Perspectives from Some Asian Countries

STATE-TO-STATE MEDIATION: PERSPECTIVES FROM INDIA

R. Rajesh Babu [*] ***& R.V. Anuradha*** [**]

ABSTRACT

State-to-state mediation as a mechanism for settlement of international disputes has significant potential as a reliable alternative to the predominantly adversarial system of international dispute resolution. India has historically shown an aversion towards litigation and has preferred softer techniques and diplomatic resolution of state conflicts. As an original member of the United Nations Charter, India has endorsed the policies of pacific settlement of disputes. This philosophy is embodied in the Indian Constitution as well as its international diplomacy through adherence to the principles of Panchsheel and its support for alternative dispute settlement Institutions such as the Asian-African Legal Consultative Organization (AALCO) regional arbitration centres. The inherent recognition of the value for amicable and peaceful settlement of disputes is also reflected in India's attitude towards disputes in the trade and investment arena. Given this background, India may be open to the idea of exploring the availability of neutral third party mediation processes, as is sought to be presented under the Asia-Pacific Regional Mediation Organization (hereinafter "ARMO"). This paper attempts to bring out the Indian perspective on State-to-State mediation and the significance of ARMO from an Indian stand point.

[*] R. Rajesh Babu, Professor of Law, Indian Institute of Management Calcutta. The author can be reached at: rajeshbabu@iimcal.ac.in.

[**] R.V. Anuradha, Partner, Clarus Law Associates, New Delhi. The author can be reached at: anuradha.rv@claruslaw.com.

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KEYWORDS: *India and mediation, Panchsheel, AALCO arbitration centres, Modal BIPA, WTO disputes*

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I. MEDIATION IN INTERNATIONAL CONTEXT

In a world that is increasingly characterized by State-to-State conflicts, the importance of mediation and other mechanisms for pacific settlement of international disputes cannot be overstressed. There have been several instances wherein nation states have taken recourse to bilateral means to settle State-to-State conflicts that are often politically sensitive or violent and have successfully brought peace to the region. Less sensitive conflicts between states, such as those in international trade and investment, have followed the dispute settlement models that are inclined towards an adversarial system. These are either regime specific such as those provided under the World Trade Organization (hereinafter "WTO") Dispute Settlement Understanding or the International Centre for Settlement of Investment Dispute (hereinafter "ICSID"), or universal in scope like the International Court of Justice (ICJ) or the Permanent Court of Arbitration (PCA).

While such adversarial systems of dispute settlement between states have been successful in their spheres of operation, they have also often been accused of falling prey to hyper legalization and the tendency of the court or tribunal to expand the scope of the rules beyond the consensus that is reflected in the applicable international law. This had led to questions on the legitimacy of the adjudicating process and the adjudicating bodies, as most recently embodied in the stand-off between the United States and other countries at the WTO over the WTO's appellate body mechanism. Some scholars have also pointed to the increasing influence of "power" then "rules" that dictates the outcome of these adversarial processes. For instance, it has been pointed out that the ICSID arbitration mechanism tends to favour Western capital-exporting states at the expense of the developing world.

Significant expenses of time and money are another big concerns with the adjudication or arbitration process. In both political and academic debates, an idea that is often mooted therefore is that there needs to be greater focus towards cooperation and catering to the interests of both the parties, with a future-oriented perspective. In this context, mediation is often projected as a natural candidate or as an amicable means of dispute settlement that could preserve relations and assets, and potentially lead to higher compliance ratings. More importantly, the mediation process need not replace the existing processes; it can be designed as an alternative or as a preferred companion to the existing adversarial processes that nation states are free to choose.

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II. INDIA AND MEDIATION

India has mainly been litigation averse, and has shown preference for softer techniques and diplomatic resolution of state conflicts. As an original member of the United Nations (hereinafter "U.N.") Charter, India has given her adherence to the policies of pacific settlement of disputes included in Chapter VI of the U.N. Charter, which 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".

