

The Stockholm Convention in a Europe in Crisis

30th Anniversary of the Stockholm Convention on Conciliation and Arbitration within the OSCE



Proceedings of the Seminar held in November 2022
in Stockholm

THE 1992 STOCKHOLM CONVENTION IN A EUROPE IN CRISIS

The present publication is dedicated to the memory of
ROBERT BADINTER
a founding father of the Court of Conciliation and Arbitration within the OSCE and
President from 1995 to 2013

THE 1992 STOCKHOLM CONVENTION IN A EUROPE IN CRISIS

ACKNOWLEDGEMENTS

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The OSCE Court extends its gratitude to the speakers who made a substantial contribution to the seminar's topics.

H.E. **Tobias BILLSTRÖM**, Minister for Foreign Affairs of Sweden; **Laurence BOISSON DE CHAZOURNES**, Professor of International Law, Director of the Center for International Dispute Settlement, IHEID / University of Geneva; **Hans CORELL**, Ambassador (ret.), former Under-Secretary General for Legal Affairs and Legal Counsel of the United Nations; **Emmanuel DECAUX**, Professor emeritus, University of Paris II Panthéon-Assas, President of the Court of Conciliation and Arbitration within the OSCE; H.E. Ambassador **Adam HAŁACIŃSKI**, Permanent Representative of Poland to the OSCE, Chairman of the OSCE Permanent Council (2022); **Vanda LAMM**, Professor emeritus of International Law, Széchenyi István University, Győr, Vice-President of the Hungarian Academy of Sciences, former Member of the Bureau of the OSCE Court; **Mats MELIN**, former President of the Supreme Administrative Court of Sweden, Member of the Bureau of the OSCE Court; Ambassador **Carl Magnus NESSER**, Ambassador of Sweden to Switzerland, former Director-General for Legal Affairs at the Swedish Ministry for Foreign Affairs; **Stelios PERRAKIS**, Professor emeritus, International and European Institutions, Panteion University, former Ambassador, Permanent Representative of Greece to the Council of Europe; **Anne RAMBERG**, former Secretary-General of the Swedish Bar Association, Member of the Bureau of the OSCE Court; **Inga REINE**, Judge at the General Court of the Court of Justice of the European Union, Member of the OSCE Court (arbitrator); **Vasilka SANCIN**, Professor of International Law, Faculty of Law, University of Ljubljana, Member of the Bureau of the OSCE Court; **Christian STROHAL**, Ambassador (ret.), former Director of the OSCE Office for Democratic Institutions and Human Rights; **Attila TANZI**, Professor of International Law, University of Bologna, Member of the OSCE Court (conciliator); **Christian TOMUSCHAT**, Professor emeritus, Faculty of Law, Humboldt University, Berlin, former President and current Member of the Bureau of the OSCE Court; **Pál WRANGE**, Director, Stockholm Centre for International Law and Justice, University of Stockholm;

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Court of Conciliation and Arbitration

THE 1992 STOCKHOLM CONVENTION IN A EUROPE IN CRISIS

30th Anniversary Seminar of the Stockholm Convention on Conciliation and Arbitration within the OSCE – Stockholm, 24 November 2022

Proceedings

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FOREWORD

The Convention on Conciliation and Arbitration within the OSCE was adopted on 15 December 1992 in Stockholm. Following the *Charter of Paris for a New Europe* signed by the Heads of States and Governments of the Conference on Security and Co-operation in Europe on 21 November 1990, it was the culmination of the work on the peaceful settlement of disputes undertaken since the *Helsinki Final Act* of 1st August 1975. By marking the advent of a "united and free" Europe, based on good neighbourly relations and respect for the principles of international public law, the Stockholm Convention offered concrete means of amicable settlement, through procedures instituted within the framework of the Court of Conciliation and Arbitration.

A generation later, we have to admit that these great hopes have turned into great illusions. Although the Court, combining diplomatic experience and legal expertise, offered every guarantee of competence, independence and impartiality, the States parties never, ever turned to it to try to prevent a crisis or settle a dispute. By multiplying the number of "frozen conflicts" and diplomatic good offices, or even political pressure, the participating States and also the OSCE bodies have undoubtedly neglected the importance of a moral body guaranteeing legal equality between weak and powerful States and ensuring that the force of law prevails over the law of force. The situation today following the Russian Federation's aggression against Ukraine is overwhelming. In this unprecedented context of general crisis, calling into question the foundations as well as the institutions of the OSCE, it was important to rethink with lucidity the place of the Court, this forgotten Court, which has remained marginal since its origins, within an organisation paralysed by the violation of its founding principles in a Europe at war.

This anniversary offered an opportunity for a collective reflection, bringing together members of the Court, diplomats and international experts, to map out future prospects. The failure of one generation must not be the denial of a legal ideal that has come a long way. The utopia of "perpetual peace" between European states was translated after fratricidal wars into a mobilisation in favour of justice and peace, culminating in the Hague Conferences of 1899 and 1907, and then into efforts to organise the world within the framework of the League of Nations or on the basis of the 1945 Charter. The principle of the peaceful settlement of disputes is not an adjustment variable that obeys the dictates of force. It is based on good faith and reciprocity. At a time when there is so much talk of *lawfare* and "war through law", it is to be hoped that the participating States will finally realise the importance of the jurisdictional remedies offered by conciliation and/or arbitration, with patience, flexibility and confidentiality. These are not dead-ends or sidetracks, but avenues for the future. Léon Bourgeois defined peace as the "*duration of law*". Thirty years after its creation, the Court must be ready to meet the challenges of a new generation.



EMMANUEL DECAUX
President

INTRODUCTION

The year 2022 marked the 30th anniversary of the adoption of the Convention of Conciliation and Arbitration within the OSCE at the Ministerial Council in 1992. The subsequent creation of the Court in 1995 has been widely acclaimed and generated great expectations. However, the mechanisms that the Court features for the peaceful settlement of disputes have not been triggered so far. The seminar aimed at making a critical review and to adapt its arguments to the current political context and crises while underlining its usefulness and the services it can provide.

The seminar, held on 24 November 2022, was jointly organised by the Court of Conciliation and Arbitration within the OSCE (OSCE Court), the Ministry for Foreign Affairs of Sweden and the Stockholm Centre for International Law and Justice (University of Stockholm) which hosted the event and also provided a substantial financial contribution.

The first part of the one-day conference covered topics related to the origins of the 1992 Stockholm Convention, its assets and challenges as well as the obstacles faced, while looking at different methods of peaceful settlement of disputes in today's world: arbitration, conciliation, mediation. The second part featured a forward-looking approach and scrutinised the role of the Court within the different mechanisms provided by the OSCE, keeping in mind the spirit of Helsinki. The seminar's conclusions allowed to draw a new roadmap for the 1992 Stockholm Convention and to adapt its discourse to conflicts and challenges that Europe is facing today.

The seminar brought together diplomats, legal advisers, representatives of academia, members of the Court and of the Bureau who explored and discussed the topic.

The present compendium contains a selection of the proceedings of the presentations made at the seminar.

EXECUTIVE SUMMARY

The seminar to mark the 30th anniversary of the Convention on Conciliation and Arbitration within the OSCE took place on 24 November 2022 at the campus of the University of Stockholm, in hybrid format allowing remote participation. The event was co-organised by the OSCE Court of Conciliation and Arbitration, the Ministry for Foreign Affairs of Sweden and the Stockholm Center for International Law and Justice (SCILJ) of the University of Stockholm, which provided a logistical as well as a substantial financial support.

Opening Addresses

H.E. Tobias Billström, Minister for Foreign Affairs of Sweden, opened the seminar with a welcome address (recorded video message), stating that Sweden, as Depositary, was both a proud parent and the concerned guardian of this important treaty. Proud because the Convention offered a number of substantial advantages to those seeking assistance in resolving disputes peacefully, including its exemplary institutional framework, the flexibility and the cost effectiveness of its procedures and the great stature of its conciliators and arbitrators. H.E. Ambassador Adam Hałaciński, Chairman of the OSCE Permanent Council, and Permanent Representative of Poland to the OSCE, underlined in his opening statement that the principle of peaceful settlement of disputes remained a value in itself and we should still strive and advocate for it. The Court was definitely an important OSCE tool to this end, he acknowledged. Emmanuel Decaux, President of the OSCE Court of Conciliation and Arbitration mentioned that it was important for the OSCE Court to mark the 30^{ème} anniversary of the adoption of the Stockholm Convention, not only to be faithful to the past but to face the challenges of the present. “It is because the idea of peace through law is so brutally challenged today, that we must seek together the meaning of the peaceful settlement of disputes in a Europe in crisis”, he concluded.

Great Expectations

The first part of the seminar looked at the origins of the 1992 Stockholm and the great expectations it has generated. Ambassador Hans Corell who had been involved since the very beginning of the preparatory work and negotiations, recalled the very positive development experienced at that time, building up on the Charter of Paris for a New Europe of 1990, in which the Heads of the States participating in the CSCE declared that the ten principles of the Helsinki Final Act would guide them towards an ambitious future. In particular, they reaffirmed their commitment to settle disputes by peaceful means and decided to develop mechanisms for the prevention and resolution of conflicts among OSCE participating States.

Thirty years after the Ministerial Council meeting in Stockholm, 34 States have become parties to the Convention, without any dispute being submitted to the Court, however. Therefore, a critical review was needed to assess the Court’s role in today’s globalised world taking into account the geopolitical situation and the realm of inter-state dispute settlement in a larger context.

Challenges and Opportunities

The second part of the seminar shed light on the challenges faced by the Court. Since its creation in 1995, the global structures of the international community had undergone a remarkable shift in the three last decades, which has seen a multiplication of available mechanisms and a move from sovereign States to civil society and private sector actors, as well as regional entities. In this context, the limits of inter-state disputes were underlined. As already identified earlier, the Court faced many competitors, mainly in European institutions. While the multiple structures proposing a vast array of procedures, be it mediation, conciliation or arbitration, have flourished in recent years, they could be seen as complementary and not necessarily as mere competitors. The fragmentation of the OSCE area and many absentees from the list of States parties did not help to bring the Court in the forefront of the mechanisms available within the OSCE, concluded Emmanuel Decaux. He questioned above all the lack of political will.

New Approaches

While the Court yet needed to prove its effectiveness and efficiency, its existence and the available mechanisms remained still relevant. In her presentation, Vanda Lamm, underlined the specific characteristics of the OSCE Court as a court of arbitration, but also a forum for conciliation, which has a broad jurisdiction and very flexible mechanisms. Given the great flexibility of the Court, she presented the idea to set up a specific “model rules of procedure” for conciliation commissions and arbitral tribunals that would give the parties a clear support and expedite the setting up of the conciliation commissions and arbitral tribunals, resulting in a speedier ending of the cases.

To the question of the adaptation of the Stockholm Convention to changed circumstances, Christian Tomuschat came to the conclusion that a dynamic process of consultations between the parties during the proceedings was perfectly perceivable in the current provisions of the Convention. This enhanced consultation process could conduct from conciliation to mediation, the momentum of which might generate a new spirit of confidence, he concluded.

To the question whether there have been any missed opportunities, Vasilka Sancin, addressed the subject from the point of view of “lessons learned” and potentials for a future proactive stance. While the Bureau members necessarily had to refrain to over-eagerly approach States in order not to jeopardize the Court's independence and impartiality as fundamental postulates of international adjudication, it needed to find the right balance in promoting the Court.

The findings brought about at the seminar will give some guidance to define the further strategy of the Bureau. It will endeavour to extend the number of States parties to the Stockholm Convention, engage on a more proactive path and seek a better integration in the mechanisms available within the OSCE for the resolution of conflicts and confidence-building measures.

The seminar was opened with welcome addresses of H.E. Tobias BILLSTRÖM, Minister for Foreign Affairs of Sweden and H.E. Ambassador Adam HAŁACIŃSKI, Chairman of the OSCE Permanent Council and Permanent Representative of Poland to the OSCE, as well as Emmanuel DECAUX, President of the Court of Conciliation and Arbitration within the OSCE.

Speakers at the seminar included (cf. biographical notes in Appendix I):

- Laurence BOISSON DE CHAZOURNES
Professor of International Law, Director of the Center for International Dispute Settlement, IHEID / University of Geneva
- Emmanuel DECAUX
Professor emeritus, University of Paris II Panthéon-Assis,
President of the Court of Conciliation and Arbitration within the OSCE
- Hans CORELL
Former Under-Secretary General for Legal Affairs and Legal Counsel of the United Nations
- Vanda LAMM
Professor emeritus of International Law, Széchenyi István University, Győr, Vice-President of the Hungarian Academy of Sciences, former Member of the Bureau of the OSCE Court
- Stelios PERRAKIS
Professor emeritus, International and European Institutions, Panteion University,
former Member of the OSCE Court
- Inga REINE
Judge at the General Court of the Court of Justice of the European Union,
Member of the OSCE Court (arbitrator)
- Vasilka SANCIN
Professor of International Law, Head of the Department of International Law,
Faculty of Law, University of Ljubljana, Member of the Bureau of the OSCE Court
- Christian STROHAL
Former Director of the OSCE Office for Democratic Institutions and Human Rights
- Attila TANZI
Professor of International Law, Faculty of Law, University of Bologna,
Member of the OSCE Court (conciliator)
- Christian TOMUSCHAT
Professor emeritus, Faculty of Law, Humboldt University, Berlin,
former President and current Member of the Bureau of the OSCE Court
- Pål WRANGE
Director, Stockholm Centre for International Law and Justice, University of Stockholm

Mats MELIN, former President of the Supreme Administrative Court of Sweden, and Anne RAMBERG, former Secretary-General of the Swedish Bar Association, who are both members of the Bureau of the OSCE Court, chaired the sessions.

Ambassador Carl Magnus NESSER, Director-General for Legal Affairs at the Swedish Ministry for Foreign Affairs, wrapped up the discussions with concluding remarks.

OPENING ADDRESS

H.E. Ambassador Adam HAŁACIŃSKI

Chairman of the OSCE Permanent Council,
Permanent Representative of Poland to the OSCE

Mr. Chairperson,
Distinguished Minister Billström,
Distinguished President of the Court, Professor Decaux,
Excellencies,
Ladies and gentlemen,

It is my great pleasure to join you today at this seminar to mark the 30th anniversary of the adoption of the Stockholm Convention on Conciliation and Arbitration within the OSCE. I thank the organisers for inviting me. Poland recognises and highly appreciates the commitment of Sweden and the work of the Swedish OSCE Chairpersonship throughout last year that aimed at promoting the Stockholm Convention, the Court and more broadly, the OSCE conflict prevention tools. Let me also take this opportunity to express our gratitude to Professor Decaux for the excellent cooperation we have been enjoying this year. Ladies and gentlemen, I fear that bringing my perspective from this year as Chair of the OSCE Permanent Council may make our discussion rather gloomy. I hope, however, that other speakers will be able to shed more light and hope on this picture, as the title of this seminar states.

Indeed, Europe is in crisis for almost nine months and an open full-scale war is taking place in Europe. The front line is less than 2000 kilometers from Stockholm and even closer to Vienna. We know perfectly well that the conflict affects us all. It is needless to repeat it here among international lawyers, but the fact that Russian Federation's war against Ukraine is illegal, must be repeated continuously, over and over again. By attacking Ukraine, the Russian Federation has breached several peremptory norms of international law. It has defied the prohibition on the use of military force and the obligation to resolve international disputes peacefully. By threatening to use weapons of mass destruction it has also violated the prohibition on the threat of the use of force stipulated in Article 2, paragraph 4 of the United Nations Charter. By ignoring its international legal obligations, Russia has contravened the principle of fulfilling its international obligations in good faith. Russia has also negated the Ukrainian people's right to self-determination, which includes the right to choose their own political system and the right to make free decisions regarding participation in political, economic and military alliances. This happened in violation of the principle of non-interference in internal affairs. All of these examples describe the utmost contempt for the basic principles of the international legal order, the latter and the spirit of the United Nations Charter and the entire Helsinki Decalogue. This illegal war is also inhuman. It brings enormous suffering to millions of people. It is conducted with disregard to international humanitarian law and human rights law. We already have seen credible reports of war crimes being committed in Ukraine, and we may expect with sorrow many more to be discovered.

The consequences of this illegal war are multifaceted and global. In our domain, diplomacy, there is uncertainty and unpredictability. States have reconsidered their policies or even alliances. They redefined their strategic interests, goals and vision for international cooperation. It is a dynamic, ongoing process that will continue, and we do not know the outcome. Having said that, the main point I am going to make is that the crisis we are facing – the real crisis spelled out with a capital C - is much greater than perhaps we immediately see it. It is not caused by war in Ukraine. On the contrary, the war is a consequence of it. The underlying problem that we as an international community face is with adherence to norms by all states or, more legally speaking, respecting the rule *pacta sunt servanda* by all.

This crisis has been with us already for years. We see it crystal clear at the OSCE. It has even its own name: selective implementation. It has been developing gradually. For years it has been neglected, pretended not to exist, denied or disregarded as long as OSCE business as usual was possible. Our organisation is of purely political nature. Political will is everything. The starting point and ultima ratio of any deliberations, political will and making decisions by consensus are the two pillars on which the organisation is founded. They are, at the same time the strongest, but also the weakest side of this club practically speaking. Anything in the OSCE could be subject to bargaining, trade-offs or even blackmail. When preparing for our OSCE presidency this year, we were aware of those political circumstances. We were not naive about making substantial progress or changing drastically the trend. What we were hoping for was a common sense of responsibility for our collective security and the OSCE. With everything it represents, we were also determined to stand by the rules and principles, protecting the latter and the spirit of the so-called Helsinki Decalogue. Witnessing a drastic deterioration of the security situation at the beginning of this year, we were doing everything possible to prevent the worst from happening. We took advantage of all the tools that the OSCE had at its disposal to de-escalate. Moreover, we initiated a range of consultations on the OSCE's role in addressing the ongoing tensions. Our imperative was to find a way for diplomacy to prevail over the use of force. Our vision was translated into a proposal to launch a renewed European security dialogue. In that endeavor, we were guided by the conviction that the OSCE was still a vital pillar of the international system. What happened afterwards is well known. I am saying all this not to state that we failed, but to underline that Poland strongly believes in the international law and the rules based international order. There is no alternative for international legal order based on all the main principles enshrined in the United Nations Charter and the Helsinki Final Act. Furthermore, there is nothing fundamentally wrong with our principles. I dare to say, it is unlikely that we would be able to invent any comprehensive international system aimed at peace and prosperity for all that was not based on the same principles and norms we have developed over the last decades, particularly after the Second World War. The real challenge we face is not to establish new rules, but rather how to ensure compliance with the existing ones, how to make sure that violating them would be uneasy, unprofitable, or even practically impossible and how to ensure that taking responsibility for breaching those commonly agreed principles is inevitable. If we can somehow find answers to these questions, we will not see most of the problems we face today again.

