
- (ii) Their contribution in the development of law is more reduced than in the case of arbitration or adjudication.
- (iii) The conciliator's terms of settlement are mere recommendations which the parties are at liberty either to accept them or reject them.

Should the above diplomatic mechanisms in international dispute settlement result into an exercise in futility, particularly, since these mechanisms or methods are characterized by non-binding recommendations, procedure leading to legally binding decisions is resorted to. Some treaties provide for arbitration and/or judicial means of settlement which both result in a third-party decision legally binding upon the parties. Both also require the consent of the parties.

(a) Adjudication

Adjudication (judicial settlement) is performed by a standing (permanent) court. The judges are already selected, the procedure is fixed and the law, which the court has to apply, is predetermined.

Among the few standing international courts and tribunals, the International court of Justice (ICJ) or, as it is often, somewhat emphatically, also called, "The World Court", is certainly the most important one Chapter XIV of the United Nation Charter deals exclusively with the International Court of Justice, and as state in

Article 92, "The International court of justice shall be the principal organ of the United Nations. It shall function in accordance with the annexed statute, which is based upon the statute of the permanent Court of International Justice and forms an integral part of the present charter."

The International Court of Justice (ICJ)

Only states may be parties in contentious proceedings before the court ¹⁹. This restriction is antiquated because of many areas of international law nowadays affect individuals, corporations and legal entities other than states and application and interpretation of the law is thus, left to municipal courts.

Jurisdiction in contentious proceedings is dependent on the consent of states, many of the smaller states represented at the San Francisco Conference in 1945 wanted to provide for compulsory adjudication in the charter, but the composition of the great powers prevented the adoption of any such provision. According to Article 36(1) International Court of Justice statute, all the parties to the dispute must agree that the case should be referred to the court.

Normally, the parties refer the dispute to the court jointly by concluding a special agreement, but there is no reason why each party should not make a separate reference at a separate time. The court has held that a defendant state may accept the jurisdiction of the court after proceedings have been instituted against it, such acceptance may take the form of an express statement, or it can be implied, if the defendant state defends the case on the merit without challenging the jurisdiction of the court.

Furthermore, Article 36 of the International Court of Justice statute, also provide for states to agree in advance by treaty to confer jurisdiction on the court. Once again, it must be stressed that the court can only hear cases involving state with their consent ²⁰. As can be seen from the recent decision of the International Court of Justice in the *EAST TIMOR* case ²¹, the requirement of consent is taken rather strictly and can lead to very unsatisfactory result.

The procedure before the International Court of Justice is as laid down in its statutes and Rules of Court, adopted in 1978. The procedure of the court in contentious cases includes, a written phase, in which the parties file and exchange pleadings, and an oral phase of public hearings at which the court is addressed by agents and counsels of the parties.

English and French are the two official languages and everything written or said in one is translated into the other. Following the oral hearings, the court deliberates in private and then delivers its judgment at a public sitting. The judgment is final and there is no appeal. Judgments of the courts are binding (as are the judgments of all international courts and arbitral tribunals) ²².

So far, the advantages of International Court of Justice (arbitration) are as follows:

- (i) Its decisions are binding as between parties in respect of that particular case.
 - (ii) It commands respect world-wide as it is a United Nations accepted organ.
 - (iii) Based on its advisory jurisdiction, it has the power to give binding advisory opinions.
- The disadvantages can be highlighted as follows:
- (i) There is the decline of the utilization of the International Court of Justice as states now prefer to avoid judicial settlement of dispute.
 - (ii) Writers have frequently scorn the court, because they see a lack of respect by states and, especially invoking cases of non-appearance of defendant states before the International Court of Justice.
 - (iii) Developing countries have rightly criticized the International Court of Justice for its western-oriented composition and bias.
 - (iv) For poorer small countries, there has also been some *reluctance to use the court, for simple reason of lack of*

money. It is true that no fees are demanded by the International Court of Justice, because its administrative costs are financed out of the United Nations budget. But the cost of legal counsels, experts, secretarial assistance, travel and translations as well as the costs of boundary demarcation are often immense. The United Nation Trust Fund, which was created to assist, has shown its weakness as an effective tool.

- (v) The authority of the court is reestablished in limited areas of international law and the limits of the ability of the court to adjudicate effectively in new areas of law have not been fully tested.
- (vi) There is the general reluctance of states of submit to compulsory adjudication by a standing court which is considered to have too many impact upon their sovereignty.

(b) Arbitration

The International Law Commission defined arbitration, "as a procedure for the settlement of dispute between states by a binding award on the basis of law and as a result of an undertaking voluntarily accepted"

Arbitration has been used for a long time by states to settle their dispute and it may be considered the most effective method, in view of the large number of cases and variety of types of dispute that have been settled in this way.

