

Introduction: The Paradox of Conciliation

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The present volume is a compilation of contributions from authors coming from different perspectives and regions submitted to a colloquium whose title was ‘Effectiveness through Flexible Procedures. International Conciliation in a Wider Context’. Indeed, conciliation is a flexible dispute settlement means and some recent practice has demonstrated its actual and potential effectiveness. Today it remains largely unemployed, underestimated and – even more regrettably – simply ignored by many practitioners and policy makers. Perhaps the latter explains the former ascertainment.

Conciliation offers the opportunity to combine it with different aspects of other means of dispute settlement, such as mediation, inquiry and arbitration. With mediation it shares the fact that what the conciliators do is just make a proposal to the parties without any binding character; with inquiry the capacity to proceed to an investigation of the relevant facts and elements of the dispute; with arbitration the feature that in general it is the product of a collective body akin to a tribunal, that a pre-established procedure is followed in which the equality of arms of the parties is guaranteed although, as mentioned, the final product is not a binding award but nevertheless constitutes a reasoned and motivated proposal.

In fact, conciliation offers multiple paradoxes. Compared with other means of settlement of international disputes mentioned in Article 33, paragraph 1 of the Charter of the United Nations (negotiation, mediation, arbitration, judicial settlement and enquiry) conciliation is certainly amongst the younger ones, if not the last one. Its first appearance in international instruments occurred in the 1920s through bilateral treaties.¹ Practice, however, started earlier. An International Joint Commission set up by the Treaty between the USA and Great Britain concerning the boundary waters between the USA and Canada acted not only as an enquiry organ but also had the power to make

1 Conciliation Convention between Chile and Sweden, 26 March 1920, League of Nations Treaty Series, No. 111; Treaty of Conciliation between the Swiss Confederation and the German Reich, 3 December 1921, League of Nations Treaty Series, No. 320; Convention between Norway and Sweden concerning the establishment of a Conciliation Commission, 27 June 1924, League of Nations Treaty Series No. 717.

recommendations.² Conciliation received a general impulse with the adoption by the Assembly of the League of Nations of a Resolution in 22 November 1922, encouraging the use of it.³ The first multilateral treaty incorporating conciliation was the 1928 Geneva General Act for the Pacific Settlement of International Disputes.⁴ At the regional level, the first general treaty exclusively devoted to conciliation was the Convention of Inter-American Conciliation of 5 January 1929⁵. Later on conciliation was included in the 1948 American Treaty on Pacific Settlement (Pact of Bogota)⁶, in the 1957 European Convention of the Peaceful Settlement of Disputes⁷ and in the 1964 Protocol to the OAU Charter on the Commission of Mediation, Conciliation and Arbitration.⁸ The work of the *Institut de Droit international* has been important in the promotion of conciliation as a means of dispute settlement at the international level, with the adoption of two Resolutions, at the Session of Lausanne in 1927 and at the Session of Salzburg in 1961⁹.

If one compares the use of conciliation with that of older means, it appears at first sight that these older ones, such as adjudication or mediation, have continued to be more employed than the newer of conciliation. In this regard, attention must be drawn to the contributions by Heinhard Steiger and Makane Mbengué and Apollin Koagne Zuapet. The former examines the practice involving European States in the early times of conciliation (between 1931 and 1957). Mbengué-Koagne Zouapet's chapter explores the important – although largely ignored in other parts of the world – experiences in Africa. Both presentations demonstrate that the belief that conciliation has never been a much used means of dispute settlement is not correct.

2 See: Charles Ch. Hyde, 'The Place of Commissions of Inquiry and Conciliation Treaties in the Peaceful Settlement of International Disputes', 23 (1929) *Proceedings of the American Society of International Law at Its Annual Meeting (1921–1969)* 146.

3 League of Nations, Records of the Third Assembly, Plenary Meetings, 1922, pp. 199–200, cited also in Ch. Hyde (fn. 2) 147.

4 *League of Nations Treaties Series*, vol. 93, 343.

5 Entered into force on 15 November 1929 but superseded by the American Treaty of Pacific Settlement (Pact of Bogota) unless both parties to a dispute have ratified the subsequent treaty (see <http://www.oas.org/Juridico/english/sigs/b-4.html>).

6 Signed on 30 April 1948 and entered into force on 6 May 1949, 30 *UNTS* 55.

7 Signed 29 April 1957 and entered into force 30 April 1958, 320 *UNTS* 244.

8 Signed on 21 July 1964 3 (1964) *ILM* 1116.

9 See the Resolution adopted at the Session of Lausanne on 2 September 1927 (Rapporteur Michel Restworowski) and that adopted at the Session of Salzburg on 11 September 1961 (Rapporteur Henri Rolin) respectively, http://www.idi-iil.org/app/uploads/2017/06/1927_lau_06_fr.pdf and http://www.idi-iil.org/app/uploads/2017/06/1961_salz_02_en.pdf.