I strongly encourage you to discuss the Stockholm Convention and the OSCE Court of Conciliation and Arbitration from that standpoint, with those questions at the forefront of your mind. Let us not fall into the trap of doubting our achievements. Just because an understanding

of their importance is not shared by some does not mean that they are somehow incorrect or need to be changed. The principle of peaceful settlement of disputes remains a value in itself, and we should still strive and advocate for it.

Ladies and gentlemen, today more than ever, we should ensure that law and rules prevail over the use of force and aggression in international relations. The Court is definitely an important OSCE tool to this end. I sincerely hope that this seminar will serve as a useful opportunity to address some of these pertinent questions. I would like to thank you for your attention and wish you a very fruitful discussion.

OPENING ADDRESS

Professor Emmanuel DECAUX

Professor emeritus, University of Paris II, Panthéon-Assas
President of the Court of Conciliation and Arbitration within the OSCE

First, on behalf of the Court of Conciliation and Arbitration, I would like to warmly thank the Minister for Foreign Affairs of Sweden, H.E. Tobias Billström, and Ambassador Adam Hałaciński, Representative of the OSCE Chairpersonship-in-Office, for their opening messages that put us right at the heart of the issue of this seminar.

Our gratitude also goes to our Swedish colleagues, in particular Ambassador Carl Magnus Nesser and Professor Pål Wrangé, who were able to give a dual diplomatic and academic dimension to this event, following on from the preparatory conference held in Stockholm last May. I would like to thank their teams as well as Ms. Christa Allot, the Executive Secretary of the Court, for this perfect organisation. Finally, I would like to thank all the speakers and the participants in this seminar, whether they are present in this room or online.

It was important for the Court to mark the 30^{ème} anniversary of the adoption of the Stockholm Convention, not only to be faithful to the past but to face the challenges of the present. It is because the idea of peace through law is so brutally challenged today, that we must seek together the meaning of the peaceful settlement of disputes in a Europe in crisis. In a spirit of seriousness and lucidity, but also of collective will and commitment to the law, our objective is threefold.

I - First, we must pay tribute to the founding fathers of the Convention. Things were not easy either at the turn of the 1990s, when, after the fall of the Berlin Wall, the post-war borders were not guaranteed, in particular the Oder-Neisse line, and the break-up of the former Yugoslavia that brought war back to Europe. Following the dissolution of the Soviet Union, the number of participating States increased from 35 in 1990 to over 50 in less than two years, reaching a total of 57 to date.

The CSCE was able to build collective security, "*co-operative security*", on solid principles and flexible mechanisms at that crucial moment. It was the grand design of German Minister Hans-Dietrich Genscher and his peers, to fully integrate the peaceful settlement of disputes into the pan-European framework of the OSCE. The ambition of the drafters of the Stockholm Convention was thus to give a practical effect to the commitment contained in Principle V of the Helsinki Final Act of 1975, by establishing a permanent institution, combining arbitration and conciliation, available to the States parties to the treaty, as well as to all participating States. Robert Badinter, the Court's first President, and the members of the Bureau, in particular Lucius Caflisch, are to be commended for their leadership in setting up the concrete framework of this noble ideal, for which they have remained tireless advocates. The bibliography recently published online by the Court shows how much the Convention has resonated with internationalists. Let us mention here the collective works published by Christian Tomuschat, my eminent colleague and friend, when he was President of the Court, notably *Flexibility in*

International Dispute Settlement, Conciliation Revisited published in 2020, which open many avenues.

II - However, despite these tireless efforts and repeated encouragement, we must all take stock. The Court exists, it is in working order, but to do what? What does remain thirty years later of this originally promising enterprise? Great hopes, great expectations, perhaps great illusions... We could be satisfied if the world was going well! Like a fire engine in the garage, when there is no fire. But legal disputes of all kinds, juxtaposed, added up, entangled and festering, escape all control.

For the past twenty years, the participating States seemed to have resigned themselves to the multiplication of "*frozen conflicts*", geopolitical crises that were swept under the carpet because they could not be resolved in accordance with OSCE principles and commitments, while diplomatic negotiations in various formats stalled. The 2008 war between Georgia and Russia, followed by the one in 2014 between Russia and Ukraine, paved the way for Russia's full-scale military aggression against Ukraine in February 2022, threatening the regional stability and world peace, in defiance of the principles of public international law.

At this point, it should be recalled that the peaceful settlement of disputes only makes sense in a situation of peace, as Lucius Caflisch said. The mechanisms of the Stockholm Convention presuppose the good will and good faith of the States involved, in accordance with the spirit of Helsinki. But in the framework of a necessary peace, conciliation and arbitration have their place, as shown by the very useful work of the bilateral commissions established by the post-war peace treaties, such as the Franco-Italian conciliation commission set up by the 1947 treaty.

Furthermore, the Court of Conciliation and Arbitration retains its potential to resolve limited conflicts, remove irritants by promoting "confidence-building measures", particularly between States Parties who should be the first to demonstrate their commitment to the peaceful settlement of disputes.

More than ever, a generation after the adoption of the Stockholm Convention, the Court seems to me to be necessary. It should be useful not only as a symbol of a legal ideal that has lasted for centuries, but as a guarantee of efficiency for a community of States governed by the rule of law.

III - This is why our seminar intends to look to the future, to transform the new challenges into opportunities. I do not want to anticipate the speeches and debates that we are expecting, but we feel that we need to take a leap of faith, a "*reset*".

As a multilateral treaty, with its own circle of States Parties, but based on OSCE principles and commitments, the Stockholm Convention provides the Court with a solid legal framework, combined with great flexibility. Thus, arbitration can be combined with conciliation if States so wish, offering a chance for an amicable settlement while safeguarding the possibility of a binding decision. But States can also opt directly for arbitration or for a conciliation attempt. The Convention is a general framework that may seem far removed from reality, but it also offers a great deal of scope to adapt to the new challenges of the contemporary world. From

the outset, President Badinter emphasised problems relating to the environment, neighbourhood issues and transboundary damage. Some disputes go beyond the inter-state framework assigned to the Court, but many cases could be referred by States to its confidential conciliation and good offices procedures. In this regard, it is conceivable that States Parties or OSCE institutions could refer cases to the Court informally, on an *ad hoc* basis, for an informed opinion.

The Court has established regular contacts with the OSCE institutions, thanks in particular to recent Chairpersonships-in-Office - such as those of Albania, Sweden and Poland - and wishes to develop these relations not only in Vienna, but also in Copenhagen with the Parliamentary Assembly and in Warsaw with the Office for Democratic Institutions and Human Rights (ODIHR), to recall its primary mission "*within the OSCE*", and its readiness to contribute to the resolution of inter-state disputes, in a prompt, diligent and discreet manner, from the earliest stages, through prevention and *early warning* as well as fact-finding. In a word, the Court must be part of the toolbox of OSCE institutions.

From the very beginning, our Court has also established contacts with the Council of Europe, in particular through the *Ad Hoc* Committee on International Law (CAHDI/CAHIL), stressing the complementary nature of the mechanisms, and all the more so since the entry into force of Protocol No. 11 in 1998, as the new European Court of Human Rights cannot perform the Commission's former investigative or good offices functions. Here too, the Court of Conciliation and Arbitration must be fully integrated into the European landscape.

In any case - and I would like to end with a testimonial to them - I am sure that the jurisconsults and diplomats who make up the two panels of the Court, the panel of arbitrators and the panel of conciliators, with their experience and competence, their independence and their impartiality, are worthy of your trust.

The Court is at work, in all its diversity, ready to meet the challenges that await it. Thirty years after the adoption of the Stockholm Convention, I hope that we will be able to say in turn, like François de Malherbe, a lawyer who was also a poet: "and the fruits will pass the promises of the flowers".

THE ORIGINS OF THE STOCKHOLM CONVENTION: ASSETS AND OBSTACLES

Hans CORELL

Former Under-Secretary-General for Legal Affairs and Legal Counsel of the United Nations

Excellencies,
Ladies and gentlemen,
Distinguished participants,

In this Seminar entitled “The 1992 Stockholm Convention in a Europe in Crisis”, I have been invited to address the topic “The origins of the Stockholm Convention: assets and obstacles”. I do this with great pleasure since I was deeply involved in this process initiated by the Conference on Security and Co-operation in Europe (CSCE).

In particular, I would like to stress the very positive political development that we had experienced in Europe at the time. It started with the Helsinki Final Act in 1975 with its ten principles, among them the principle of peaceful settlement of disputes.¹

And then, in 1989, the Berlin Wall came down making a tremendous difference in the political climate in Europe.

In 1990, this was followed by the Charter of Paris for a New Europe, in which the Heads of State and Government of the States participating in the CSCE declared that the ten principles of the Helsinki Final Act would guide them towards an ambitious future.² In particular, they reaffirmed their commitment to settle disputes by peaceful means and decided to develop mechanisms for the prevention and resolution of conflicts among the participating States. They also committed to define, in conformity with international law, appropriate mechanisms for the peaceful resolution of any dispute which may arise, including mandatory third-party involvement. They stressed that full use should be made in this context of the opportunity of the Meeting on the Peaceful Settlement of Disputes which would be convened in Valletta, Malta, in the beginning of 1991.

Against this background it was a very positive atmosphere when we gathered in Valletta in early 1991. When I met with the experts participating in the meeting, I realised that many of them were colleagues that I knew from before, namely chief legal advisers of ministries for foreign affairs. We used to meet in the Committee of Legal Advisers on Public International Law (CAHDI) in the Council of Europe. And we had also started meeting in informal consultations with colleagues from all over the world on the margins of the meeting of the Sixth (Legal) Committee of the UN General Assembly in the autumns.

¹ See <https://www.osce.org/files/f/documents/5/c/39501.pdf>

² See: <https://www.osce.org/mc/39516?download=true>

Our meeting in Valletta – The CSCE Meeting of Experts on Peaceful Settlement of Disputes – was intense and took place between 15 January and 8 February 1991.

The atmosphere was very positive. The negotiations were held against the background of the Charter of Paris for a New Europe, signed by the Heads of State or Government of all the CSCE participating States on the 21st of November 1990.

During our deliberations we took note of the fact that the States were already bound by a number of agreements containing various methods for peaceful settlement of disputes. It was also noted that many participating States were parties to the 1899 and/or the 1907 Hague Conventions for the Pacific Settlement of International Disputes. We also noted that many of them had accepted the jurisdiction of the International Court of Justice, in accordance with the Statute of the Court.

A number of proposals were submitted for consideration by our meeting, which resulted in a report containing principles for dispute settlement and provisions for an easy procedure for peaceful settlement of disputes.³

In our report, reference was made to the Helsinki Final Act and that all the ten principles of the Declaration on Principles Guiding Relations between Participating States were of primary significance and, accordingly, applied equally and unreservedly, each of them being interpreted taking into account the others.

The report contained provisions for a CSCE process for peaceful settlement of disputes, formulated in 16 sections, the basic provision being that any party to a dispute could request the establishment of a CSCE Dispute Settlement Mechanism by notifying the other party or parties to the dispute. In the draft, there were also provisions on the role of the Committee of Senior Officials. It was also understood that the parties to a dispute could accept any comment or advice of the Mechanism as binding, in part or in full, with regard to the settlement of the dispute.

The report was submitted to the CSCE Council of Ministers. At a meeting in Berlin on 19-20 June 1991 the ministers endorsed the report of the Valletta Meeting and agreed to designate the Conflict Prevention Centre as the nominating institution for the CSCE Dispute Settlement Mechanism under the provisions of the recommendations thereto of the Committee of Senior Officials. The ministers also recalled the experience of the Permanent Court of Arbitration and its Secretary-General which should be drawn upon, if so agreed, when the CSCE Procedure for Peaceful Settlement of Disputes was implemented and noted that appropriate use could be made of the premises and facilities of the International Bureau of the Permanent Court of Arbitration.

However, it was soon decided that the members of the experts on peaceful settlement of disputes should develop a full-fledged treaty on settlement of disputes. For this purpose, we had meetings in Geneva in 1992. First, we established working groups to prepare texts that

³ See <https://www.osce.org/secretariat/30115>

were later discussed in plenary meetings. The result was the draft of what eventually became the Convention on Conciliation and Arbitration within the CSCE. The draft was presented to the Council of Ministers. On 15 December 1992, at their meeting here in Stockholm, the Council adopted the Convention.⁴

The Convention entered into force in 1994 and has been ratified so far by 34 OSCE participating States. The Court is based in Geneva, Switzerland, and operates as an independent institution functioning in accordance with OSCE principles.

This brings me to an important development with respect to the Conference on Security and Cooperation in Europe, namely the transformation of the Conference into an Organization – the Organization for Security and Co-operation in Europe (OSCE).⁵ I was also deeply involved in this process, chairing a working group of experts – basically the same colleagues as had developed the Convention – requested to formulate provisions that could transform the Conference into an Organization.

This exercise was later translated into the CSCE Budapest Document 1994 Towards a Genuine Partnership in a New Era. In this document are found inter alia the Budapest Summit Declaration and Budapest Decision I.⁶ The following two paragraphs in the declaration are of particular interest in this context:

Paragraph 3: The CSCE is the security structure embracing States from Vancouver to Vladivostok. We are determined to give a new political impetus to the CSCE, thus enabling it to play a cardinal role in meeting the challenges of the twenty-first century. To reflect this determination, the CSCE will henceforth be known as the Organization for Security and Co-operation in Europe (OSCE).

Paragraph 22: The Government of Hungary is requested to transmit to the Secretary-General of the United Nations the text of the Budapest Document, which is not eligible for registration under Article 102 of the Charter of the United Nations, with a view to its circulation to all the members of the Organization as an official document of the United Nations.

The following paragraph in the decision is of particular interest in this context:

Paragraph 29: The change in name from CSCE to OSCE alters neither the character of our CSCE commitments nor the status of the CSCE and its institutions. In its organizational development the CSCE will remain flexible and dynamic. Work will be continued on issues relating to further institutional development of the CSCE, including strengthening and rationalization of its instruments and mechanisms. The CSCE will regularly review its goals, operations and structural arrangements. The CSCE will review implementation of the Rome Decision on Legal Capacity and Privileges and

⁴ See <https://www.osce.org/files/f/documents/e/9/459919.pdf>

⁵ See <https://www.osce.org/who-we-are>

⁶ See: <https://www.osce.org/mc/39554?download=true>

Immunities and explore if necessary the possibility of further arrangements of a legal nature. Participating States will, furthermore, examine possible ways of incorporating their commitments into national legislation and, where appropriate, of concluding treaties.

This was the situation when I left Sweden in March 1994 to take up my position as the Legal Counsel of the United Nations in New York. Therefore, I lost contact with the further work to develop the OSCE. However, I know that an enormous amount of work has been put into this process and that the OSCE has now developed into an organization with an impressive amount of institutions and structures, in addition to the Court of Conciliation and Arbitration.

However, as I understand it, the question of the legal status of the OSCE is still a matter that has not been resolved. I know that, in 2009, an open-ended Informal Working Group on Strengthening the Legal Framework of the OSCE engaged in work to resolve a number of questions, among them the legal status of the OSCE. Different options were discussed, among them an option entitled: "Implementation of the 1993 Rome Council Decision through signature and ratification of the 2007 Draft Convention by a group of interested participating States." In 2007, a draft convention on international legal personality, legal capacity and privileges and immunities of the OSCE had namely been drawn up by an Informal Working Group at expert level. The Informal Working Group on Strengthening the Legal Framework of the OSCE has held several meetings since then. I also know that Austria, as Host State, has taken the step of recognising the status of the OSCE as a subject of international law by concluding a headquarters agreement with the OSCE.

However, since I am not an expert in these details, I do not think that it is appropriate for me to delve in these matters in a short introductory statement, in particular since there are experts here who have written about the problems in this field. Among them I recognise Professor Christian Tomuschat, who is present among us today.

Let me close by saying that my experiences in the early 1990s of working for the CSCE are very positive. It was an era when we hoped for a very positive development in Europe, in particular since the Helsinki Final Act had attracted such attention and approval among States in Europe and North America.

It is therefore with great sadness that I see that one of the initiators of the Helsinki Final Act is now behaving in a manner completely at variance with the purpose of the founding of the CSCE. The words "in a Europe in Crisis" in the title of our seminar are therefore a sad reminder of the fact that not even permanent members of the United Nations Security Council understand that they must set the example for the rest of the world when it comes to respecting international law. In this case the Russian Federation is violating the most fundamental provisions in the Charter of the United Nations. And the attack on Ukraine is an obvious crime of aggression.

Democracy and the rule of law are preconditions for creating a world in which human beings can live in dignity with their human rights protected. Since the OSCE is a very political organization, I will not miss the opportunity of drawing attention to a publication of some 40

pages, freely available on the web for downloading and printing in 26 languages, including Russian and Ukrainian. It is entitled “Rule of law – A guide for politicians”.⁷

Thank you for your attention!

⁷ See <https://rwi.lu.se/publications/rule-law-guide-politicians/>

CHALLENGES FACED BY THE COURT

Vanda LAMM

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First, let me thank the Ministry of Foreign Affairs of Sweden for organising this Seminar to commemorate the signature of the Convention on Conciliation and Arbitration within the OSCE. It's an honour and pleasure for me to be with you and to say a few words on the challenges faced by the Court.

The last third of the 20th century and the first decade of the 21st century were marked by the proliferation of international judicial bodies, and several, primarily regional courts, in addition, international criminal courts and tribunals dedicated investigating and prosecute individual people for serious violations of international criminal law or international humanitarian law were established as well.

The OSCE Court of Arbitration and Conciliation was also set up in this period, however, this forum is different from the courts or tribunals coming into being then in many respects. First and foremost, this forum is at disposal for the States for conciliation and arbitral settlement of disputes. It has very wide competence, essentially, it is an institution for the settlement of any inter-state dispute, and from this viewpoint, the OSCE Court significantly differs from other courts established at that time, the majority of which has special jurisdiction (human rights courts, courts of economic integration organisations). That is, the OSCE Court of Arbitration and Conciliation is not only a court of arbitration, but a forum for conciliation, it has some characteristics of a forum with permanent jurisdiction and of a court of arbitration, which has broad jurisdiction and a very flexible mechanism.

The foundation of the OSCE Court of Arbitration and Conciliation is chiefly related to the armed conflict emerging after the dissolution of the former Yugoslavia. At that time, it was anticipated that after the termination of the hostilities, the OSCE Court of Arbitration and Conciliation would be especially suitable for conciliation or arbitration between the successor States of the former Yugoslavia with respect to its regional character and extraordinarily broad *ratione materiae* jurisdiction.

Beyond this, the OSCE Court of Arbitration and Conciliation has several advantages in comparison with other dispute settlement bodies, despite this, the States have not had applied to this forum yet.