Article 51(d) of the Constitution of India declares that India in its international relations shall "foster respect for international law and treaty obligations" and endeavour to "encourage settlement of international disputes by arbitration". Though Article 51 is a directive principle that is recommendatory in nature, it provides an important guidance on how the government should engage with other nations. Article 363 of the Constitution also bars the interference by all Indian courts including the Supreme Court in matters arising out of "any provision of a treaty, agreement, covenant, engagement, sanad, or other similar instrument" leaving State-to-State conflicts to the exclusive domain of international dispute settlement process.

India's commitment towards peaceful coexistence and pacific settlement of international disputes reverberated in the 1954 India-China treaty that enunciated the "Panchsheel"—the Five Principles of Peaceful Coexistence. The idea of Panchsheel lays down the very important truth that people of different political systems could live and work together with common objectives of peaceful co-existence and development. The preamble of Panchsheel called for:

1. Mutual respect for each other's territorial integrity and sovereignty;
2. Mutual non-aggression;
3. Mutual non-interference;
4. Equality and mutual benefit; and
5. Peaceful co-existence.

These principles were also incorporated in the Declaration of World Peace and Cooperation adopted by the Asian-African Conference, Bandung, Indonesia, in April 1955 as well as in a resolution on principles of co-existence adopted by the inter-parliamentary Union at its Helsinki Session in August 1955. The Bandung "Declaration on the promotion of world peace and co-operation" called for "Settlement of all international disputes by peaceful means, such as negotiation, conciliation, arbitration or

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judicial settlement as well as other peaceful means of the parties' own choice, in conformity with the Charter of the United Nations" The Asian and African Conference declares its conviction that friendly co-operation in accordance with these principles would effectively contribute to the maintenance and promotion of international peace and security, while co-operation in the economic, social and cultural fields would help bring about the common prosperity and well-being of all.

The principles were incorporated in the U.N. General Assembly resolution on Peaceful Co-existence (presented by India, Yugoslavia and Sweden) and were unanimously adopted on Dec. 11, 1957 by the United Nations. The importance of the principles was reiterated at the Commemoration Ceremony of the 60th Asian African Conference in Bandung, Apr. 24, 2015. Even today, Panchsheel continues to be the guiding principle for India in its international relations, despite its failure in providing amicable resolution to the disputes between India and its two main neighbours, Pakistan and China.

A. Panchsheel and the Afro-Asian Initiatives on Dispute Resolution

A tangible outcome of the historic Bandung Asian-African conference and the Bandung "spirit" was the creation of the Asian Legal Consultative Committee (ALCC) in Nov. 15, 1956 (now known as the Asian-African Legal Consultative Organization (hereinafter "AALCO")) with its headquarters in New Delhi, India. The purposes and objectives of the Organization was to serve as an advisory body to its Member States in the field of international law and as a forum for Asian-African co-operation in legal matters of common concern; and to exchange views, experiences and information on matters of common concern having legal implications and to make recommendations thereto if deemed necessary.

A major achievement of AALCO was launching the "Integrated Scheme for Settlement of Disputes in the Economic and Commercial Transactions" in 1978, based on which five Regional Arbitration Centres were established, two in Asia and three in Africa, to promote and provide for international commercial arbitration in the regions. "The attempt was to establish a network of Regional Centres for Arbitration functioning under the auspices of the AALCO in different parts of Asia and Africa so that the flow of arbitration cases to arbitral institutions outside the Afro-Asian region could be minimized." More importantly, the AALCO's integrated dispute settlement scheme was a culmination of a series of efforts on the part of developing countries (ever since the Havana Conference held between 1947-1948) at international and regional levels, within and outside the U.N., to provide a fair and adequate system for settlement of disputes

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arising out of international commercial transactions including foreign investments.[1]