A frequent pattern in Arbitration Treaties is for each of the two parties to appoint an Arbitrator. The two Arbitrators thus appointed agree on the choice of the third Arbitrator (or umpire). The Arbitrator tribunal consists of three or more person who can decide by majority vote. An Arbitrator is concerned with the imposition of a solution on the disputing parties. Nwogu has rightly pointed out that Arbitration provides flexible and important machinery, not only for the settlement of investment dispute, but *also for the settlement of a commercial dispute. And if a procedure will*

help to limit the claim of sovereign immunity, which constitutes a hindrance in suing a foreign state.²³

Under arbitration, the role of the International Center for the Settlement of Investment Disputes (ICSID) will be briefly touched.

The International Centre for the Settlement of Investment Disputes (ICSID)

The primary purpose of the International Center for the Settlement of Investment Disputes [ICSID] in Washington under the auspices of the world bank, is to promote foreign investment, especially in developing countries, by offering a natural method of settling disputes between states and private foreign investor. ICSID is based upon a multilateral treaty ratified by more than 100 states.

The center may either conciliate or arbitrate dispute and has an annulment committee to review ICSID awards. Municipal courts of member states have no power to control the validity of ICSID awards, but they may be directly used by both states, and private parties to enforce such awards. However, not many lasses have so far been filed with ICSID, and few have led to a decision.

Mention must however be made to the fact that the center is widely known all over the world. It provides an institutional framework, well-tested rules and experienced arbitrators are available in case parties do not agree on the umpire and such umpire should come from a neutral country. The place of arbitration shall be fixed by the center unless agreed upon by the parties.²⁴

However the strongest criticism of the center is that, it is too costly especially in a case involving huge sums, because it charges a percentage of the amount in question as administrative and arbitrator's fees. That criticism has led to some modification of the rule in 1986 setting a limit to the maximum charges.

The center, it must be stressed, provides a direct right of action to an investor against the host state without doing through diplomatic protection.²⁵ On the other hand, the host state can bring action against an investor without the investor's home state giving

diplomatic protection to its national or, bring an international claim on behalf of the investor.²⁶

Hence, the center seeks to remove the political steam out of the investment dispute by providing a neutral avenue to settle such dispute on the basis of law and economy. Previously, an investor cannot sue a host state unless, where the home country take up the matter internationally as it happened in the case of *AMCO/IRANIAN OIL COY.*

Furthermore, once a party has consented on ICSID arbitration, such consent cannot be unilaterally withdrawn.²⁷ neither can a party frustrate the proceedings by refusing to appoint its arbitrator. Should such a thing occur, the center shall appoint an arbitrator amongst its qualified and experienced panel members.²⁸ Moreover, once an award has been rendered, the foreign company under article 54 of the ICSID Rules enjoys the guarantee that the award will obtain recognition and enforcement in each state bound by ICSID simply by furnishing a copy of the award.

However, under article 25(4) of the ICSID Rules, the state can stipulate that, certain classes of disputes will not be considered arbitrable. For example, disputes arising from mineral and other resources are excluded by Jamaica, disputes arising from investments not specifically approved are excluded by Israel, disputes arising from questions pertaining to oil and act of sovereignty are excluded by Saudi Arabia, etc.

The following advantages of arbitration can be inferred:

- (i) Arbitration can be quicker than litigation. A court action involves conformity with laid down procedures which cannot be circumvented. An arbitration does not have to follow any laid down procedure.
- (ii) Arbitration process permits some disputes to be resolved solely on documents, without a hearing. The procedure saves time and money.
- (iii) Arbitration takes care of the convenience of the parties and their witnesses in fixing the date, time and place of hearing.

END NOTES

- This is not the case with normal court proceedings, where the paramount thing is the convenience of the court itself.
- (iv) Arbitration proceedings can be kept confidential. There is no "washing of dirty linen in public"
 - (v) There is the possibility of reaching a binding third-party decision.
- The noted disadvantages are:
- (i) There is a tendency for arbitrators appointed by parties to regard themselves as representatives of the state, which had appointed them, rather than as impartial dispensers of justice. Fortunately, such attitudes are now rare (or may be more skillfully concealed)
 - (ii) The basic problem of arbitration is the possibility of its awards being nullified by courts, as was the case on two consecutive occasions namely, the case between AMCO-ASIA and INDONESIA and, CLOCKNA and CAMEROUN.

CONCLUSION

Conclusively therefore, whether negotiation, which is common in any legal system to settle disputes, or good offices and mediation, which is noted for its active participation in the settlement of disputes and a great provider of financial assistance, or even fact finding and inquiry, which is a good way of reducing tension amongst disputing parties, not to talk of conciliation, which is characterized as useful in settling minor cases as well as case of legal nature, and to crown it up, by legal means, which comes into play in highly contentious matters, one thing is constant, and that is, the presence of a third party (umpire), whose sole objective is to resolve the dispute at hand. Once again, to conclude this present study, reference will be made to Professor Schmitthoff's contention - "It is a truism to state that arbitration is better than litigation, conciliation better than arbitration, and prevention of the disputes²² better than conciliation"²⁹.

- *Lecturer, Department of Private and Property Law, Faculty of Law, University of Ilorin, Ilorin, Nigeria.
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