We need to mention that it is not scarce in international law that the States set up certain judicial bodies, then subsequently do not resort to those or only sporadically. It is also instantiated that the States over time attempt to revive certain inactive courts via the introduction of reforms. In international law the third-party settlement and the judicial settlement of disputes is voluntary, the States are not obligated to resort to international courts or

tribunals, with the exception that they assume such an obligation in advance. This applies to other mechanisms of the peaceful settlement of disputes. Thus, it might arise that certain courts or tribunals are destined to inertia, or the initial enthusiasm of the States for these institutions may abate.

It is well known that the intention of the drafters the Convention on Conciliation and Arbitration within the OSCE was, and it could be expected with good reason, that the States of the Western-Balkan region would more willingly submit their disputes to an institution working under the auspices of the OSCE than to a universal international dispute settlement mechanism.

All the more so, since one can expect a final decision from the OCSE Court much quicker than from e.g., the International Court of Justice. It could also be assumed with good reason that with the termination of the hostilities between the Western-Balkan States, numerous disputes to be settled would emerge, not only in connection with the armed conflict but rather as a consequence of the dissolution of a former federal State and several problems related to the succession of States. It could also be anticipated that not only the successor States of the former Yugoslavia would apply to the OSCE Court of Arbitration and Conciliation, but other States as well.

As it is familiar, this was not the case, which has several reasons. *Nota bene*, the former Bureau, just like the current one, have dealt with this issue considerably. Professor Tomuschat, former President of the Court, and the current President, Professor Decaux, and others as well, have emphasised in writing and at different conferences and presentations the advantages of turning to the OSCE Court of Arbitration and Conciliation several times.

As a consequence of the proliferation of international courts and tribunals, the States in fact have several fora at their disposal, and they may freely opt for the mode, the means or international judicial institution for the settlement of their disputes.

A great advantage of arbitration courts in comparison with permanent courts is that on the one hand the parties can decide who they designate to settle their dispute, and on the other hand, cases come to their conclusion far earlier than cases before permanent courts. It is not inadvertent that despite the proliferation of international courts, the States frequently apply to arbitration courts. If we have a closer look at the time range of reaching a final decision by permanent international courts, we can certainly see that decisions to be made take lengthy months, but more frequently years, may it be the International Court of Justice, the International Tribunal for the Law of the Sea or the European Court of Human Rights. In many cases, the parties are deterred from filing applications to international judicial fora by the lengthiness of the proceedings.

In the case of the OSCE Court of Arbitration and Conciliation it would be worthwhile to consider how it could be guaranteed, in view of the rules in effect, that Conciliation Commissions or Arbitral Tribunals constituted pursuant to the Convention on Conciliation and Arbitration reach a mutually acceptable settlement or render a final arbitral award in a much shorter time than other international institutions or judicial bodies.

In view of the Rules of Procedure of 1997, we can find provisions, which would be worth dealing with, or, within the framework of which we could facilitate the setting up of a Conciliation

Commission or an Arbitral Tribunal. Here one can refer to Articles 19 and 27 of the Rules of Procedure. Under these provisions both the conciliation commissions and the arbitral tribunals shall lay down its own rules of procedure.

By all means, these clauses guarantee great freedom to the conciliation commissions and the arbitral tribunals in the drafting of their rules of procedure. At the same time, it entails the danger of the prolongation of the procedure. For that specific reason, it would be advisable to elaborate model rules of procedure, which could serve as a model for conciliation commissions and the arbitral tribunals. It needs to be emphasised that the application of this model rules would not be mandatory, at the same time, it could promote the elaboration of their own rules of procedure. One could say that such a document would distinctly support and expedite the setting up the conciliation commissions and arbitral tribunals and the ending of the cases.

I believe that for the OSCE Court of Arbitration and Conciliation it is a challenge and a matter of concern that this institution is not sufficiently familiar yet. It is unquestionable that in the interest of enlightening the advantages of the Court a great deal has been done, scientific conferences have been organised, volumes of essays and studies have been published with authors and lecturers of distinction. These have received great professional feedback. Nevertheless, I am not sure whether these reached the threshold of response of political decision-makers, and whether they are familiar with the OSCE Court of Arbitration.

Unfortunately, in the territory of Europe a war is fought currently, an armed conflict, which we have not seen on the continent since World War Two. We can only express our hope that this war will come to an end sooner or later and the politicians will realise that disputes should be settled by peaceful means. It would be impossible to enumerate how many matters, disputes await resolution between the warring parties after the termination of the war, to the settlement of which the OSCE Court of Arbitration and Conciliation could by all means contribute.

MISSED OPPORTUNITIES

Vasilka SANCIN

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Member of the Bureau of the Court

Ladies and gentlemen, good morning,

At the outset, I wish to thank all the organisers of today's jubilee conference, and in particular Ambassador Carl Magnus NESSER, Director-General for Legal Affairs at the Swedish Ministry for Foreign Affairs for his unwavering support to the Court.

Speakers before me have already addressed some of the fundamental issues surrounding the Court's establishment and 30 years of its existence, and many speakers yet to follow will provide important insights into the new challenges for the future. Allow me nevertheless, to say a few words under a title "missed opportunities" that was assigned to me for the purposes of this panel, but I promise not to deliver a pessimistic assessment of the past, but rather focus on lessons learned and potentials for future proactive stance, briefly contemplating on three issues: 1) Court's appearance and visibility, 2) one selected advantage of the Court in comparison to other arbitration proceedings available for resolution of inter-state disputes (recognising that other speakers will be perhaps picking on others), and 3) issue a call for Court's strategic constructive interaction with OSCE participating States through many OSCE institutions and mechanisms and beyond.

Let me briefly first turn to the Court's APPEARANCE and VISIBILITY.

Perhaps it is poignant to paraphrase Daniel Willey who wittingly noted that "*Too often, we miss out on opportunities because we were too busy waiting for them to fall into our lap that we missed them tapping on our shoulder.*" It is true that the Court, particularly members of the Bureau should always be on guard not to in any way jeopardise Court's independence and impartiality and appearance thereof, as fundamental postulates of international adjudication. It is always tricky to find the right balance when trying to promote the Court and engage in awareness-raising activities by the members of Court, while at the same time ensuring that these members would be able to sit in the conciliation commission or arbitral tribunal without challenges as to their independence and impartiality. Nonetheless, the Court has perhaps until recently exercised to much self-restraint, except on a few noteworthy occasions which led to organisation of symposia producing, among others, important volumes of collected works. Due to limited engagement in proactive promotion of the Court through all available means, including with the use of modern technologies and social platforms, the Court risks that "tappings" on the shoulder will be too few and too far in between.

It is self-explaining, if I mention that the Court only this year agreed upon and obtained its proper official logo, which albeit symbolic, testifies to the Court's professionalism and readiness to yield meaningful results.

I am thrilled to report here on this august occasion that by introducing a simulation of arbitration within the Court in the annual international MUNLawS competition for university and high school students, organised by the Faculty of Law of the University of Ljubljana, we have succeeded in providing training on arbitral proceedings under the Stockholm Convention (SC) and the Court's Rules of Procedure to already three generations of participants, who resolved fictional disputes concerning borders, minorities, environmental issues, as well as those concerning space activities and use of modern technologies, including artificial intelligence (AI). These young people - over 190 of them from 26 countries participated at the MUNLawS this year alone - have already by engaging in this extracurricular activity demonstrated their interest and potential in becoming future decision makers in their respective countries – they, undoubtedly, shall remember the Court's existence and its potential. Additionally, a number of Ambassadors and other diplomats posted to Slovenia attend the MUNLawS opening ceremonies, where last year the Court's President, Professor Decaux, and this year the Executive Officer, Mrs. Allot, delivered inspiring speeches on opportunities offered by the Court. We can only imagine the multiplying effect of such awareness-raising activities, if introduced also in other universities across not only SC's States parties, but entirety of OSCE participating States.

Now, I wish to bring your attention to one cherry-picked ADVANTAGE offered by the Court in comparison to other arbitration proceedings. It concerns the costs of the arbitral proceedings. It is perhaps too little known and publicised, that in disputes submitted before the Court, the parties to the dispute bear only their own procedural costs (as stipulated in Article 17 SC), while the costs of the arbitrators shall be borne by all States parties to the SC from the Court's budget. Namely, Article 13 (Financial Protocol) in the relevant part provides: *"Subject to the provisions of Article 17, all the costs of the Court shall be met by the States parties to this Convention."*

This clearly distinguishes the Court from, for example, Permanent Court of Arbitration proceedings or any other ad hoc arbitrations. Considering significant costs associated with arbitrators' fees, in, for example, a five-member arbitral tribunal, a State party could spend from approx. 500.000 to 1.000.000 euros or national currency equivalents less for having a dispute resolved, just by not having to contribute also to the arbitrators' fees for the resolution of the dispute in question. And this is not an insignificant advantage and opportunity.

Turning now to a concrete example of a dispute that was so far tackled elsewhere, although it could have well come before the Court, a border dispute between Slovenia and Croatia. This dispute is certainly just one of the many challenges emanating from the dissolution of the former Yugoslavia. It concerns the fact that the former Yugoslav republics, now new States, needed to determine their inter-state land and maritime borders, while taking into consideration the opinions of the Arbitration Commission of the Conference on Yugoslavia (commonly known as Badinter Arbitration Committee) - Robert Badinter afterwards serving also as the first President of the Court from 1995 until 2013 and instrumentally contributing to the creation of the Stockholm Convention in 1992. While taking into account these apparent connections between the dispute in question and the Court, the dispute has so far never come before the Court. Today, this is not the first nor the last intervention discussing the competition among international actors competent to engage in peaceful dispute resolution among States. Without

delving too much into all the details of the case, suffice it to say that various means of peaceful settlement of disputes were used in attempts to find acceptable solutions over almost two decades - which for that matter almost coincides with the Court's existence – before the agreement was reached in 2009 to submit the dispute to an *ad hoc* arbitration, and then agreed to use the PCA secretarial services for the purposes of the conduct of proceedings. It is no secret to mention that in many deliberations on the most appropriate means to be employed, both conciliation and arbitration proceedings within the Court were contemplated. What, however, can also be said is that some other international institutions were significantly more proactive and “present” during relevant periods, in comparison to the Court in spite of the previous mentioned fairly significant, to say the least, connections among the members of the Court and parties in the dispute. Given that the 2017 Arbitral Award delivered by an *ad hoc* tribunal, which determined the entire course of the Slovenia-Croatia State border, and which is essential for determining the territorial extent of sovereign prerogatives of each State, remains to be fully implemented, not least due to its outright rejection by one of the two States. Perhaps the evolution in this case is an important lesson learned that could serve for a strategic outreach to the two States involved, highlighting the availability of the conciliation proceedings for implementation of the Award's determinations. Moreover, let me also observe, that the five-member *ad hoc* arbitral tribunal under the 2009 Arbitration Agreement (with intermediate replacement of the two arbitrators) was not a negligible cost in the total amount spent on trying to resolve this longstanding dispute.

Finally, my proposal for strategic constructive interaction with other OSCE institutions and mechanisms, as well as with other international organisations and other bodies, is the following:

Until recently the Court was in somewhat regular interaction mainly with the Permanent Council and Chairmanship of the OSCE. This is important and should be continued, but the OSCE works also through a number of other important structures, institutions and mechanisms that provide an opportunity for the Court to lead a continuous constructive dialogue with them. The Court could offer participation in various of their numerous activities that could benefit from knowledge and experience of its members that are already recognised and enjoy trust by the SC's States parties who have appointed them to the Court, while respecting SC's provisions for the conciliators to be persons holding or having held senior national or international positions and possessing recognised qualifications in international law, international relations, or the settlement of disputes, and for arbitrators to possess the qualifications required in their respective countries for appointment to the highest judicial offices or to be jurisconsults of recognised competence in international law. There were possibly too few occasions explored and too little efforts invested so far, so I am convinced that such strategic engagement based on a short-term (one-year), mid-term (6-years corresponding to the mandate of one composition of the Bureau) and long-term action plan, would bring about a yet unprecedented understanding and recognition of the Court's importance, competence and added value.

To conclude, some voices can be heard that the Court failed to live up to great expectations at the time of its establishment. A quick glance at many challenges of today's multilateralism and unprecedented developments on the ground within the OSCE area, shows that it is perhaps more urgently needed than ever to invest extra efforts in encouraging States to explore flexible and unencumbered possibilities of peaceful dispute settlement within the

Court. The Court could successfully tackle not only the “hard core” international legal issues, but also “newer matters”, concerning environmental and climate change issues, disputes that might arise out of limited resources availability and energy supply disagreements, oftentimes coupled with migration issues, as well as timely and responsibly resolve several challenging issues concerning the development and use of new technologies, including artificial intelligence. Let us not forget that, as observed by others before me, *“Most great accomplishments do not look promising in the beginning. If you give up on a big dream too early, you have probably stepped on gold and mistook it for a rock”* (Israelmore Ayivor, Leaders' Ladder).

I thank you for your kind attention and I'm looking forward to the discussion.

THE COMPETITION AND COMPLEMENTARITY BETWEEN EUROPEAN ORGANIZATIONS IN DIFFERENT DISPUTES SETTLEMENT MECHANISMS*

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1. EUROPE AND THE SETTLEMENT OF DISPUTES: INTRODUCTORY REMARKS

The advent of organised post-war Europe (in fact, the creation in 1948 of the Western European Union (WEU) and in 1949 of the Council of Europe (CoE)) is in line with the European Movement, from the point of view of peaceful coexistence, cooperation, the principles and values of democracy, human rights, and the rule of law. These references are reflected in the first institutional approaches in Europe, initially Western, then quasi-Pan-European. At the same time, the international institutional and material organisation was developing. The peaceful settlement of inter-state disputes became a major concern of the international community, as set out in the United Nations Charter (arts. 1, 2, para. 3 and Chapter VI). To this end, art. 33 para.1, sets out the methods to be followed to reach an equitable outcome. This solemn manifestation of the will of States is also expressed in the Manila Declaration (1982), taking into account the UN's statutory position in this respect as well as the traditional attitude of States preferring to resort to procedures external to international organisations (negotiations, arbitration, International Court of Justice/ICJ)¹.

To sketch out the situation, the state of mind and the modus operandi with regard to international disputes and their settlement in a changing institutional/political Europe, which since its inception has displayed significant jurisdictional regionalism², it will first be necessary to summarise the institutional and material structure of the European cooperation/integration architecture. It shows that procedures for the peaceful settlement of disputes operate at two levels: on the one hand, actions/initiatives *within* and *by* international organisations and, on the other, *outside* international organisations. This approach takes account of the normative framework in this area, stipulated by the United Nations Charter (Article 33, para. 1). By "dispute" we mean a disagreement on a point of law or fact, or an opposition of legal views or interests between two States (ICJ, *Lotus*, 1927; ICJ, *Southwest Africa*, 1962)³. Here, we are

* This contribution reflects the presentation during the Stockholm Seminar, held in November 2022, and takes into consideration only those international developments occurring at that time.

¹ For the various aspects of the problem, see the critical considerations of A. Pellet, *Le droit international à la lumière de la pratique: l'introuvable théorie de la réalité*, Cours général de droit international public, RCADI, Vol. 414, Boston/Leiden, Brill/Nijhoff, 2019, pp. 270 ff.

² Burgorgue-Larsen L., Le fait régional dans la juridictionnalisation du droit international, in SFDI, *La juridictionnalisation du droit international*, Colloque de Lille, Paris, Editions Pedone, 2003, pp. 203-264.

³ A "dispute" does not coincide with "differences of opinion" (ICJ, Advisory Opinion, *Mazilu*, 1989).

mainly talking about traditional disputes between States or between individuals and States.⁴ Within this legal framework, European justice and its institutions are also evolving, with complex litigation systems encompassing both inter-state actions and proceedings brought by individuals/private persons against States, as well as proceedings brought by other "plaintiffs" in a multitude of disputes with an ambivalent, plural legal-political characterisation.

This gives rise to a responsibility for each option to be followed, an area where *negotiations* (in general) as a means of approaching/resolving a problem seem to prevail over a jurisdictional perspective (e.g. ICJ). In this respect, my contribution essentially analyses the situation respectively at the Council of Europe (CoE), the European Union (EU), and the Organisation for Co-operation and Security in Europe (OSCE), as well as other settlement mechanisms/modes, in the light of the particularities of international litigation, before the outbreak of the Russia/Ukraine conflict, which generally imposes uncertainties on the future of the systems in question.

This multi-dimensional European framework of a legal/political space with variable geometry of commitment, enlarged since 1990 and with omnipresent geopolitical potential, is developing above all outside the international systems/mechanisms with a universal dimension such as the International Court of Justice (ICJ), the Permanent Court of Arbitration (PCA), the International Tribunal for the Law of the Sea (ITLOS), Panels of the World Trade Organisation (WTO), etc. In addition, account must be taken of the changing nature and content of classic/inter-state and other "disputes" - a term with no concrete definition - that arise at every opportunity. From this point of view, however, there are a number of factors that deserve attention at this stage: the gradually "politicised" nature of inter-state appeals to the Strasbourg Court - without neglecting the ICJ - or the special nature of cases arising from situations of armed conflict at the crossroads of international humanitarian law (IHL), international human rights law (IHRL) and international criminal law (ICL). The material scope of the "dispute" sheds light on the situation and possibly indicates the choice to be made, the procedure to be followed and the applicant's objective.

In the European area, this approach is becoming imperative, even if the emerging international disputes are apparently few and far between. Over time, and regardless of the changes or mutations of all kinds, on both a regional and a global scale (such as political reorientations, the break-up of the former USSR and the former Yugoslavia, the various armed conflicts, etc.), it seems necessary to pay attention to the legal/political framework of the European area with this "division of labour" and evolving powers, such as the EU and the Court of Luxembourg⁵.

The diversity of actions is thus expressed at every level as it is also the case elsewhere (Organisation of American States/OAS, African Union/AU, etc.) and bearing in mind certain legal, political, and institutional data, as well as the progressive evolution alongside, or in parallel with investigation/monitoring, fact-finding, or procedures of international justice.

⁴ There is another category of disputes concerning international entities/bodies/organisations. See, in this regard, the First Report on the Settlement of International Disputes involving International Organizations. ILC, Special Rapporteur A. Reinisch, Doc. A/CN.4/756, 3/2/2023.

⁵ Plender R., *Procedure in the European Courts: comparisons and proposals*, RCADI, 1992, Volume 267, pp. 9-344.

2. INTERNATIONAL LITIGATION AND THE EUROPEAN INSTITUTIONS - ELEMENTS OF CONSIDERATION ON THE QUESTION "ANTAGONISM OR COMPLEMENTARITY"? - SOME DELIMITATIONS

The following observations can be drawn from the European context and from an overall consideration of the particularities of the material:

From a general point of view, the situation confirms that at this level of approach, we are talking about an enlarged European legal area (since 1990) which is undoubtedly the most highly developed in the world. This is a jurisdictional regionalism marked by the presence of bodies/institutions with specialised competences, i.e. specialised tribunals/courts, e.g. the European Court of Justice (ECJ), the jurisdictional system of the BENELUX, with an arbitration panel and its court of justice with a complex jurisdiction, the Court of the European Free Trade Agreement (EFTA) dealing with disputes relating to the European Economic Area, the European Court on the immunities of the State, which has not yet been seized, the European courts of Strasbourg and Luxembourg. Some of these specialised tribunals or courts have become little active or even remain inactive. The European legal area is also characterised by the multitude of international procedures and the establishment of methods of dispute resolution/arbitration.