Conciliation is frequently chosen in multilateral and bilateral treaties in their final clauses relating to the settlement of disputes concerning their interpretation or application.¹⁰ It generally appears as a residual mode of dispute settlement if the parties have not chosen an adjudicative method to settle their disputes. This choice has largely been perceived as a manner to overcome the structural divide between countries favourable to judicial or arbitral settlement and those against. In most of the cases, conciliation appears as the only compulsory means envisaged by those treaties. Yet, the faculty of unilaterally instituting the conciliation procedure remains largely unemployed.

1 Some Examples of Uses and Misuses of Conciliation

In order to assess the potentialities of conciliation, it is useful to remember some concrete cases of uses (and misuses) of this method. For many years, the work of the Conciliation Commission on the continental shelf area between Iceland and Jan Mayen was shown as an isolated example of a successful conciliation.¹¹ If many instruments envisage the possibility of recourse to arbitration or judicial settlement in case of failure of prior diplomatic means, rare are the situations in which the parties provide for procedures that go the other way round: the creation of an impartial body which will perform conciliatory functions first and then, in case of failure, arbitral ones. This was the case between Egypt and Israel with regard to the dispute concerning the establishment of boundary markers in the Taba area. An arbitral tribunal of five members was constituted. According to Article 1X of the Special Agreement,

¹⁰ Among others, the list includes the 1969 Vienna Convention on the Law of Treaties, the 1969 International Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character, the 1978 Vienna Convention on Succession of States in respect of Treaties, the 1982 United Nations Convention on the Law of the Sea, the 1983 Vienna Convention on Succession of States in Respect of State Property, Archives and Debts, the 1985 Vienna Convention for the Protection of the Ozone Layer, the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, the 1992 Convention on Climate Change, the 1992 Convention on Biological Diversity and the 1997 Convention on the Non-Navigational Uses of International Watercourses.

¹¹ See its report to the governments of June 1981, which paradoxically was published in *RIAA*, vol. XXVII, at 1–34. Comprehensive analysis of the case by Ulf Linderfalk, 'The Jan Mayen Case (Iceland/Norway): An Example of Successful Conciliation', in: Christian Tomuschat, Ricardo Pisillo Mazzeschi and Daniel Thürer (eds.), *Conciliation in International Law. The OSCE Court of Conciliation and Arbitration* (Leiden/Boston: Brill, 2017) 193–216.

after the filing of the counter-memorials a three-member chamber comprising of two national arbitrators would have the faculty to make a unanimous recommendation to the parties.¹² The two remaining members of the tribunal were kept completely out of these conciliation proceedings, which failed, with the five-member tribunal ending up fulfilling its task as an arbitral body. This hybrid solution may deserve criticism, particularly in the case in which the arbitral tribunal renders its decision on the exclusive basis of international law and may not decide *ex aequo et bono*. Conciliation and arbitration are separate and different tasks and it can be an unwise decision to require someone to perform both of them in the same case. In the example at issue, one may be particularly critical in view of the fact that not all of the members of the tribunal were put in an equal position, with some of them knowing the alternatives of conciliation and others not.

A mitigated success is that of the OAS experience in the dispute between Belize in Guatemala. The success of conducting both States to submit the dispute to the International Court of Justice conceals the prior failure of the 'facilitating' procedure to address the merits of the dispute.¹³ A successful conciliation procedure, whatever its name, essentially rests on the impartiality of the conciliators, which necessarily excludes *a priori* views on the dispute concerned, as well as political pressure that may be perceived as favouring one side of it.

A successful conciliation procedure is that initiated by Timor Leste in relation to its maritime boundary dispute with Australia by virtue of Article 298 (1) (a) (i) and Annex V of the UNCLOS. This was the first time in which this procedure was resorted to. It shows a small country using all available means in order to settle its dispute with a bigger neighbour and particularly an experienced conciliation commission successfully addressing the issue.¹⁴ Jorge Viñuales and Ginevra Le Moli examine this example in their chapter.

An example of the non-use of conciliation where it appears to be the most appropriate and available method is the case of Bolivia in its dispute with Chile regarding sovereign access to the Pacific Ocean. Bolivia brought the dispute to the ICJ by virtue of the Pact of Bogotá. As seen, this instrument also allows its States Parties to use compulsory conciliation.¹⁵ Bolivia chose the ICJ and failed

12 Arbitration Compromise regarding the permanent boundary between Israel and Egypt (with annex), signed at Giza on 11 September 1986. UNTS, No. 29013.

13 See the Special Agreement of 8 December 2008 and its Protocol of 25 May 2015, including the novelty of the holding of popular referenda in both States in: <https://www.icj-cij.org/en/case/177>.