The decision to establish these centres was adopted at the 19th Annual Session of AALCO held in Doha (Qatar) in January 1978. The Kuala Lumpur Regional Centre for Arbitration (KLRCA) was established in 1978 was the first regional centre established by AALCO in Asia to provide institutional support as a neutral and independent venue for the conduct of domestic and international arbitration proceedings in Asia. This was followed by Cairo Regional Centre for International Commercial Arbitration (CRCICA), Egypt in 1979; Regional Centre for International Commercial Arbitration-Lagos (RCICAL) Nigeria in 1989; Tehran Regional Arbitration Centre (TRAC), Iran in 1997 and finally the recent Nairobi Regional Arbitration Centre, Kenya in 2016. These institutions were established with the objectives of:

a. Promoting international commercial arbitration in the Asian and African regions;
b. Coordinating and assisting the activities of existing arbitral institutions, particularly among those within the two regions;
c. Rendering assistance in the conduct of Ad Hoc arbitrations, particularly those held under the UNCITRAL Arbitration Rules;
d. Assisting the enforcement of arbitral awards; and
e. Providing for arbitration under the auspices of the Centre where appropriate.[2]

These arbitration centres were expected to compete with the western, historically dominant arbitral institutions such as the International Chamber of Commerce Court of Arbitration, American Arbitration Association, London Court of Arbitration, etc, that were the preferred destinations of high value international arbitration. Indeed, over the years, there has been a considerable increase in the number of cases, both international and domestic, referred to AALCO's Regional Arbitration Centres especially the older Centres. Mediation as an option has been increasingly promoted by these centres.

Despite their success in attracting and settling some international and domestic commercial disputes, these Arbitration centres could not really matchup with the Western Arbitral institutions and they remain largely

[1] Reg'l Ctr. Int'l Commercial Arbitration Cairo, *Arbitration Under the Auspices of the Cairo Regional Centre*, 2(2) ARAB L. Q. 185, 185 (1987).
[2] Asian-Afr. Legal Consultative Org. [AALCO], *Report on the AALCO's Regional Arbitration Centres*, at 2, AALCO Doc. 56/NAIROBI/2017/ORG3 (2017), http://www.aalco.int/Regional%20Arbitration%202017.pdf.

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marginalised. Their shortcomings can only be attributed to the lack of state support or sponsorship and their inability to beak in to the big league owing to the inherent bias in the structure of the international agreements and the dispute settlement processes. Other than the host nations, Asian African countries have neither shown special interest nor promoted these centres as the preferred venue for government and private contracts. The venue of most Asian or African dispute resolution has remained to be euro-centric institutions or their branches in the Asia-Pacific region, with Singapore being an exception. In fact, India is among the top three countries that use the Singapore International Arbitration Centre (SIAC) for dispute settlement.

III. INDIA AND STATE-TO-STATE MEDIATION

India has not indicated any specific preference for mediation in its international dispute resolution so far, especially in State-to-State conflicts. However, at the WTO, she was one of the proponents for a mediation-type mechanism to resolve the issue of non-tariff measures affecting imports. India, along with several other countries, co-sponsored a proposal for "[establishing] flexible and expeditious procedures of a conciliatory and non-adjudicatory nature, involving a facilitator, may promote mutually acceptable solutions to Members' concerns regarding non-tariff barriers that aid exporters and importers . . . ."[3] The proposed mechanism suggested a tight time-bound manner of resolving disputes, through dialogue and discussion, and appointment of a neutral "facilitator", if the parties should so wish. The "facilitator" would, in an impartial and transparent manner, facilitate discussions between the parties with the aim of arriving at a mutually agreed solution. In the process, the mechanism also envisaged that the facilitator may suggest possible ways to resolve the issue. Despite the support from a majority of the WTO Members, the proposal has not seen any positive push towards being implemented. This could perhaps be attributed to the general slow-down of the WTO negotiations in general.

Another interesting development is India's views towards resolving disputes of bilateral investment treaty. A recent Report of the High-Level Committee to Review the Institutionalisation of Arbitration Mechanism 2017 established in the light of an adverse award in *White Industries v. The Republic of India*[4] has shown a preference for State-to-State conflict

[3] Negotiating Group on Market Access, *Ministerial Decision on Procedures for the Facilitation of Solutions to Non-Tariff Barriers*, WTO Doc. TN/MA/W/106 (Feb. 3, 2010).