The peaceful settlement of an international dispute is an obligation of States (under the UN Charter, arts 1 and 33) without, however, imposing the method of settlement⁶. These obligations derive from commitments made by States. In this respect, the notion of "*dispute*" should be understood in its broad sense, having regard to the competences of the various jurisdictions. Regarding actions taken on the part of private persons in an international inter-state dispute, particularities emerge in relation to human rights and European law, and in certain situations such as armed conflicts, military occupation, or situations of *de facto* control also between human rights and international humanitarian law.

From this point of view, an inter-system/intra-system cohabitation, with the UN, regional and other procedures, arises in Europe. It is also a question on the presence and the role of actions outside Europe relating to the settlement of international disputes: consultations, good offices, mediation, conciliation, panels of experts, etc. In this context, several mechanisms such as the ICJ, ITLOS, the PCA and the WTO bodies may evolve.⁷

It should be noted that each institution or body at international level, as an international organisation, but also at internal level within an international organisation, takes advantage of its own position to gain more room beyond its own competence, in order to contribute to the objective of the policies to be achieved at the international level. In this complex regulatory framework, with its priorities in the area of general/specific disputes in international law, the ICJ - given its general jurisdiction and authority - occupies an important position, without, however, underestimating the role of specific bodies.

⁶ Merrills J. & Graham I., *International Dispute Settlement*, 5th edition, Cambridge University Press, 2012.

⁷ Karagiannis S., La multiplication des juridictions internationales : un système anarchique, in SFDI, *La juridictionnalisation ...*, op. cit. 2003, pp. 7-162.

In addition to the “political” / “legal” nature of the international dispute - depending on the national perception - the scope of normative application *ratione materiae* guides the choice of the interested or concerned party. There has also been a gradual shift towards investigative procedures, often involving fact-finding and observation/monitoring missions, alongside the procedures of international justice (see the UN missions to Ukraine, not to mention actions before the courts in The Hague and Strasbourg). It is also worth mentioning the possible *ad hoc* intervention of an international investigatory body (e.g. the International Humanitarian Fact-Finding Commission/IHFFC, under Article 90, Additional Protocol I of the Geneva Conventions of 1977), particularly in relation to alleged violations of IHL in a situation of armed conflict or the application of the latter.

These systems - especially at the jurisdictional level (ICJ, Court of Strasbourg) - are sometimes instrumentalised, i.e., used for “political” ends, beyond the objective nature to respect and protect international law and human rights, without, however, denying the cause to be preserved, i.e., international law and the IHRL which are under test of application.

Is it not significant that the international community and Europe are currently undergoing significant changes? The international legal order and a certain legal ethic seem to be in trouble, with so much state-behaviour transgressing a certain rule of law that prevailed, for the most part, after the 1990s. A situation and behaviour that are prompting certain countries to use all available legal means, including international recourse.

3. EUROPEAN INSTITUTIONS AND SETTLEMENT OF DISPUTES – SOME CONSIDERATIONS

In the European context, international litigation is complex, given the legal status of the individual and the European order of human rights.⁸ This complexity is further enhanced with the presence of an institutional process of European integration, promoted by the EU, which embraces inter-state actions, private disputes, actions brought by individuals/private persons, both between States and international institutions.

3.1. The System of the Council of Europe

As an excellent European political institution, at the forefront of the values and principles of democracy, the rule of law, and human rights, declared as early as 1949 and moreover with a universal dimension and scope, and which govern Europe today and even beyond, the Council of Europe (CoE) has been able to line up to the objective of promoting the peaceful settlement of disputes between its members and consolidating peace and cooperation on the continent, without delay.

To this end, a *Convention for the Peaceful Settlement of Disputes* was adopted in 1957, following the model established by the General Act of Geneva (1928), and ratified by 13 Member States. Under this instrument, legal disputes can/should be referred to the ICJ (see

⁸ Cançado Trindade A.A., The procedural capacity of the individual as subject of international human rights law: recent developments, in *Karel Vasak Amicorum Liber, Les Droits de l'Homme à l'aube du XXIe siècle*, Brussels, Bruylant, 1999, pp. 521-544.

e.g., the *Germany/Italy* cases, twice in 2008 and 2022, with Greek intervention in the first (2011); other international disputes - political? - should be dealt with by *conciliation* and *arbitration*. The 1957 Convention provides (Art. 1) an important indication as to the classification of legal disputes that may be submitted to the ICJ, in particular those named in Art. 36 para. 2 of the ICJ Statute. It should be noted here that there is a linguistic discrepancy between the wording of the provision in question: “legal disputes under international law” and “all international legal disputes”, which may not be under international law? If the arbitration agreement does not provide for the applicable law or if it does not exist, the Arbitral Tribunal will examine and decide *ex aequo et bono*. Finally, another interesting aspect of this instrument from the Strasbourg-based organisation concerns the reparation provided for (Art. 30); in fact, it is a question of just satisfaction.

The mechanism of the European Convention on Human Rights (ECHR), with the European Court of Human Rights (ECtHR) as a solid jurisdictional stronghold for the benefit of persons/individuals, is certainly the most advanced system for the protection of human rights at international level. In fact, since the 1950s, the ECHR has been developing its own system, an advanced legal structure with a Court whose rulings are binding and engage the international responsibility of the States concerned, and with a monitoring system for enforcement. This system of international protection of human rights has seen several inter-state appeals (currently numbering 47), which are described as “disputes” from the point of view of the ECHR, although they vary in context, content, and allegations from one case to another. It should be noted that several appeals refer to armed conflicts with a multitude of situations, including military occupation and its consequences; they also concern *de facto* situations not recognised by international law.

In this respect, the two Greek actions against the United Kingdom concerning Cyprus (1956/1957), or the actions of the three Scandinavian countries and the Netherlands against Greece during the dictatorship (Greek case 1967), or the four Cypriot inter-state cases against Turkey since the armed aggression of 1974, together with the case of *Ireland v. United Kingdom* concerning the “torture techniques” inflicted on IRA detainees, cannot be placed in the same category of action, for example. As for appeals linked to armed conflicts in Georgia, Ukraine, Nagorno- Karabakh, not forgetting Cyprus, they also have political aspects in terms of the aim of recognising the responsibility of the defendant States, while benefiting the victims from the point of view of the Convention and IHL.

Of particular importance is the work of the *statutory bodies* (*Secretary General; Parliamentary Assembly/PACE; Commissioner for Human Rights*), *treaty bodies* and other institutions (*European Commission against Racism and Intolerance/ECRI, Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment/CPT, Venice Commission*). Each institution within the Organisation takes advantage of its position/status to examine a situation presenting aspects of a serious “dispute” within a State, or a latent/open “dispute” with another State beyond national borders. The Secretary General is a prime example of this function/intervention, with the aim of contributing to the easing of tension or its resolution. Furthermore, debates within institutions such as the *Parliamentary Assembly* demonstrate the developments that are taking place in this respect between inter-state relations and the attitudes of governments.

On the other hand, it is not easy to raise issues of dispute before the Committee of Ministers (Deputies), except for those relating to human rights, within the framework of the sessions of the Human Rights meetings of the Committee of Ministers (CM-DH) - four times a year - relating to monitoring compliance with the execution of Strasbourg Court judgments. Whenever there is an attempt to introduce “security” issues, the response of the Chairmanship-in-office always refers to the “incompetence” of the CoE and refers it to the OSCE. This is a politically unsatisfactory situation for the political organisation of Europe, which sometimes expresses itself in a climate of contradictions/tensions raised by difficult questions concerning the follow-up to the execution of the Court's judgments. The Cypriot cases against Turkey offer a significant example (e.g., *Cyprus v. Turkey IV* and those relating to missing persons, *Varnava and others v. Turkey*).

Specific questions on the status and situation of ethnic minorities, for instance, examined within the framework of the *Advisory Committee on National Minorities*, a body of independent experts, demonstrate the sometimes significant divergences in the implementation of the Framework Convention or even the interpretation of the provisions and the limits or even inability (?) - through the lack of will - to impose convergence with the European standards and the “European public order”. Other interesting cases include Russia, Bulgaria/North Macedonia, Ukraine/Russia, Greece/Turkey, Greece/Albania etc.

It should be noted that over time, the CoE has initiated and developed fact-finding/monitoring missions concerning the compliance of national actions with the obligations assumed under the various treaties and other thematic international instruments (action plans, recommendations, etc.).

In this respect, the status and role of the CPT and its reports raise questions, although they do not in themselves constitute “disputes” between a Member State and the Organisation, but from which emerges a responsibility on the part of States to comply with the commitments made by the parties in question.

Other statutory bodies (*Committee of Ministers, Parliamentary Assembly*) are putting forward initiatives aimed at “redirecting” States to behave “properly and in accordance with European standards”. An important step forward in terms of investigations was the dispatch by Secretary General T. Jagland to a mission in Ukraine, led by the former President of the Court, Sir Nicholas Bratza, regarding the violent events of Maidan in 2013 (Report submitted in 2015).

Finally, the Venice Commission sometimes raises through its opinions the existence of “differences”/not “divergences of opinion” between the position of a Member State and the Organisation's *acquis* in the field of the rule of law.

3.2. The System of the European Union

The EU does not formally constitute a “dispute settlement mechanism” as such, apart from the Luxembourg Court, but there has been an evolution in several aspects following its enlargement towards the countries of Central and Eastern Europe (Copenhagen criteria of 1993, then Agenda 2000, etc.). With the advent of the Lisbon Treaty, a new era is emerging in

which the EU is playing a greater role in dispute settlement, through individual or institutional actions-initiatives (Council and above all the High Representative), impacting countries even outside the circle of Member States. It is also worth noting the EU's role in international affairs (crises/conflicts/great debates, etc.) in the context of the emergence of a political power (Common Foreign and Security Policy/CFSP) also before or within the UN and other regional organisations (CoE, OSCE), and in the context of relations with the countries of the African, Caribbean and Pacific (ACP) group.

It should be remembered that the process of European integration began with the system of the Brussels/WEU Pact, which provided for a procedure for the judicial settlement of legal disputes and then compulsory conciliation for other disputes. However, the Treaty of Amsterdam (1997) resulted in the transfer of powers to the EU (2000) and, eventually, in the dissolution of the WEU.

As the Court of Justice of the EU in Luxembourg, whose jurisdiction is competent to apply and interpret European law as well as international law, it is seized of direct appeals. It can deal with a wide range of disputes, including cases brought by individuals, some of which raise questions/issues that are properly matters of international law. The Court also has jurisdiction to hear inter-state disputes between Member States in the context of the treaties and the implementation of their provisions, but also between third States having an institutional relationship with the EU.⁹ It should be noted that it rarely deals with inter-State disputes (e.g. *Hungary/Slovakia*, Case C-346/10, 16 October 2012, *Austria/Germany*, Case C-591/17, 18 June 2019). However, cases concerning the rule of law in the Visegrad countries demonstrate the existence of "points of contention" between the Member States and the EU (see cases brought before the CJEU).

As an important international player, the EU sometimes assumes the role of mediator in international relations. There are several examples of activities in this area, such as the Stability Pact (1994/1995), which was subsequently taken over by the OSCE. Within this framework, the most important exercise in terms of consequences (positive/negative) was the "management" of the crisis and break-up of the former Yugoslavia: the Peace Conference, the enumeration of criteria for the recognition of successor States of the former Yugoslav Republic; the creation of an Arbitration Commission (Badinter) which issued no less than 15 Opinions on questions raised by European officials.

An important dimension - which became a problem without a solution for 30 years - was the dispute between Greece and the Former Yugoslav Republic of Macedonia (FYROM, now North Macedonia) over its name, which was admitted to international organisations with a provisional name. This dispute, which is certainly "non-justiciable", given its nature and content, was resolved by a bilateral political agreement, ratified by the Prespes Agreement (17/06/2018) in the presence of EU representatives.

The position of the *European Council* in Helsinki in December 1999 is also worth mentioning. In its conclusions, a recommendation was addressed to the candidate countries to settle their international disputes. This request was followed in practice (*Romania/Ukraine* before the ICJ,

⁹ See e.g. *Anastasiou* case (C-432/92, 05/07/1994) concerning illegal exports from the occupied part of Cyprus. See also Case C-872/19R, *Venezuela v Council*, 22 June 2021.

Slovenia/Croatia before the PCA on 29/06/2017 and also case *C-457/18, Slovenia/Croatia*, 31.01.2020).

As for the specifics of Turkey's "dispute" with Greece over the islets of Imia, a procedure (negotiation, ICJ), a timetable and, if necessary, as a last resort, a return to the European Council for consideration and action has been set up. The project has been aborted.

The presence as observers at the negotiations on the Cyprus question offers another example of a certain contribution by the EU to negotiations, as this was the case in the past with a presence/observation at Annan Plan of 2004, the tripartite negotiations at Mont Pellerin and Crans Montana by the Commission/High Representative. It can be seen as a simple contribution, not institutionalised, to the search for compatibility of the solutions put forward with EU law/community acquis. Moreover, the Annan Plan was rejected on the basis of its contradictions with international law and the EU's legal and political acquis. Inevitably, the EU must assume a role in resolving the Cyprus question, as the future of Cyprus as an EU Member State and of its citizens cannot contradict the principles/values of the EU.

In the context of European initiatives, the establishment of an independent international fact-finding mission on the 2008 conflict in Georgia (South Ossetia, April 2008) led by Swiss diplomat Heidi Taglivini is also of particular interest.

However, there are still problems with non-justiciable disputes (questions of nationality and the Macedonian language) between Bulgaria and North Macedonia, which are hampering progress in the process of integrating the candidate country into the EU.

3.3. The OSCE

Since the 1990 Charter of Paris, the aim has been to promote various mechanisms that are supposed to contribute to the cause, including the Court, instituted by the *Convention on Conciliation and Arbitration within the OSCE*, adopted at Stockholm in 1992. The Convention emphasises on conciliation and arbitration, providing for the setting up of a *Conciliation Commission* and an *Arbitration Tribunal*.¹⁰

There has also been a steady increase in the number of mechanisms (the Valletta principles on conciliation (1991), the Berlin consultation mechanism (1991), the examination of the Nagorno-Karabakh situation since 1992, and the stationing of an international force (1994)). It should also be noted that an OSCE assistance group was set up during the Russia/Chechnya crisis.

There is also an investigation/fact-finding mission by the IHFFC regarding an incident affecting the OSCE Special Monitoring Mission to Ukraine on 23.4.2017 in a region not controlled by the Ukrainian authorities, but by secessionist forces. Admittedly, the arrangement concluded between the OSCE and the IHFFC constitutes a new fact, a first.

¹⁰ See L. Caflich's contribution to this seminar.

3.4. The Case of NATO

In fact, the Alliance plays an ambivalent role in conflict management, through different policies - contribution to UN activities, e.g., in Afghanistan, Bosnia, Kosovo (KFOR). Nevertheless, cases brought before the ECtHR (see the *Behrami and Saramati v France, Germany, and Norway*) raise the question of the responsibility of international actors in relation to the decisions of the UN Security Council (2007 judgment, much criticised). The intervention/attack (air strikes) unauthorised by the Security Council against Serbia (1999) is also to mention here. Generally speaking, NATO constantly refers those concerned to negotiations; it insists on appeasing tensions between allies/members even promoting MOU. From this point of view, can the position of the Secretary General - sometimes a mediator, a conciliator - be described as “neutral” (?), particularly in the case of Greece/Turkey and Turkey's often aggressive policy (in 2020-2022) towards Athens?¹¹

4. SETTLEMENT OF DISPUTES: CHALLENGES AND PROSPECTS

At the end of this legal-political and institutional sketch of international litigation in Europe, we find ourselves faced with certain challenges for the imperative of the peaceful settlement of disputes, relating to the initiation of proceedings and the choices of the path to follow which must be taken into account, namely:

- the protection of the “national interests” of States, particularly in relation to security issues;
- promoting the ability of the respective European/international organisations to contribute to international peace and cooperation, as well as to the “interests” of the international community/general interest;
- the risks of a “proliferation” of methods of initiating or extending negotiations, even prior to them; the increasing “politicisation” of inter-state actions before institutions, particularly jurisdictional institutions (e.g., ICJ: *Armenia/Azerbaijan*, *Ukraine/Russia*, or before the Strasbourg Court), and the impact on the effectiveness of procedures/decisions.

What, in fact, is the purpose of the procedure to be followed, on which the choice of the State concerned depends? Simple fact-finding? Entirely conclusive on compliance with international law? Or even to serve/guarantee peace? Without highlighting the responsibility of those involved? To repair the damage caused?

But how do you deal with the courts? What choice is there for non-justiciable disputes? What are the legal/political boundaries? What are the boundaries for specialised courts and the particularities of the OSCE (the method of resolution; between arbitration and the judiciary the opportunity/potential for conciliation, an international practice and successful model elsewhere (see the recent Lebanon/Israel case, via the United States).

¹¹ ... “encouraging” that negotiations are required ...

It is worth recalling the difficulties and/or opportunities in triggering a settlement mechanism, particularly a jurisdictional one, and the traditionally “restrained”/hesitant/negative attitude of several countries/governments, including the “Big Five” of the Security Council, to resort to jurisdictional methods. It is significant that only 73 States currently recognise the jurisdiction of the ICJ, including several with reservations *ratione materiae/temporis/personae*. The reason for this is undoubtedly a preference for negotiations or other means of settlement rather than binding jurisdiction.

Similarly, “interference” with European procedures with specific features for settling disputes, from those envisaged by the UN Charter (Art. 33, para. 1), raises a preliminary question of “priority”/preference? And consequently, what is the place of the OSCE?

A particularly complex and political issue concerns cases involving the consequences of armed conflicts and their specific features in proceedings before the courts (Strasbourg Court), which examine violations committed from the perspective of the human rights of victims/individuals, while hesitating/refusing to assess the alleged conduct in the light of IHL, an attitude with its own consequences. In the same cases, the question of “reparations” arises. In this respect, it is necessary to overcome the “formal” and to give meaning to justice, to preserve law and to “dare” in interpretation.¹²

It should be noted that the application of IHL comes into play in the case of situations of armed conflict, military occupation or territories controlled by *de facto* authorities. Commissions of enquiry such as the IHFFC, a body set up under Art. 90 of Additional Protocol I of 1977 to the Geneva Conventions of 1949, whose competence is recognised by 76 States parties with the objective of re-establishing respect for IHL, have a role to play.¹³ The IHFFC has carried out, on every given request, an investigation mandate from the States/Parties to the conflicts, including even the United States and Russia, where it has offered its “good offices”, without however receiving a positive response.