14 See <https://pca-cpa.org/en/cases/132/>.

15 Chapter 3: Procedure of Investigation and Conciliation.

to obtain a judicial acknowledgment of the existence of an obligation by Chile to negotiate with it a sovereign access to the Pacific Ocean. The message of the Court was nevertheless that the parties should continue the dialogue to find a solution to the landlocked situation of Bolivia.¹⁶ In his declaration, the President of the Court was explicitly clear as to the limits of the judicial function:

There are certain differences or divergence of opinions between States which inherently elude judicial settlement through the application of the law. Even when these divergences have a legal dimension, tackling those legal aspects by judicial means may not necessarily lead to their settlement. This may be due to the fact that the role of the law is often limited by virtue of its instrumental dimension.

It is possible, as is the case here, that the Court may reject the relief requested by an applicant because it is not sufficiently founded on law. This may satisfy the judicial function of the Court, but it may not put to an end the issues which divide the Parties or remove all the uncertainties affecting their relations. It is not inappropriate, in such circumstances, for the Court to draw the attention of the Parties to the possibility of exploring or continuing to explore other avenues for the settlement of their dispute in the interest of peace and harmony amongst them.¹⁷

The inevitable question that arises in this context is whether it would not have been wiser for Bolivia to resort to conciliation instead of to the ICJ, since both possibilities were open by the Pact of Bogota. The possibility of conciliation still remains open.

2 Criticism of Conciliation Is Largely Exaggerated

Conciliation allows both legal analysis and considerations of opportunity, political or other to be taken into consideration. By no means is this necessarily a weakening of the role of law. The recent example of the *Timor Leste* conciliation

¹⁶ ‘... the Court’s finding should not be understood as precluding the Parties from continuing their dialogue and exchanges, in a spirit of good neighbourliness, to address the issues relating to the landlocked situation of Bolivia, the solution to which they have both recognized to be a matter of mutual interest. With willingness on the part of the Parties, meaningful negotiations can be undertaken’ (*Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*), merits, judgment, 1 October 2018, para. 176).

¹⁷ Declaration of President Yusuf, paras. 7–8.

demonstrates rather the opposite. There are disputes in which practical considerations cannot be dealt with by a judge or arbitrator exclusively applying the law and this is precisely the type of disputes which are more suitable for conciliation.

Conciliation has also been accused by its detractors as having all the inconveniences of arbitration, in particular the difficulties for the constitution of the tribunal and its heavy procedure, and none of its advantages, in particular the fact that after adversarial proceedings the outcome is not binding. One could contend rather the opposite: it has the advantages of arbitration, that is to say an adversarial procedure, and not the inconveniences of its acceptance by some States – the binding character of the decision. In conciliation they ultimately remain masters of the decision. Furthermore, conciliation procedures as established in many bilateral and multilateral instruments are subject to precise time limits. The ‘recommendation’ has the strength of a motivated reasoning. As such, if it is well-reasoned, if it has taken into account the views expressed by the parties and has fairly examined them, at the end of the day it rests somewhere in between a mere recommendation and a binding decision. Its rejection in these circumstances appears difficult.

The characteristics of conciliation are well known: 1) an organ, 2) an adversarial procedure, 3) confidentiality and 4) a non-binding report. Daniel Thürer and Serena Forlati discuss these and other elements in their respective chapters. They convincingly demonstrate the convenience and advantages of these attributes.

3 **The Potential of the Conciliation Procedure of the Court of Arbitration and Conciliation of the OSCE**

The 1992 Stockholm Convention on Conciliation and Arbitration adopted within the framework of the OSCE remains a ‘sleeping beauty’, as President Tomuschat once referred to it.¹⁸ The important number of 34 State Parties to the Convention necessarily allows for optimism in its future use. The potential is there. This is all the more true since some disputes located in Central and Eastern Europe in particular, in which law mixes with political, historical, ethnical and strategical considerations, could be excellent candidates for conciliation. Certainly, the fact that some States Parties to these conflicts are not parties to the Stockholm Convention of 1992 must be taken into account. Another

¹⁸ OSCE magazine *Security Community*, Issue 2, 2014.

possibility to be considered in order to overcome the eternalizing of these conflicts is the convening of a Pan-European Conference to address those issues, where the current OSCE Court of Conciliation and Arbitration could play a role. The case of the so-called Court of Arbitration of the International Peace Conference for Yugoslavia during the 1990s constitutes an example. The fact that its President, Robert Badinter, also became the first President of the OSCE Court of Conciliation and Arbitration is a telling symbolism.

To conclude this introduction, it is my firm wish that conciliation will soon become again a dispute settlement means to be seriously considered and employed in these particular times in which many legal disputes are intrinsically mixed with political and other realities that make difficult the use of adjudicative or even other so-called diplomatic means to settle them.