[4] The primary ground of the White Industries award was on delays of the Indian judiciary. *See generally* White Indus. Austl. Ltd. v. The Republic of India, UNCITRAL Arbitration Rule, Final Award (Nov. 30, 2011), https://www.italaw.com/sites/default/files/case-documents/ita0906.pdf.

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resolution in investment matters, over investor-to-state dispute settlement. The report urges India to explore mechanisms for alternative dispute resolutions (ADR) that are available under Bilateral Investment Treaties (hereinafter "BITs") as State-to-State dispute resolution gives states greater control over the arbitral proceedings as compared to investor-to-state arbitrations. The Report notes that:

> The rise in the number of investment arbitrations against states, as well as the high number of substantial awards made against developing countries in particular, calls for the adoption of mechanisms for dispute management by states in order to ensure that states can effectively handle disputes which arise under BITs.

India has redrafted its Model Bilateral Investment Protection Agreement (hereinafter "BIPA") to balance investor protection with the Government's regulatory powers. Article 14 of the 2015 Model BIPA prescribes a multi-tiered dispute resolution procedure which starts with a mandatory clause of "exhaust all local remedies". If satisfactory resolution is not forthcoming in five years, both parties could move on to the next stage which is a "must use" best-efforts to resolve the dispute amicably for a period of six months, only failing which can the investor submit a claim for arbitration. Further, Article 15 of the Model BIPA in the case of "Dispute between (state) parties", they should, as far as possible, settled the dispute "through consultation or negotiation, which may include the use of non-binding third-party mediation or other mechanisms." Only if such third-party mediation or other mechanisms do not produce a result in six months, then either Party may submit the dispute to an arbitral tribunal. The process is more in line with the recently concluded India-Brazil BIPA that provides for an ombudsman and state-state arbitration and focuses on dispute prevention.

Endorsing the Model BIPA, the High-Level Committee Report has specifically emphasized mediation, which has the advantage of being cost-effective, preserving confidentiality, "strengthening the relationship between the parties" and "preserving long term relationships". The Committee has recommended that the government attempts to incorporate a mandatory mediation clause in any new BIPA by India. It is here that the Asia-Pacific Regional Mediation Organization (hereinafter "ARMO") could play a constructive role as an independent institutional mechanism to facilitate dispute resolution.

Another important ongoing negotiation where the ARMO has a potential role is the Regional Cooperation for Economic Partnership (hereinafter "RCEP") negotiations, which is being negotiated among India,

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Japan, Korea, Australia, New Zealand and the Association of Southeast Asian Nations (ASEAN) nations. The RCEP is expected to be comprehensive in its scope and coverage, extending to trade in goods, services, investment, etc. The availability of the ARMO as one of the options for amicable resolution of disputes under the RCEP Agreement, could be a significant starting point for the ARMO.

IV. CONCLUDING THOUGHTS

Where dialogue and discussion fail to resolve the controversies between states, an adversarial process may not be the most efficient way. In the Indian context, mediation as a technique has not been attempted in a focused manner so far, in resolving State-to-State disputes. But there is an inherent recognition of the value for amicable and peaceful settlement of disputes through bilateral cooperation.

The ARMO, by providing a neutral and facilitative forum of experts, has significant potential in the Asia-Pacific region. Its credibility and strength will need to emerge through experience and practice. In order to make it a viable and efficient alternative that countries can resort to when required, one of the options that the proponents of the ARMO could consider, is to present it to governments to incorporate it into the ongoing negotiations for trade and investment agreements. In this context, reference of the ARMO in the proposed RCEP Agreement, or in any of the ongoing trade and investment agreements, or bilateral investment protection agreements, could perhaps provide the ARMO a significant launching pad.

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