In the end, it was the OSCE that gave the IHFFC a special mandate in the case of an explosion causing casualties in Ukraine, in territory controlled by separatist forces.¹⁴

The manner/mode of action in which the IHFFC carries out its mandates vis-à-vis the States/international players is particularly significant and is supposed to serve as an example to be followed by the OSCE bodies, and even by the Court.

¹² Question linked to the State's jurisdictional immunity. There is currently a degree of mobility in national case law.

¹³ For this, see Perrakis S., “Enquêtes internationales et établissement des faits pour violations de droit international humanitaire. Pratique récente et l’avenir de la Commission internationale humanitaire d’établissement des faits. Quelques considérations”, *Revue Hellénique de Droit Européen*, 1/2014, pp. 57-68.

¹⁴ See the (confidential) report submitted by the IHFFC in 2017 to the Secretary General of the Organisation, Report of the Independent Forensic Investigation in relation to the incident affecting an OSCE Special Monitoring Mission in Ukraine (SMM Patrol) on 23 April 2017, Bern, 21 August 2017.

5. CONCLUSIONS

Between the dream and the realism of dispute settlement, the essential question is how to preserve the law for the benefit of peace or, at least, a certain international order, serving the interests of the players in question without disregarding the interests of the international community. In this context, what can be the role of the OSCE Court? So how can we act? How can we set up a settlement mechanism/method in a flexible and trustworthy manner?

It now seems that, when it comes to settling inter-state disputes, with remarkable flexibility and informality, often going beyond planned diplomatic and other procedures, negotiations as a method/means prevail over international courts. The latter are used, of course, when a body has substantive jurisdiction from which the interested/concerned State benefits more widely. International justice, particularly at The Hague and Strasbourg - long, slow, and rigid in view of the institutional regulatory constraints imposing a procedural “modus operandi” - does not necessarily lend itself to immediate effective action. As for international arbitration, it seems to be developing somewhat differently.

In addition, the effectiveness of the international courts established depends not only on the enforcement of decisions/judgments that are binding on the parties, but also on the ability of control mechanisms to ensure enforcement, which is ultimately a matter of the will of States.

The state of international litigation, brought and examined before the European institutions in Strasbourg, Brussels, and Luxembourg, shows that there is a place, not just symbolic, in Europe's judicial architecture for the OSCE Court. In fact, it is a question of having the political will to settle a dispute “out of the box”; of having a real culture/willingness to settle international disputes, which combines with the national interests that would be willing to present the case before an institution with different characteristics from the others. Nevertheless, the OSCE Court will have to adopt a *proactive* attitude. By way of example, the “war reparations” case, in which the question of the effective implementation of German responsibility in Greece, Italy and Poland and the consequences arising therefrom for the victims of the crimes perpetrated during the Second World War and the countries concerned, presents itself as one such possibility; the question is complex from the legal, political and moral standpoint, and which is legally still unsettled, and controversial in view of Germany's negative attitude towards assuming its responsibility. It should be pointed out that the issue could also fall within the jurisdiction of the Arbitral Tribunal provided for in the 1953 London Treaty, not forgetting the ICJ on related issues, albeit with a German reservation on its jurisdiction *ratione temporis* and *materiae*. Could the OSCE Court provide such an example, without prejudice to any other judicial approach already taken?

So, can we talk about complementarity or competition between the institutions? From a general angle, is it simply a question of European institutions in this area of extreme importance for Europe, the international community, and its legal order, or of a political will to ensure a solution to the problems posed? Is it lack of confidence, hesitation or mistrust in international law, institutional procedures, and international justice? In addition to underestimating the capacity of European institutions to intervene, there is the traditional mistrust of States. Experience, if not practice, shows that the political will emanating from considerations of “national interest” often guides the steps to be taken, having regard also to the nature of the disputes in question.

Finally, would it not be wise, in the near future, to associate more OSCE structures/policies with those of the Council of Europe and even to extend certain actions to embrace the whole of the OSCE's European area. Is it not significant, for example, that the United States participates in the Venice Commission, an important institution of the Council of Europe for monitoring the rule of law in Europe? Institutional restructuring would be more effective, with a complementary approach to overcome the "obstacles". However, the repercussions of the conflict in Ukraine could prove negative for this hypothesis. It goes without saying that we will have to adapt to the circumstances. To this end, as part of a complementary approach, we should consider adopting a more active stance in order to solicit international players and States, to refer cases to the Court. A challenge on the occasion of the 30th anniversary, but above all for the future. Are there any "volunteers" to serve peace?

The legal acquis and culture established based on the values and principles of the UN Charter and international legal order must guide us. In the face of today's political uncertainties and difficulties, we must insist on the need to preserve and even strengthen the legal acquis of cooperation and international solidarity in a context of peaceful coexistence and dispute settlement. If States cannot "withstand" law and order, we will at least have to content ourselves with settling their differences. Between the weak and the strong, it is freedom that prevails and law that liberates. Can we still think about it? This project may still seem "utopian" today, but as highlighted by President Emmanuel Decaux, the existence of the OSCE Court is a reminder that the ideal of "peace by law" is the cornerstone of the European security system".¹⁵

¹⁵ Speech to the Permanent Council of the OSCE, 19.05.2021.

THE EUROPEAN UNION – JUDGE AND PARTY

Inga REINE

Judge, General Court of the Court of Justice of the European Union
Member of the Court (arbitrator)

I have been asked by the organisers to briefly outline the workings of the Court of Justice of the European Union (the institution consisting of two judicial instances), focusing in particular on the role of the Court in resolving inter-state disputes. To avoid the confusion, whenever I speak of two instances together, I will use the term EU courts.

I hope that my intervention will help to address the elephant in the room – an international dispute settlement mechanism that hasn't been used even once during its 30 years of existence.

I will show some of the advantages of the EU courts as opposed to other means of inter-state dispute resolution. I shall first provide a brief overview of the functioning of the EU courts, then I shall briefly explain the type of inter-state disputes that end up before the EU courts, and then draw some conclusions regarding the advantages and challenges that EU courts are facing.

1. THE WORKINGS OF THE EU COURTS

I assume that the majority of the audience here has some degree of familiarity with the inner workings of the EU courts. Since the reform of the Court of Justice of the European Communities in the 1980s, it has been divided into two instances, the Court of Justice and the Court of First instance. The latter has subsequently been renamed as the EU General Court.

Member States and institutions of the EU may bring action before the EU courts. In particular, under Article 265 of the Treaty on the Functioning of the European Union (TFEU), where “the European Parliament, the European Council, the Council, the Commission, or the European Central Bank, in infringement of the Treaties, fail to act, the Member States and the other institutions of the Union may bring an action before the Court of Justice of the European Union to have the infringement established... Any natural or legal person may, under the conditions laid down in the preceding paragraphs, complain to the Court that an institution, body, office, or agency of the Union has failed to address to that person any act other than a recommendation or an opinion.”

Both EU courts have jurisdiction, to “review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, ... and of acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties.” This jurisdiction has some caveats, which I will discuss below.

In addition, as a judicial instance, the Court of Justice of the European Union (CJEU) has jurisdiction in two key areas of law. First, and most prominently, pursuant to Article 267 of the TFEU it has jurisdiction over references from national courts – “concerning preliminary rulings concerning ... the interpretation of the Treaties...”. Currently, there is a discussion on

transferring some of the competences for preliminary rulings from the CJEU to the EU General Court.

Secondly, the European Commission may bring an action against Member States for infringement of EU Law. I will say few words about this later.

2. PLACE FOR INTER-STATE DISPUTE SETTLEMENT

Although the EU courts are not often thought of as mechanisms involved in the settlement of inter-state disputes, they in fact have a key function inside the Union for settling disputes as to the scope of States' international obligations.

As I have already demonstrated, the EU Law system operates through a complex mechanism of what may be called a vertical (disputes between EU institutions and Member States) and horizontal (disputes between EU institutions or disputes between EU Member States) dispute settlement.

EU courts contribute to interpreting EU Law not only by means of concluding that a legal act (legislative or non-legislative, of general or individual application) must be annulled, or action (or failure to act) must be considered illegal. What is no less important is that EU courts contribute significantly to interpreting EU law in a way for it to be conform with EU Treaties and international law.

2.1. Some examples of the Court of Justice Acting as Inter-State Dispute Resolution Mechanism

Functioning as a guardian of the treaties, the Commission is tasked with ensuring compliance with EU Law.

Failure to comply with the Treaties can include multiple different violations: (i) failure to apply and enforce primary law, as well as failure to cooperate loyally; (ii) failure to transpose, apply, and enforce a directive; (iii) failure to achieve, in a specific case, the result intended by the directive; (iv) failure to notify, where required, measures transposing a directive; and (v) failure to implement, apply, and enforce regulations.¹

EU Treaties allow the Commission to seek a conclusion from the CJEU that a Member State is in breach of EU law and that its conduct must be terminated. Paralleling the procedure for cessation of internationally wrongful acts, Article 258 TFEU reads: "If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations. If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union."

The infringement procedure covers not only obligations arising out of the texts' primary or secondary law. It extends to the obligation arising out of the settled case-law that States are to comply with the decisions of the EU Courts as soon as possible.²

¹ Stine Andersen, *The Enforcement of EU Law* (Oxford University Press, 2012), 46.

² Stine Andersen, *The Enforcement of EU Law* (Oxford University Press 2012), 56.

To take a comparatively recent example, in response to the so-called refugee crisis in 2015, under which refugees began to enter the EU across the Mediterranean or through Turkey, the EU developed a plan under which those refugees would be transferred away from frontline Member States to other States.

Notably, unlike previous schemes, this decision was not optional. Several Member States refused to participate and openly defied the initiative. To enforce the plan, the European Commission ultimately brought enforcement proceedings before the CJEU.³

In addition, the EU courts find themselves in a very privileged situation compared to international dispute settlement mechanisms in terms of enforceability of judgments.

The European Commission will bring an action against a defaulting Member State that fails to comply with a judgment establishing a breach of obligations. Not so long time ago, a similar provision was introduced to the European Convention on Human Rights. However, the fundamental difference between the EU and the Council of Europe is that the “second infringement” ruling by the CJEU imposes significant financial penalty.

As good as matters are before the EU courts, some cases show the limit of judicial action. Recent examples with respect to question governing the rule of law in Hungary and Poland demonstrate that the court may deliver a punctual opinion on the matter, but it will not necessarily solve the core of the problem.⁴ In the mentioned cases the CJEU ultimately upheld a decision of the EU to cut funds to Member States for violating the rule of law, if such a violation could be shown to endanger the EU budget or the dispersal of EU funds.⁵ However, these judgments did not make the situation easier. These examples highlight the potential of mediation mechanisms.

2.2. The EU General Court’s Role in Inter-State Disputes

The EU General Court on its part sees an increase of the number of disputes that could be compared to international disputes. This is an interesting alternative to direct confrontation between Member States under Article 259 TFEU before CJEU. Notably, Member States tend to challenge the action of other Member States before the Commission.⁶

For instance, Germany challenged the Commission’s finding that the German law on renewable energy of 2012 (the EEG 2012) involved illegal State aid.⁷ Although nominally only a dispute between Germany and the Commission, it involved a dispute between the State parties to the constitutive treaties – as represented by the Commission as guardian of the treaty – and an individual treaty party.

³ See Judgment of the Court of 2 April 2020, *Commission v. Poland, Hungary and the Czech Republic*, Joined Cases C-715/17, C-718/17 and C-719/17, EU:C:2020:257. Also, *Common Market Law Review* 58: 1819–1844, 2021. 1820 (Case Law).

⁴ Judgment of the Court of 16 February, *Hungary v Parliament and Council*, C-156/21, EU:C:2022:97 and Judgment of the Court of 16 February, *Poland v Parliament and Council*, C-157/21, EU:C:2022:98.

⁵ Regulation (EU, Euratom) 2020/2092

⁶ Laurence W. Gormley, *Infringement Proceedings* (Oxford University Press, 2017), 65. See Case 141/78 *France v United Kingdom* [1979] ECLI:EU:C:1979:225; Case 388/95 *Belgium v. Spain* [2000] ECLI:EU:C:2000:244; Case C-145/04 *Spain v. UK* [2006] ECLI:EU:C:2006:543, and Case C-364/10 *Hungary v. Slovakia* [2012] ECLI:EU:C:2012:630.

⁷ Order of the General Court of 8 June 2015, *Germany v Commission*, T-134/14, EU:T:2015:392.

In a recent case, Poland challenged the decision of the Commission to permit third-party use of a pipeline operated in part by Russian company Gazprom that provided gas to Poland.⁸ When the decision was handed down in favour of Poland, Germany stepped in and launched an appeal itself.⁹

In addition, the EU General Court's "clientele" has evolved in one other way.

Third States have also attempted to challenge EU actions before the EU General Court.

In one recent case, Cambodia challenged the reintroduction of tariffs on rice imports. Cambodia had been exempted from tariffs as part of a development scheme. However, the Commission concluded that Indica rice was being imported from Cambodia in volumes and at prices that were causing serious difficulties to the EU industry and thus proposed to reintroduce tariffs. Despite the objection by the European Commission, the EU General Court has found that Cambodia has a standing to challenge the Commission's regulation.¹⁰

Similarly, in another case, Venezuela challenged the imposition of restrictive measures preventing the export from the EU to Venezuela of military weapons or other dual-use items as a means of preventing further violations of human rights. Although initially rejected by the EU General Court, CJEU eventually found that Venezuela had standing to challenge the decision.¹¹

3. ADVANTAGES OFFERED BY THE EU COURTS

The EU courts offer distinct advantages as compared to other courts for the resolution of inter-state disputes or disputes between States and corporations.

Rulings of the EU courts are automatically enforceable across 27 States. There is no need for a separate procedure – either under the New York Convention or otherwise – to take place in national courts.¹² Article 280 TFEU provides for automatic enforcement.

This is in contra distinction to the difficulty in enforcing decisions of other international courts such as the ICJ (which must be enforced through the UN Security Council) or the PCA.¹³ As has been noted elsewhere, ISDS tribunals have enjoyed increasing rates of non-compliance.¹⁴

The conflicts of interest that have been identified in international arbitration have been avoided, thankfully to very strict and demanding procedure for nomination and appointment of judges and Advocates General to the EU courts.

⁸ Judgment of the General Court of 10 September 2019, *Poland v Commission*, T-883/16, EU:T:2019:567.

⁹ Judgment of the Court of 15 July 2021, *Germany v. Poland*, C-848/19 P, EU:C:2021:598.

¹⁰ Order of the General Court of 10 September 2020, *Kingdom of Cambodia, Cambodia Rice Federation (CRF) v Commission*, T-246/19, EU:T:2020:415.

¹¹ Judgment of the Court of 22 June 2021, *Venezuela v Council*, C-872/19 P, EU:C:2021:507.

¹² Article 280 TFEU (ex Article 244 TEC) "The judgments of the Court of Justice of the European Union shall be enforceable under the conditions laid down in Article 299".

¹³ Article 94(2), Charter of the United Nations. "If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary make recommendations or decide upon measures to be taken to give effect to the judgment."

¹⁴ Aniruddha Rajput, "Non-Compliance with Investment Arbitration Awards and State Responsibility," 37 *ICSID Review* 247 (2022).

Second, the EU courts are able to deal with cases quickly. In 2021, the average length of proceeding before CJEU was 16,6 months, while before the EU General Court – 17,3 months.¹⁵

EU courts enjoy a reputation for professionalism and support for the rule of law. However, this has not come in one day. EU courts as we know them today have evolved out of an instance open only to privileged applicants (EU institutions and Member States). Fortunately, this was a very shortly lived presumption, as cases emanating from individuals and companies have almost instantly occupied a prominent place in its work. CJEU is celebrating its 70th anniversary this year.

Multiple State interventions do not surprise anyone. It is perfectly normal, albeit not too often, to see 27 Member States and EU institutions in the same courtroom. It is not perceived as an attempt to politicise the court, but as a significant contribution to the quality of debate before the court.

This brings me to the main concluding point. There is nothing extraordinary about using judicial mechanisms. They offer a significant advantage of giving punctual answers to professionals that will be later sitting around the table seeking diplomatic solutions.

At the same time, history shows that a real kick to a judicial mechanism rarely comes from States. Especially because States are always very, if not too, careful about potential repercussions of a judgment. The true potential lies in individual and class actions. And the OSCE Court for Conciliation and Arbitration has a great potential for doing just that.

¹⁵ Report on Judicial Activity 2021. Key figures concerning judicial activity:
<https://curia.europa.eu/panorama/2021/en/judicial-activity.html> #key-figures.

THE SPIRIT OF HELSINKI AND THE GEOPOLITICAL DIMENSION OF THE PEACEFUL SETTLEMENT OF DISPUTES WITHIN THE OSCE

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The Helsinki process has developed over almost fifty years, with pauses and accelerations, on the basis of clear legal principles, flexible diplomatic methods and strong political commitments. Its originality lies in the fact that it has combined the principles and aims of the United Nations Charter with a geopolitical framework designed to overcome the confrontations of the Cold War and the ambiguities of peaceful coexistence, at a time when Europe was cut in two by the Iron Curtain and the Berlin Wall. The ambition was to move from "*détente, to entente and cooperation*", to use a phrase coined by General de Gaulle, on a continental scale, involving on an equal footing all States concerned with collective security in Europe, including the United States and Canada.

It was a long-term intergovernmental negotiation, based on the difficult search for consensus and the close linkage established from the outset between the three "baskets", security, technical cooperation and the third basket which became "human dimension". The process was marked by high points, moments of achievement, such as the adoption of *the CSCE Final Act* signed in Helsinki by all the Heads of States and Governments on 1^{er} July 1975 and the adoption of the *Charter of Paris for a New Europe*, signed on 21 November 1990, enshrining "a new era of democracy, peace and unity". It has also had its setbacks, periods of paralysis or stalemate.

This continuous development took place within an empirical framework, refusing institutionalisation and bureaucracy, even after the formal transition from the CSCE to the OSCE. Professor Luigi Condorelli has spoken of a "*soft organisation*" for this structure that combines flexibility and responsiveness, but is weakened by the lack of legal status, making it a subject of international law like all intergovernmental organisations.

In this context, the Stockholm Convention, adopted thirty years ago, is an exception, being one of the few treaties concluded within the OSCE. This situation on the margins has been, I believe, both a weakness and a strength.

This is a weakness, as this marginalisation within the OSCE institutions and structures reflected the initial reluctance of some States, not the least, towards the Court. One need only read again Article 38 of the Convention, which is particularly redundant in terms of the law of treaties:

"In conformity with international law, it is confirmed that nothing in this Convention shall be interpreted to establish any obligations or commitments for CSCE participating States that are not parties to this Convention if not expressly provided for and expressly accepted by such States in writing."

But the subjective nature of the Stockholm Convention, binding only on the States Parties as an *inter se* agreement, is also a strength, giving it an autonomous existence, a life of its own, and guaranteeing its independence in a variable geometry system. It can be said that the Court today has a dual nature, being "within the OSCE", and thus available to all participating States as well as OSCE institutions, in a flexible and voluntary manner, but also apart, with its status, composition and seat, based on the legal commitments arising from a multilateral treaty, rights and obligations assumed by the States Parties in the wider framework of public international law.

In this sense, the Stockholm Convention is a particularly original experiment that defines both a legal space and a geopolitical space.

1. THE STOCKHOLM CONVENTION AS A LEGAL SPACE

The Stockholm Convention defines a legal space, in line with the United Nations Charter, as well as with the Helsinki process.

The search for the peaceful settlement of disputes is a centuries-old quest, marked by the Hague Peace Conventions of 1899 and 1907, which saw the codification of modern arbitration and the establishment of the Permanent Court of Arbitration, then with the League of Nations by the creation of the Permanent Court of International Justice, which became the International Court of Justice with the United Nations Charter of 1945. Alongside the classic forms of inter-state arbitration and international justice, other alternative methods of peaceful dispute settlement have also developed. Article 33 of the UN Charter lists these forms, ranging from negotiation to judicial settlement, including investigation, mediation and conciliation. But the major advance of the Charter is to enshrine the obligation of States to seek the settlement of *"any dispute, the continuance of which is likely to endanger the maintenance of international peace and security (...) by peaceful means of their own choice"*. The General Act for the Peaceful Settlement of International Disputes, revised in 1949 – which remains too little ratified, it must be said – thus aims to link conciliation, judicial settlement and arbitration.

Article 33 of the Charter also provides to *"resort to regional agencies or arrangements"*. The 1957 European Convention for the Peaceful Settlement of Disputes is part of this framework, which also seeks to make the commitment of the States Parties to the Convention binding in principle, while as well as opening up the choice between the primary jurisdiction of the ICJ, conciliation or arbitration. The progress is relative if one notes that this Convention has only gathered 14 ratifications, but in the meantime, from a very specific angle it is true, the European Convention on Human Rights has opened the way to inter-state applications for its 46 States Parties. In this respect, the 1957 Convention played a key role in the dispute between Austria and Italy over Alto Adige, which was brought before the European Commission of Human

Rights at the time, just as it serves as a basis for the ongoing dispute between Germany and Italy over jurisdictional immunities of States.

The drafters of the Stockholm Convention took account of this institutional *acquis*, expressly stressing in the preamble that "*they do not in any way intend to impair other existing institutions or mechanisms, including the International Court of Justice, the European Court of Human Rights, the Court of Justice of the European Communities and the Permanent Court of Arbitration*". Furthermore, Article 19 of the Convention takes particular care to "*safeguard the existing means of settlement*". The subsidiary or superfluous nature of the convention could not be more clearly stated, in a world where everything has already been said.

However, the innovation of the Stockholm Convention is that it follows the line of the Helsinki process. Firstly, because the very purpose of conciliation is to "*assist the parties to the dispute in finding a settlement in accordance with international law and their CSCE commitments*" (Art. 24), unlike arbitration, which aims to "*settle*" the dispute "*in accordance with international law*", except in the case of an agreement between the parties to decide a case in equity, *ex aequo et bono*, as the Convention states (Art. 30).

Most importantly, the Convention is the result of repeated commitments by States Parties to the peaceful settlement of disputes. Without going through all the steps in the process, there is a logical continuity between the 1975 CSCE Final Act and the 1992 Stockholm Convention. At the heart of the Helsinki Decalogue is Principle V on the "*Peaceful Settlement of Disputes*", based on the idea that "*The participating States will settle disputes among them by peaceful means in such manner as not to endanger international peace and security, and justice. They will endeavour, in good faith and in a spirit of co-operation, to reach a rapid and equitable solution on the basis of international law (...)*". But instead of merely reiterating commitments of principle, the Stockholm Convention goes further, setting up a mechanism with a Court, led by a permanent bureau and with two lists of members, conciliators and arbitrators, ready to function in the event of a referral by the States Parties.

It is therefore a question of moving from theory to practice, with an adapted, effective and rapid tool. It must be said that the results are not met. Beyond the technical arguments - the wide array of choices between procedures, the natural preference for tried and tested methods, the preservation of acquired situations, the well-established practices as in David Lodge's "Small World" bringing together judges, arbitrators, agents and counsels, the fear of having to "wipe the slate clean" - it is above all the lack of political will that must be questioned.

2. THE STOCKHOLM CONVENTION AS A GEOPOLITICAL SPACE

A simple reading of the ratification map reveals inexplicable abstentions and neglected potential. While the purpose of justice and arbitration has always been to guarantee equality between States, large and small, as Léon Bourgeois said, it is difficult to understand how the Court does not appear to be a bulwark against the law of the strongest.

1) This is all the more striking in view of the fragmentation of the CSCE area, which is subject to opposing geopolitical dynamics. In thirty years, the number of participating States has

increased considerably, but *the "OSCE area"* remains almost unchanged, covering the entire surface of the northern hemisphere, from Canada and the United States to the Central Asian States, joined by Mongolia, which became the 57^{ème} participating State in 2012.

Whereas the logic of the CSCE was one of state-to-state negotiations, aiming to overcome blocs and break down walls, there is an increasingly marked crystallisation of positions, classically opposing the East and West of Vienna. The centrifugal movement linked to the end of the communist bloc and the dissolution of the USSR led to the multiplication of "frozen conflicts" and then open wars linked to Russia's intervention in its "near abroad" with the support provided to self-proclaimed entities, such as in Moldova or Georgia. These political tensions have been the backdrop to the last two OSCE summits, in Istanbul in 1999 and Astana in 2010. Despite the OSCE's diplomatic efforts, including its field missions, there has been one armed conflict after another, with the Russia-Georgia war of 2008, the Russia-Ukraine war of 2014 leading to the new war of aggression of Russia against Ukraine, which rages since 2022, while the recurrent war between Armenia and Azerbaijan took a new turn in 2020.

These conflicts have given rise to numerous disputes, with four cases pending before the International Court of Justice, based on the Convention against Racial Discrimination or the Genocide Convention. In the latest case, *Ukraine v. Russia*, filed on 27 February 2022, some 20 OSCE participating States have applied for third-party intervention. At the same time, the European Court of Human Rights has dealt with both individual applications, as in the case of *Iliascu v. Moldova and Russia*, and inter-state disputes, with the multiplication of cross-group disputes, which contribute to blurring the distinctions, as in the Azeri or Armenian cases. In the interstate context, the European Court of Human Rights decided a case of *Georgia v. Russia (II)* by a judgment of 21 January 2021, there are 15 other pending cases related to these recent conflicts, including a case of *Ukraine and the Netherlands v. Russia* brought in 2014, following the destruction of Malaysia Airlines flight MH17 over the Donbass. Another case brought in 2014, *Ukraine v. Russia*, concerns the situation in Crimea. Three cases were filed in 2018 (*Ukraine v. Russia (VII) and (VIII) and Georgia v. Russia*). Three more in 2020 (*Armenia v. Azerbaijan, Armenia v. Turkey, Azerbaijan v. Armenia*), followed by four in 2021 (*Ukraine v. Russia (IX), Russia v. Ukraine, Armenia v. Azerbaijan (II) and (III)*) and three in 2022 (*Ukraine v. Russia (X), Armenia v. Azerbaijan (IV) and Azerbaijan v. Armenia (II)*). Finally, it should be noted that the PCA serves as a framework for two arbitrations between Ukraine and Russia, established pursuant to Annex VII of the Montego Bay Treaty on the Law of the Sea, concerning territorial waters in the Black Sea (2017/06) and the fate of Ukrainian vessels and seafarers arrested and detained by Russia (2019/28).

In the other half of Europe, the European Union's power of attraction leads it to multiply its good offices with the candidate countries, without its efforts always being crowned with success, as shown by the sea serpent of the arbitration between Slovenia and Croatia, which was handed down on 29 June 2017 in the framework of the Permanent Court of Arbitration, and which was the subject of a ruling by the Grand Chamber of the Court of Justice of the European Union on 31 January 2020, without providing a solution on the ground. Here, too, it may be thought that conciliation would still have a place. More recently, the EU has attempted to resolve the crisis between Bulgaria and North Macedonia. Similarly, it is the head of European diplomacy who is trying "to ease tensions" between Kosovo and Serbia. On a more technical level, Member States prefer to settle their disputes within the framework of EU law,

without abandoning the primacy of the Court of Justice of the European Union, which was a stumbling block in the BREXIT, as well as in the negotiation of the general agreement with Switzerland.

Few disputes between two Member States of the European Union are the subject of international proceedings. An exception is the new case between Germany and Italy concerning state immunities, which was filed in April 2022 before the ICJ. The two states, which have abandoned their requests for provisional measures, seem willing to allow time for negotiation, since the German submission is due on 12 June 2023 and the Italian counter-submission on 12 June 2024. Disputes before the European Court of Human Rights are hardly more numerous. An extradition case between Latvia and Denmark was struck off the list of cases on 16 June 2020 as part of a friendly settlement. The case between Slovenia and Croatia in a banking dispute was decided by a Grand Chamber on 18 November 2020. A case between Liechtenstein and the Czech Republic, filed on 19 August 2020, remains pending before the European Court of Human Rights.

2) Faced with these types of disputes, the Court of Conciliation and Arbitration within the OSCE suffers from several handicaps: a prerequisite for unilateral referral to the Court for a conciliation procedure is that the States involved are States Parties, even if it remains accessible to participating States on the basis of an agreement between them. *A fortiori* for the establishment of an arbitral tribunal, in the absence of a declaration of acceptance currently in force (Art. 26, para. 2), only a joint referral is possible at this stage. But behind these procedural questions, linked to the prior acceptance of the States, it is their lack of political will that appears. Even if the opposition between political and legal disputes is relative, States prefer to plead their case before public opinion rather than seek ways and means of a mutually agreed solution. The specificity of conciliation is that it relies on the good faith and goodwill of the states involved, without being able to impose anything on the parties, or to use the carrot or stick, as donors can do.

But practical, very concrete measures would strengthen the chances of arbitration and conciliation, both upstream - in terms of prevention, early warning and fact-finding - and downstream - through follow-up measures and implementation guarantees.

Firstly, the circle of States Parties must be enlarged, with new ratifications by States wishing to give full effect to the principle of the peaceful settlement of disputes.

States parties should also renew their optional declaration in favour of arbitration. Although conciliation is the most flexible method, offering without imposing anything, the path of arbitration in an established framework should be encouraged by States governed by the rule of law, making the most of the link between the two procedures.

States Parties should also regularly renew the members they appoint as arbitrators and conciliators, so that the Court remains a fully representative living instrument, with a diversity of expertise that can contribute to the Court's attractiveness. The decisive step would of course be to submit a case, a first case, to the Court to allow it to prove itself. Dispute settlement also needs confidence-building measures.

At another level, should we not ask ourselves about the limits of inter-state litigation in today's world. Many disputes concerning the environment, sustainable development or human security involve local authorities and private actors. Should we not open the way for them, with the agreement of the states concerned, by means of diplomatic protection, if only to allow the facts to be established by a neutral, independent and impartial body or the proper follow-up of an amicable settlement?

Similarly, the advisory opinion procedure could be a flexible way of cooperating with various European institutions, starting with the OSCE institutions and structures for hearings or legal consultations.

At a time when the OSCE is facing an unprecedented crisis that constitutes a "litmus test", calling into question its foundations and methods, we must strongly emphasise that the Stockholm Convention remains rooted in international law and faithful to the spirit of Helsinki. Let me conclude by recalling some simple convictions:

- All participating States have the option of joining the Stockholm Convention and of making full use of its procedures in their bilateral disputes. Strengthening the Stockholm Convention network can only facilitate and accelerate the smooth running of the procedures implemented.
- Arbitration and conciliation should be part of the toolbox of the OSCE Chairmanship-in-Office and other institutions in the context of conflict prevention and crisis de-escalation. New synergies should be created with all institutions and structures within the OSCE and other organisations contributing to a "Europe of law".
- The Court, for its part, must not only be available but must be "proactive": it must be prepared, efficient and dynamic, mobilising all the "friends of the Convention" to make it better known. Like an obstinate watchdog, the Court has a duty to keep the torch burning for a particularly original "legal area of States governed by the rule of law", which must be a guarantee of peace, strengthened by its legal principles and democratic values.

LESSONS LEARNED FROM THE PERMANENT COURT OF ARBITRATION

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1. INTRODUCTORY REMARKS

Paradoxically, the current international crisis building upon the conflict in Ukraine is precisely one of the kind the OSCE, and its predecessor CSCE, had been created to prevent or manage.¹ The latter has been most successful in its mission, to the extent that observers and political scientists consider it as a major determinant for the end of the Cold War.² It is arguable, especially for the purposes of the present contribution, that since its inception in 1969 in Madrid, through the diplomatic milestone of the 1975 Helsinki Final Act, the CSCE could be considered in and of itself as a long term process of multilateral conciliation. As put it by Victor-Yves Ghebaly

“The Helsinki process may, in fact, be regarded as a particularly complex solution to the fundamental problem posed by the East-West conflict during the Cold War - that of banishing the spectre in Europe of the *ultima ratio regum* ("The last argument of kings", as inscribed by Louis XIV of France on his cannons) by opening the way to communication and cooperation between nation states separated by a profound ideological divide”.³

One may wonder why the upgraded configuration of the CSCE – the OSCE – could not prevent what its predecessor succeeded to put to an end to. The reason seems hardly be found in alleged legal or institutional flaws in the current system, but rather in the political climate characterised by the recalcitrance of States to make use of the available legal and institutional tools, at a time of prevailing nationalistic multipolarism. This obviously stands in the way of the functioning of the OSCE carefully crafted wheels and clogs, as well as of other intergovernmental configurations of multilateral cooperation.

Still, margins for enhancing available means of dispute prevention and settlement can always be explored. To that end, the present contribution focuses on conciliation amongst other means of diplomatic dispute settlement,⁴ as a tool to facilitate finding common ground between

¹ Miriam Sapiro, 'Changing the CSCE into the OSCE: Legal Aspects of a Political Transformation', (1995) 89 AJIL 631.

² See, amongst others, Bjørn Møller, 'European Security: The Role of the Organization for Security and Cooperation in Europe', LSE Crisis States Working Paper Series No. 2, Working Paper 30, February 2008.

³ 'The CSCE Forum for Security Cooperation: the Opening Gambits', (1993) 41 NATO Review 23.

⁴ See, generally, for all Jean-Pierre Cot, 'Conciliation' in Anne Peters (ed), *Max Planck Encyclopedia of Public International Law* (online edn, OUP 2006), while on conciliation within the OSCE framework, see Christian Tomuschat, Riccardo Pisillo Mazzeschi and Daniel Thürer (eds), *Conciliation in International Law: The OSCE Court of Conciliation and Arbitration* (Brill-Nijhoff 2017).

the disputing parties, while allowing for a degree of control by them on the conduct and end product of the non-adjudicative procedure, thus, facilitating spontaneous abidance by it.

The choice of the topic is made against the background of the fact that, despite of the Stockholm Convention on Conciliation and Arbitration of 1992 (Stockholm Convention), providing for conciliation, alongside arbitration,⁵ it has never been resorted to. In the following pages the question is addressed whether the successful experience in the field by the Permanent Court of Arbitration (PCA) could provide a source of inspiration in the OSCE context.

The present contribution comes in four parts. First, the basic features of the conciliation procedure under the Stockholm Convention will be briefly recalled as a yardstick by which to assess the relevant practice of the PCA. Second, a general overview will be provided of the PCA's involvement in conciliation. Third, the analysis will focus on the recent and most significant PCA success story in the field under consideration, namely the Timor-Leste/Australia conciliation. Fourth and finally, few concluding remarks will follow.

2. THE CONCILIATION PROCEDURE UNDER THE STOCKHOLM CONVENTION

The Stockholm Convention provides for mandatory conciliation. That is a procedure which may be initiated unilaterally by a State party before a Conciliation Commission to be established on a case-by-case basis to resolve “any dispute” with one or more States parties that could not be resolved through negotiations within a reasonable period of time,⁶ or by agreement between two or more States parties or between one or more States parties and one or more CSCE participating States.⁷

The procedure for appointing conciliators resembles that which is typically followed for the appointment of arbitrators. Namely, each disputing party appoints a conciliator, amongst those referred to under Article 3, while the Bureau appoints three.⁸ This number may be increased or decreased by the Bureau as long as it remains uneven. If one of the disputing parties fails to appoint its own conciliator, the Bureau shall act as appointing authority by default and appoints the appropriate number of conciliators from the same list.⁹ The Commission elects its chairperson from among the members appointed by the Bureau.¹⁰

It is to be stressed that both the disputing parties and the Bureau may choose their appointees from the list provided under Article 3. Differently, the PCA, in finding suitable candidates for appointment in conciliations (and arbitrations), is not limited to a predetermined pool of candidates. This allows to select suitable candidates on a case specific basis according to

⁵ See ‘Conference on Security and Co-operation in Europe: Decision on Peaceful Settlement of Disputes Including the Convention on Conciliation and Arbitration Within the CSCE’ (1993) 32 ILM 551, Annex 2. Despite its name, the OSCE Court of Conciliation and Arbitration is not formally part of the OSCE’s institutional structure and is a non-permanent body that creates conciliation commissions and arbitration tribunals on an *ad hoc* basis, see Niels M Blokker and Ramses A Wessel, ‘Revisiting Questions of Organisationhood, Legal Personality and Membership in the OSCE: the Interplay Between Law, Politics and Practice’ in Mateja Steinbrück Platise, Carolyn Moser and Anne Peters (eds), *The Legal Framework of the OSCE* (CUP 2019) 135, 136.

⁶ Arts 18(1) and 20(1).

⁷ Art 20(2).

⁸ Articles 21(2) and 21(5).

⁹ Article 22(2).

¹⁰ Article 21(6).

technical expertise, experience in dispute resolution, nationality, language, legal and cultural background.

The Conciliation Commission under the Stockholm Convention has a broad mandate, as its objective is to “assist the parties to the dispute in finding a settlement in accordance with international law and their CSCE commitments.”¹¹ It has been suggested that this provision affords the Conciliation Commission an ample latitude in finding the basis for the settlement of the dispute submitted to it, including by applying equity, as long as its finding is in accordance with international law and the CSCE commitments.¹²

If the parties to the dispute reach a mutually acceptable solution, the terms of their agreement may be formalised by the Conciliation Commission in a “summary of the conclusions”.¹³ In the event that the parties cannot reach a mutually acceptable solution, the Conciliation Commission draws up a final report indicating the possible solution to the dispute,¹⁴ which is notified to the parties, who have 30 days from receipt to examine the proposal and inform the President of the Commission whether they intend to accept or reject it.¹⁵ If the parties to the dispute do not accept the proposed solution, the Commission is to transmit the report to the OSCE Council. The latter may exert political pressure on the parties to review their positions.

The conciliation procedure under the Stockholm Convention has been described as “a difficult intermediate situation between more flexible and controllable dispute settlement procedures and procedures with binding effects.”¹⁶ Among the procedural aspects of the mechanism in question that may have contributed to this critical assessment may feature the impossibility for the disputing parties to appoint conciliators other than those already designated under Article 3, the prevalence of conciliators appointed by the Bureau, and the involvement of the OSCE Council in case conciliation fails.

It is also noteworthy that conciliation under the Stockholm Convention is subsidiary in nature. That is to say that the Conciliation Commission may not exercise its competence over a dispute which has been submitted to a court or tribunal having jurisdiction, or even simply if the disputing parties had previously accepted the exclusive jurisdiction of another forum.¹⁷ Article 19(2) also provides that the Conciliation Commission shall suspend its work if one or all of the parties “refer the dispute to a court or tribunal whose jurisdiction in respect to the dispute the parties thereto are under a legal obligation to accept” or if another body has been called upon “to submit observations on the dispute.”

In full contrast to the above, Article 16 of the 1996 PCA Conciliation Rules provides that “the parties undertake not to initiate, during the conciliation proceedings, any arbitral or judicial proceedings in connection with a dispute that is the subject of the conciliation proceedings”.

¹¹ Article 24.

¹² Riccardo Pisillo Mazzeschi and Eugenio Carli, ‘The Conciliation Procedure of the OSCE Court: Problems and Prospects’ in Christian Tomuschat and Marcelo G Kohen (eds), *Flexibility in International Dispute Settlement: Conciliation Revisited* (Brill Nijhoff 2020) 205, 214.

¹³ Article 25(1) and Article 21(1) of the Rules of Procedure of the OSCE Court

¹⁴ Article 25(1).

¹⁵ Article 25(3).

¹⁶ Riccardo Pisillo Mazzeschi, ‘Prevention and Resolution of Conflicts in the OSCE and the Role of the Court of Conciliation and Arbitration’ in Christian Tomuschat, Riccardo Pisillo Mazzeschi and Daniel Thürer (eds), *Conciliation in International Law: The OSCE Court of Conciliation and Arbitration* (Brill-Nijhoff 2017) 55, 76.

¹⁷ Article 19(1). See also the Preamble, Recital 3.

However, it should be noted that the same provision preserves, with a significant degree of “constructive ambiguity”, the admissibility for either party to swerve from a PCA conciliation procedure, if necessary to safeguard its rights.

3. CONCILIATION AT THE PCA: A BRIEF OVERVIEW

The PCA has a long experience in administering conciliations between States, but also between intergovernmental organisations and other public entities, as well as between States and sub-state entities or, less importantly for the present purposes, corporations.¹⁸ It should be noted that this practice has developed despite the absence of an explicit mandate to this effect in the two founding Conventions.¹⁹

The administration of conciliation procedures by the PCA is usually conducted under the UNCITRAL Conciliation Rules.²⁰ In complementary terms, in 1996 the PCA adopted a set of flexible procedural rules to facilitate conciliation (‘PCA Conciliation Rules’).²¹ These rules are based on the UNCITRAL Conciliation Rules, with amendments indicating, *inter alia*, the availability of the Secretary-General of the PCA to assist in the appointment of conciliators and the International Bureau to provide administrative support.²² The PCA Conciliation Rules and the services of the Secretary-General and the International Bureau are only available in relation to disputes where the State is a party to one of the founding Conventions, and, as mentioned, the selection of conciliators is not limited to persons appointed as PCA members under those Conventions.²³

3.1. Denmark/Lithuania Conciliation (1937-1938)²⁴

The first conciliation case to be brought before the PCA concerned a dispute over the construction of a railway by a Danish company in Lithuania.²⁵ The contract between Lithuania

¹⁸ For a brief overview see Garth Schofield, ‘The Permanent Court of Arbitration: From 1899 to Present’ in Chin L Lim (ed), *The Cambridge Companion to International Arbitration* (CUP 2021) 349, 383-388.

¹⁹ Namely, the 1899 Convention for the Pacific Settlement of International Disputes (adopted 29 July 1899, entered into force 4 September 1900) and the 1907 Convention for the Pacific Settlement of International Disputes (adopted 18 October 1907, entered into force 26 January 1910). The texts of the Conventions are available in Shabtai Rosenne, *The Hague Peace Conferences of 1899 and 1907 and International Arbitration: Reports and Documents* (TMC Asser Press 2001).

²⁰ See United Nations General Assembly, Resolution 35/52 (4 December 1980).

²¹ Permanent Court of Arbitration Optional Conciliation Rules (adopted 1 July 1996), available at <https://docs.pca-cpa.org/2016/01/Permanent-Court-of-Arbitration-Optional-Conciliation-Rules.pdf>. See also the Permanent Court of Arbitration Optional Rules for Conciliation of Disputes Relating to Natural Resources and the Environment (adopted 16 April 2002), available at <https://docs.pca-cpa.org/2016/01/Optional-Rules-for-Conciliation-of-Disputes-Relating-to-the-Environment-and-or-Natural-Resources.pdf>.

²² See PCA Conciliation Rules, Articles 4(3) and 8.

²³ See the Introduction to the PC Conciliation Rules.

²⁴ The case is available in Phyllis Hamilton et al (eds), *The Permanent Court of Arbitration: International Arbitration and Dispute Resolution, Summaries of Awards, Settlement Agreements and Reports* (Kluwer Law International 1999) 285 ff.

²⁵ The case was referred to conciliation under Article 7 of the 1926 Treaty of Conciliation between Denmark and Lithuania. Article 9 of the Treaty provided that ‘it is the task of the Permanent Conciliation Commission to shed light on the questions in dispute and to collect for this purpose all relevant information by means of inquiries, or otherwise, and to endeavor to conciliate the parties. After examining the matter, the Commission may communicate to the Parties the terms of the arrangement which it considers suitable and to set a time limit for their response.’

and the Danish company provided for payments in either US dollars or Litas, at the option of the Danish company. The dispute arose after the US dollar depreciated significantly and Lithuania started paying the Danish company with this currency. Upon failure of the negotiations between the parties, Denmark intervened as guarantor for the Danish company engaging on the diplomatic level with Lithuania.

Since the PCA founding Conventions did not expressly provide for a conciliation procedure, upon request from the chairman of the Conciliation Commission, in order to provide the disputing parties with the PCA's facilities and administrative assistance, the Secretary-General of the PCA sought the approval of the Administrative Council. In May 1937, the Administrative Council gave its authorisation to the International Bureau to make its premises and staff available to the Conciliation Commission extending to it the regulatory framework provided for commissions of enquiry under the founding Conventions.²⁶

The following year, the Conciliation Commission submitted its report finding that it lacked the competence to decide questions of law and that its task was only to provide the parties with proposals that might help them to resolve the dispute. This would preserve the right of the parties to resort to arbitration under the Danish-Lithuanian Conciliation and Arbitration Treaty, in case of failure of the conciliation procedure. At the same time, the Commission could not enter into joint negotiations with the representatives of the two parties, since the Agent of Lithuania had been authorised to engage only in discussions addressing legal issues. Accordingly, the Conciliation Commission concluded its work by submitting to the disputing parties proposed terms for an agreement.

Such a proposed agreement could not be reached due to the lack of consent by Lithuania, which stressed its dissatisfaction with the decision by the Conciliation Commission not to address legal issues.

3.2. *France/Switzerland Conciliation (1954-1955)*²⁷

This case concerned a dispute over the reimbursement of the costs of internment of a Polish division during World War II and alleged violations committed by the French customs authorities. The Swiss Federal Council had offered the army division asylum through internment in exchange for total disarmament. Switzerland claimed compensation from France was for the cost of the Polish troops for their stay in Switzerland until 1945 when they were fighting as part of the French army. France rejected the claim arguing that it was for Poland to pay for its own costs and set in motion the conciliation procedure under Article 5 of the 1925 Franco-Swiss Peace Treaty, which provided for compulsory conciliation. In the "proposed terms of settlement"²⁸ the Commission suggested that France should pay the costs of internment up to 1941, when the French soldiers interned were released, adding only part of the costs for the remaining years as a matter of fairness, rather than law. The Commission did not uphold the Swiss claim for the alleged violations by the French customs authorities due to lack of evidence. Most importantly, the parties accepted the formula proposed by solutions proposed and entered into a conciliation agreement.

²⁶ 1899 Convention, Article 9 ff and 1907 Convention, Article 9 ff.

²⁷ The case is available in Hamilton et al (n 26) 288 ff.

²⁸ Ibid, 289.

3.3. Greece/Italy Conciliation (1955-1956)²⁹

Before the start of the Greek-Italian war, an Italian military submarine sank the Greek ship “Roula” in 1940, after disembarking the crew. After the end of the war Greece claimed compensation for the destruction of the ship. The parties agreed to submit the dispute to conciliation and the International Bureau and the PCA's premises were placed at the disposal of the Conciliation Commission.

Reasoning on the basis of equity, the Conciliation Commission issued its recommendations proposing that Italy should pay compensation for the destruction of the ship. Italy had advanced arguments based on the 1938 Peace Treaty between the Powers allied to Italy, which the Commission did not consider, observing that it would otherwise have to deal with purely legal arguments, thus compromising its mission, which was to resolve the dispute through conciliation. The parties accepted the Commission's recommendations and reached an agreement on the amount of compensation.

4. THE TIMOR-LESTE/AUSTRALIA CONCILIATION

The Timor Sea Conciliation, conducted between 2016 and 2018,³⁰ marks the most successful conciliation process administered by the PCA. After attaining independence in 2002, Timor-Leste had entered into a series of bilateral agreements with Australia to allow for resource sharing: the Timor Sea Treaty, the Agreement relating to the Unitisation of the Sunrise and Troubadour, and the Treaty on Certain Maritime Arrangements in the Timor Sea (CMATS Treaty).³¹ Later, Timor-Leste initiated two arbitration proceedings against Australia over the exploitation of marine resources under the Timor Sea Treaty.³²

This was the first compulsory conciliation procedure under Article 298 of the United Nations Convention on the Law of the Sea (UNCLOS).³³ The establishment and conduct of the conciliation procedure are governed by Annex V to the UNCLOS. It provides for the conciliation commission to be composed of five conciliators,³⁴ each party appointing two conciliators and the four conciliators so appointed in their turn appoint the fifth conciliator who serves as chairperson.³⁵ UNCLOS only encourages parties to appoint conciliators from the list

²⁹ The case is available in *ibid*, 291.

³⁰ Maritime Boundary between Timor-Leste and Australia, PCA Case No 2016-10, Report and Recommendations of the Compulsory Conciliation Commission between Timor-Leste and Australia on the Timor Sea (9 May 2018) ('Report of the Commission'), available at: <https://pcacases.com/web/sendAttach/2327>.

³¹ On the background to the parties' dispute see *ibid*, para 14 ff, especially paras 35-38.

³² See Arbitration under the Timor Sea Treaty (Timor-Leste v Australia), PCA Case No 2013-16, documents available at <https://pca-cpa.org/en/cases/37/> and Arbitration under the Timor Sea Treaty (Timor-Leste v Australia), PCA Case No 2015-41, documents available at <https://pca-cpa.org/en/cases/141/>

³³ (Adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3. Article 298 provides for compulsory conciliation under Annex V where a state has excluded certain subject-matters from arbitration or judicial settlement.

³⁴ UNCLOS, Annex V, Article 3(a).

³⁵ UNCLOS, Annex V, Article 3(b), 3(c) and 3(d).

maintained by the UN Secretary-General under the Convention.³⁶ However, the chairperson is to be chosen by the conciliators appointed by the parties from the list.³⁷

The work programme followed by the Timor Sea Conciliation Commission was extremely intense.³⁸ After its establishment in June 2016, at August the parties addressed the question of its competence and whether the Commission should decide on this issue as a preliminary matter.³⁹ Already in September 2016, the Commission decided on its competence in the affirmative, based on due process considerations and on Article 7 of Annex V allowing for the Commission to address the legal views of the parties on the delimitation of maritime boundaries.⁴⁰

Whilst upon consent of the parties the opening session of the hearing was webcast live,⁴¹ the Conciliation Commission held in October 2016 a series of confidential meetings with the parties' delegations in Singapore, at the end of which the parties agreed on an integrated package of "confidence-building measures" aimed at facilitating the conciliation.⁴² At the same time, Timor-Leste suspended the two arbitration proceedings initiated against Australia.⁴³

In January 2017 the Commission and the Foreign Ministers of Timor-Leste and Australia issued a Trilateral Joint Statement announcing the termination of CMATS.⁴⁴ Shortly later, Timor-Leste withdrew its claims against Australia under the Timor Sea Treaty.⁴⁵ After few further confidential meetings with the Commission, on 30 August 2017, the Parties reached an agreement on the core elements of a maritime boundary delimitation, as well as on the legal status of the Greater Sunrise gas fields in the Timor Sea, and also on a special regime for developing exploitation of the resource in question and sharing the revenues therefrom.⁴⁶

Two months later, in October, following a series of confidential meetings with the Conciliation Commission in The Hague, the parties reached agreement on a draft treaty, along the lines of the Agreement of 30 August 2017.⁴⁷ Thereafter, the parties continued discussions with each other transitional arrangements, and also with private stakeholders in the Timor Sea regarding the impact of the draft treaty on private interests.⁴⁸

³⁶ UNCLOS, Annex V, Article 3(b): 'The party instituting the proceedings shall appoint two conciliators to be chosen *preferably* from the list ...,' italics added.

³⁷ UNCLOS, Annex V, Article 3(d). In case this procedure cannot be followed, the UN Secretary General acts as the default appointing authority and makes the necessary appointments from the list, *ibid*, Article 3(e). In the Timor Sea Conciliation, both parties appointed two conciliators each who, in turn, appointed Peter Taksøe-Jensen (Denmark) as the fifth conciliator and chairman of the Conciliation Commission.

³⁸ A thorough summary of the Timor Sea Conciliation can be found in 'Contribution of the Permanent Court of Arbitration to the Report of the United Nations Secretary-General on Oceans and the Law of the Sea, as at 14 June 2019', 4-6, available at <https://docs.pca-cpa.org/2019/06/Contribution-of-the-Permanent-Court-of-Arbitration-to-the-Report-of-the-...-1.pdf>. <https://docs.pca-cpa.org/2019/06/Contribution-of-the-Permanent-Court-of-Arbitration-to-the-Report-of-the-...-1.pdf>.

³⁹ Report of the Commission (n 32) para 68.

⁴⁰ Report of the Commission (n 32) para 69.

⁴¹ The video of the opening session is available at http://files.pca-cpa.org/pcadocs/2016-08-28_pca.mp4.

⁴² See the details in *ibid*, para 95.

⁴³ *Ibid*, para 96.

⁴⁴ *Ibid*, para 103.

⁴⁵ *Ibid*, para 106.

⁴⁶ *Ibid*, paras 155-166.

⁴⁷ *Ibid*, paras 181-183.

⁴⁸ *Ibid*, para 197 ff.

On 6 March 2018, the new Maritime Boundary Treaty between Timor-Leste and Australia was signed in New York in the presence of the UN Secretary-General, the Conciliation Commission, and representatives of the PCA.⁴⁹ The Report of the Commission was issued two months later, recommending that the

“[p]arties implement the agreements reached in the course of the conciliation proceedings, including the transitional arrangements pertaining thereto” and that they “continue their discussions regarding the development of Greater Sunrise with a view to reaching agreement on a concept for the development of the resource.”⁵⁰

4. CONCLUDING REMARKS: PRACTICAL LESSONS DRAWN FROM THE PERMANENT COURT OF ARBITRATION

On the basis of the above, some final considerations can be drawn.

First, the cases illustrated show that conciliation is a flexible dispute resolution mechanism suitable for various types of disputes, including sensitive disputes arising from politically tense situations. The PCA has evolved with the changing times, which has allowed it to remain relevant and an active intergovernmental organisation for about a century. Its evolution is exemplified by the Denmark-Lithuania conciliation discussed above, at the time when the mandate of the PCA was considered to include assistance to conciliation commissions, next to administering arbitrations. One may also recall the flexibility that allowed the PCA to administer the *Radio Corporation of America v China* arbitration as early as 1934.⁵¹ This was an early mixed arbitration which paved the way for the PCA to fully administer investor-state cases many decades later. Another recent example of flexibility which is particularly germane to the dispute resolution dimension of the OSCE is the *Abyei Arbitration*, concluded in 2009, between the Government of Sudan and the Sudan People’s Liberation Movement/Army.⁵²

Second, with specific regard to the Timor Sea Conciliation, the most important takeaway is that even conflictual issues of a political nature can be resolved through conciliation. The Conciliation Commission itself identified some elements that contributed to the success of the conciliation process.⁵³ Namely, the adoption of confidence-building measures, including, crucially, the termination of the CMATS Treaty, and the suspension, first, and termination, later, of arbitration proceedings;⁵⁴ the ability of the Conciliation Commission to meet with the parties separately, next to jointly, with a view to understanding their respective objectives and interests, thus allowing it to advance proposals capable of cajoling the parties to agree on all

⁴⁹ Ibid, para 219.

⁵⁰ Ibid, para. 306.

⁵¹ *Radio Corporation of America v. China*, PCA Case No 1934-01, documents available at <https://pca-cpa.org/en/cases/16/>

⁵² *The Government of Sudan / The Sudan People's Liberation Movement/Army (Abyei Arbitration)*, PCA Case No 2008-07, documents available at <https://pca-cpa.org/en/cases/92/>

⁵³ See, in general, Report of the Commission (n 32) para 285.

⁵⁴ See also Natalie Klein, ‘Timor Sea Conciliation: A Harbinger of Dispute Settlement under UNCLOS?’ in Hélène Ruiz Fabri et al (eds), *Dispute Resolution in the Law of International Watercourses and the Law of the Sea* (Brill Nijhoff 2020), 105, 108-114. See also Report of the Commission (n 32) para 95: ‘... based on its discussions with the Parties, it appears that CMATS may remain an obstacle to moving forward that could be productively removed from the equation.’

elements of the dispute;⁵⁵ the combination of confidentiality with transparency. Whilst most of the discussions took place in a confidential environment, each party having complete control over the information and documents it submitted, the Conciliation Commission could keep all stakeholders informed of the progress of the proceedings.

Third, the Timor Sea Conciliation demonstrates that conciliation can be useful even when other modes of litigation have already been triggered. The withdrawal of arbitration claims concerning matters under discussion within the conciliation process served to build trust between the parties, and depoliticised sensitive issues. This practice shows a latitude for flexibility which is possibly difficult to be exercised pursuant to Article 19(2) of the Stockholm Convention.

⁵⁵ Report of the Commission (n 32) paras 90, 147-154.

ADAPTATION OF THE STOCKHOLM CONVENTION TO CHANGING CIRCUMSTANCES

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We have come here together to celebrate the 30th anniversary of the Stockholm Convention on Conciliation and Arbitration within the OSCE. When it was signed on 15 December 1992 here in Stockholm after the collapse of the Soviet empire and the fall of the Berlin wall, it was regarded as the culmination point of a long process of rapprochement between East and West in Europe, leading the European peoples out of the darkness of several decades of political tensions into the light of peace and mutual understanding. As we know today, this expectation has materialised only to some modest extent. From the 57 participating States of the OSCE, no less than, but at the same time no more than 34 have joined the Stockholm Convention (SC). One has to note that all the most powerful participating States have chosen to remain aloof from the judicial mechanisms provided for by the Convention. Neither the U.S.A. (nor Canada), on the one hand, nor the Russian Federation, on the other, have joined the club of nations manifesting their interest in formalised procedures of dispute settlement. Thus, the architecture designed 30 years ago lacks the final key stone of a Court that had been deemed to symbolise the harmony achieved at that time in the political field.

It was already said by the preceding speakers that up to now the Court has not had any opportunity to evince its presence and its usefulness in real terms by the active discharge of its functions. It remains in abeyance. Is this a reason for concern – or does the absence of any case hitherto submitted for conciliation or arbitration show that Europe is on the right path of consolidation? It is a simple fact that not all controversies existing within the area covered by the OSCE instruments have been resolved. Russia's present departure from the circle of "*nations civilisées*"¹ is too obvious. Even within the geographical scope of the Stockholm Convention some dissonances remain here and there. Yet within this latter group major differences that might jeopardise international peace and security have not arisen.

1. THE CURRENT SITUATION

First of all, the well-known good notice: Large parts of Europe have indeed lived up to the expectations that were placed in them. In particular the countries of the West of the continent have become accustomed to living in friendly partnership with their homologues. The notion of vindicating one's claims through use of force has fallen into disrepute or even oblivion. Through its criminal activities during the Nazi period of its history Germany has taught itself and its neighbours the lesson that armed warfare is unsuitable for the pursuit of any political goals. This lesson can now be considered to be so deeply ingrained in Europe's collective conscience that no responsible politician would any longer suggest departing from this position of principle.

¹ Reference to Art. 38 (1)(c) of the International Court of Justice.

The renunciation of violent methods has introduced a spirit of mutual understanding intent on seeking amicable settlements even where high-ranking interests are at stake. As a logical consequence, resort to methods that can lead to well-balanced and just outcomes in accordance with Art. 2(3) of the UN Charter has become the rule. Rarely do differences of opinion reach the stage where formalised procedures of settlement must be set in motion. This summary of the manifold situations may seem too optimistic to sharp observers, a rosy distortion of realities, but on the whole it should nonetheless represent an accurate reflection of the realities on the ground.

2. REASONS FOR AVOIDING RESORT TO THE COURT

1) My first remark highlights the abundant availability of formalised procedures for the settlement of disputes. As from its very origin, the OSCE instruments have attempted to enable the participating States to iron out their differences or disputes by way of the manifold mechanisms established by the organisation during the many years of its existence since 1975.² The fact that they have rarely produced positive outcomes may also have dampened the inclination to turn to our Court, which has arisen from the same breeding ground.

2) A second observation must mention the fact that the Court is largely unknown until today even in diplomatic circles. Obviously, the question cannot be avoided why the Court remains stuck in a twilight zone outside the view even of knowledgeable observers. One of the main reasons is clearly perceptible, the lack of even a single case where the Court could have shown its potential as an institution able to serve peace and security among its States parties. Many other activities of the OSCE have attracted great interest, above all its observer missions on the borderline between Ukraine and the Russian Federation as well as its activities for the protection of minorities. Necessarily, never having been seized, the Court has remained outside the limelight of the media and the critique of the community of the international legal profession. It is understandable that under these conditions States are rather prompted to shy away from entrusting the Court with any mandate.

3) It matters, in this regard, that for every single case a specific judicial body shall be constituted, which is the essence of conciliation and arbitration. The absence of any concrete case has prevented this mechanism from materialising and has at the same time impeded the formation of any reliable jurisprudence. Accordingly, this lacuna renders it extremely difficult to anticipate whether a freshly constituted ad hoc body could be expected wisely and conscientiously to act along the lines both of good reason and law. The parties only know that the jurists nominated by them deserve their confidence. This fact alone does not dissipate the doubts surrounding a new institution. Any newcomer has difficulties to be accepted on the international stage.

4) The Court was not conceived originally as a judicial body at the same level as the other relevant international courts or tribunals in Europe. The Preamble of the SC (para. 2) states explicitly that the States parties had no intention to impair “other” existing institutions or mechanisms, in particular the International Court of Justice, the European Court of Human

² For an overview see Alice Ackermann, ‘OSCE Mechanisms and Procedures related to Early Warning, Conflict Prevention, and Crisis Management’, *OSCE Yearbook* 2019, 223-231.

Rights, the Court of Justice of the European Communities (now: the European Union) and the Permanent Court of Arbitration. This subsidiarity clause (which is particularised in Art. 19 SC) devalues to some extent recourse to the Court, at least in political terms. One may find here a reason why governments, in case they are free to choose the best path for settlement, may refrain from taking the Court into consideration.

5) A further element to be considered is the widespread reluctance of States to engage in formal proceedings of third-party settlement if the jurisdiction of a specific judicial body is not compulsory under a conventional obligation. In fact, inter-State disputes may in many instances be encompassed by the widespread jurisdiction of the Court of Justice of the European Union or that of the Strasbourg Court of Human Rights. A short comparison yields insightful conclusions. Empirical observation demonstrates that the number of applications introduced by States parties to the SC before the ICJ, the competitor of our Court, is fairly low if we take the last 50 years as standard of measurement. Only six cases can be mentioned. In 1974, the United Kingdom and the Federal Republic of Germany wished to defend fishing rights in the waters around Iceland which Iceland claimed as exclusive fishing zone for itself.³ In 1992, Finland and Denmark were involved in a serious dispute about Passage through the Great Belt.⁴ ⁵ One year later, a dispute between Denmark and Norway about the maritime delimitation in the Area between Greenland and Jan Mayen turned eventually into a success story for the ICJ and the two litigant parties.⁶ In both cases, vital interests of the litigant parties were at stake but could eventually be completely reconciled, in the first case even without any decision on the merits. All these proceedings took place before our Court was established or came into operation.

The most spectacular dispute between States parties to the SC was the claim brought to the ICJ in 2008, strangely enough by Liechtenstein against Germany, on account of expropriation measures carried out by Czechoslovakia against Liechtenstein property shortly before or after the end of World War II. In this case, which was rejected for lack of jurisdiction, tremendous amounts of financial compensation were in issue.

Given its complexity, it could hardly have been handled by an Arbitral Tribunal under the SC and was not amenable to conciliation on account of its far-reaching consequences that went far beyond the case at hand.⁷ ⁸

³ *Fisheries Jurisdiction (UK v. Iceland)*, Judgment, 25 July 1974, ICJ Reports 1974, 3; (*Federal Republic of Germany v. Iceland*), Judgment, 25 July 1974, ICJ Reports 1974, 175.

⁴ *Passage through the Great Belt (Finland v. Denmark)*, *Request for the Indication of Provisional Measures*, Order, 29 July 1991, ICJ Reports 1992, 12, 20.

⁵ *Passage through the Great Belt (Finland v. Denmark)*, Order, 10 September 1992, ICJ Reports 1992, 348.

⁶ *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*, Judgment, 14 June 1993, ICJ Reports 1993, 38.

⁷ *Final judgment: Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, 8 February 2012, ICJ Reports 2012, 99.

⁸ The last one of the six cases mentioned, a dispute between Switzerland and Belgium, *Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters (Belgium v. Switzerland)*, Order, ICJ Reports 2011, 341, came before the ICJ almost by accident inasmuch as it concerned a routine matter of recognition and enforcement of a judgment under a treaty on international procedure in civil and commercial matters. Here, the OSCE Court could have been seized.

A similar balance sheet emerges also from the cases handled by the Permanent Court of Arbitration, which owes its present impressive record essentially to State-investor proceedings and not to inter-State actions.

It is clearly visible from this perfunctory oversight that as a rule States regard resort to judicial remedies as a step of last resort only. This empirical finding reflects also on our Court. Going to an international court is no routine decision. Such a step presupposes that essential interests have been affected.

6) It has often been said that our Court could possibly deal with territorial or environmental disputes of more modest dimensions. But even such less vital disputes may arouse nationalistic feelings that make it difficult for a government to entrust the relevant case to the hands of a neutral third party.

7) Lastly, any knowledgeable diplomat would certainly be well-informed about the total lack of an adequate infrastructure in the case of the Court. This less than perfect preparedness for the handling of an actual case might easily lead a foreign office to refrain from choosing the Court as the appropriate forum for litigation.

8) An entire different field is jurisdiction in human rights matters. As soon as the individual is admitted as actor in international proceedings, the number of cases rises automatically. But nowhere has the number of inter-State disputes increased concomitantly. On the whole, the attractivity of a human rights body is structurally much greater than that of an inter-State court. A comparison of our Court with the caseload of the European Court of Human Rights is therefore out of the question.

9) Lastly, a somewhat frivolous remark regarding conciliation. Does conciliation, as it is set out in the SC, not smack a little bit of a golden but old-fashioned past that reaches back into the early 20th or even the 19th century? I will come back to this observation at the end of my comments.

3. ADAPTATION TO CHANGING CIRCUMSTANCES

Let me now come to the core of my short presentation. The title of my submission refers to “changing circumstances”. Can the observer indeed identify any circumstances that have changed since the drafting of the SC in 1992? In my view, the global structures of international society have indeed undergone a remarkable and significant shift.

Without saying so explicitly, the basic assumption of the SC is that the international legal order is still essentially made up and supported by sovereign States each of which makes its own determinations, in accordance with the “classic” model of international law according to which States are viewed as separate billiard balls that do not touch one another. Thus, essentially the SC follows the classic model of bilateral international dispute settlement which, as such, is perfectly correct. On the other hand, the model envisioned by the SC suffers the impact of the progressive institutionalisation of the international legal order. At the present juncture, almost all the vital issues of the international society, likely to give rise to disputes, are dealt with in international fora on the basis of multilateral instruments and thus have, by their very nature, a multilateral character. These international fora serve generally as places for negotiation and

settlement of differences of opinion. Issues concerning the governance of the sea, climate change, world population, health or migration and refugees are all under the oversight – not the control! - of the responsible global or European institutions. Diplomats meet there on a daily basis and enjoy large opportunities to exchange views and seek pragmatic arrangements. Only few issues of outstanding importance remain for regulation on a bilateral basis.

On the other hand, the relevant international bodies lack any power to make determinations on territorial issues. In that regard, national sovereignty remains intact. Cases of border correction or delimitation, if they are at all brought before a judicial body, are therefore generally viewed as cases to be handled by the ICJ except for minor disputes allegedly suitable for our Court, but which, on their part, are never *une petitesse négligeable* for public opinion. Thus, our Court sits a little bit uncomfortably between the World Court and the many international organisations that are mandated to deal with special matters not only as legislators, but also as dispute settling mechanisms.

4. CONCLUSIONS

Is it possible after all the words of caution and prudence to formulate any recommendations? I can at least try to venture some moderate remarks. The Court sits where it sits, it cannot be lifted out of its present situation. Enlarging its jurisdiction would presuppose an amendment of the Stockholm Convention, which seems to be out of reach presently and in the near future. But three conclusions may be appropriate.

1) First of all, there is no real need to retain the subsidiarity clause enshrined in the Preamble of the SC and in its Art. 19. No difficulties have arisen or are likely to arise because of an overlap of different procedures.

2) In other fora, in particular in the WTO, a practice has gained ground that the decision-making body consults with the parties before them even during the last stage of a proceeding before the final decision is taken. The most brilliant example of this type of procedural arrangement is provided by the case relating to the *Timor Sea*.⁹ In that fashion, the parties can be sure that their concerns are taken seriously in all their complexity by the deciders. It is a time-honoured tradition that after pleadings have been held in a proceeding the members of the responsible body withdraw into the secrecy of a private deliberation room. This was good in the past but does not well fit in the present time for transnational configurations where most events are in steady flux and where, much beyond legal rules, knowledge from many extra-legal sources must be taken into account. For conciliation such a dynamic process is perfectly conceivable. It can be arranged under the text of the SC as it stands. No formal amendment process is necessary to bring about such a change, roughly from conciliation to mediation, the momentum of which might highlight the Court and generate a new spirit of confidence.

3) The Court should be kept in its position of vigilance. Under the present conditions of a friendly climate upheld by the peace-loving States in Europe it was not vitally needed, but it remains in any event a guarantor for the rule of law particularly in times of unrest. Every effort should be made to increase its membership.

⁹ Permanent Court of Arbitration, Case 2016-10, *Timor Sea (Timor-Leste v. Australia)*, Award, 9 May 2018.

BIOGRAPHICAL NOTES OF SPEAKERS¹

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Laurence Boisson de Chazournes has been a professor at the Law Faculty of the University of Geneva since 1999 and was the Head of the Department of Public International Law and International Organization between 1999 and 2009. She is the Director of the joint Center for International Dispute Settlement of the University of Geneva and the Graduate Institute of International and Development Studies. Before joining the University of Geneva, she was Senior Counsel to the World Bank, between 1995 and 1999. She has been and is a visiting professor at the University of Aix-Marseille III, the University of Paris I (Sorbonne), the University of Paris II (Panthéon-Assas) and the Graduate Institute of International and Development Studies. She has been invited as a guest lecturer at numerous universities in Europe, North America, Latin America, Africa and Asia. Laurence Boisson de Chazournes is a member of the International Law Institute (Institut de droit international).

In the field of dispute settlement, Laurence Boisson de Chazournes has served as chairperson of WTO arbitration panels on pre-shipment inspections and as arbitrator for the International Centre for Settlement of Investment Disputes (ICSID), the International Chamber of Commerce (ICC), the Permanent Court of Arbitration (PCA), the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), and the Court of Arbitration for Sport (CAS). She was a member of the CAS ad hoc Division at the Olympic Games in PyeongChang. She is a judge at the Administrative Tribunal of the Bank for International Settlements (BIS).

Laurence Boisson de Chazournes is a member of the of the Panel of Arbitrators of the International Centre for Settlement of Investment Disputes (ICSID). Moreover, she is also a member of the Hong Kong International Arbitration Center and of the list of Arbitrators of the World Intellectual Property Organization (WIPO). She has acted as Advocate and Counsel before the International Court of Justice (ICJ), the International Tribunal for the Law of the Sea (ITLOS) and other dispute settlement fora. She is a member of the PCA, a member of the WTO indicative list of governmental and non-governmental panelists, an arbitrator of the CAS and a Member of the list of Arbitrators of the French National Committee (ICC).

Laurence Boisson de Chazournes has been and is a member of many editorial and advisory boards, including those of the American Journal of International Law, the European Journal of International Law, the International Organizations Law Review and the Law and Practice of International Courts and Tribunals. She was President of the European Society of International Law (ESIL) between 2012 and 2014 and was co-chair for the 2013 Annual Meeting of the American Society of International Law. In addition to the Institute of International Law (IDI), she is a member of a number of other scientific associations. She directs research projects funded by Swiss, French and international agencies. She has authored and edited thirty-one books and has written over 260 articles and contributions to collective books.

She holds a PhD in International Law from the Graduate Institute of International and Development Studies in Geneva (Summa Cum Laude), a JD in Private Law from the University of Lyon III, a BA in Sociology from the University of Lyon II and a Diploma in Political Science from the Institute of Political Sciences (Lyon). She took the French national bar exam in 1981. She received the Elizabeth Haub Prize for Environmental Law in 2008 and a Docteur honoris causa from Aix-Marseille University in 2014.

¹ In alphabetical order, functions as of November 2022

Hans CORELL

Hans Corell served as Under-Secretary-General for Legal Affairs and the Legal Counsel of the United Nations from March 1994 to March 2004. In this capacity, he was head of the Office of Legal Affairs in the United Nations Secretariat. Before joining the United Nations, he was Ambassador and Under-Secretary for Legal and Consular Affairs in the Swedish Ministry for Foreign Affairs from 1984 to 1994.

He received his Law Degree from the University of Uppsala in 1962. From 1962 to 1972, he served first as a law clerk and then as a judge in the courts of first and second instance. He was appointed Judge of Appeal in 1980. In 1972, he joined the Ministry of Justice where he was engaged in legislative work concerning real estates, property formation, joint stock companies and incorporated associations, data protection, secrecy, general administrative law, the relation between the Realm and the Church of Sweden, and constitutional law. In 1979, he became Director of the Ministry's Division for Administrative and Constitutional Law. Two years later, he was appointed Chief Legal Officer of the Ministry.

Corell has been a member of Sweden's delegation to the United Nations General Assembly 1985-1993 and has had several assignments related to the Council of Europe, OECD and the CSCE (now OSCE). Together with two other rapporteurs, he was author of the CSCE proposal for the establishment of the International Tribunal for the former Yugoslavia, transmitted to the United Nations in February 1993. He was the Secretary-General's representative at the 1998 UN Conference that adopted the Rome Statute of the International Criminal Court. During his service in the United Nations he was also involved in the establishment of the International Tribunal for Rwanda, the Special Court for Sierra Leone and the Extraordinary Chambers of the national courts of Cambodia for trial of the senior Khmer Rouge leaders. He was also overseeing the establishment of the International Seabed Authority, the International Tribunal for the Law of the Sea and the Commission on the Limits of the Continental Shelf.

Since his retirement from public service in 2004, Corell is engaged in many different activities in the legal field, inter alia as legal adviser, lecturer, and member of different boards. Among other, he is involved in the work of the International Bar Association and the Hague Institute for the Internalisation of Law. He was a Member of the Advisory Board of the International Center for Ethics, Justice and Public Life at Brandeis University from 2005-2016 and Chairman of the Board of Trustees of the Raoul Wallenberg Institute of Human Rights and Humanitarian Law at Lund University from 2006-2012. From 2008-2013 he was Legal Adviser to the Panel of Eminent African Personalities, chaired by former UN Secretary-General Kofi Annan, engaged in the Kenya National Dialogue and Reconciliation. Corell is the author of many publications. He holds honorary Doctor of Laws degrees at Stockholm University (1997) and Lund University (2007).

Emmanuel DECAUX

Emmanuel Decaux was elected President of the OSCE Court of Conciliation and Arbitration in October 2019.

Emmanuel Decaux is Professor emeritus of the University of Paris II – Panthéon-Assas, where he taught public international law and international human rights law. He was also Director of the Doctorate School of International Law, European Law, International Relations and Comparative Law. In April 2021, he has been appointed President of the René Cassin Foundation – International Institute of Human Rights. He has published on topics of public international law and international organizations, with a focus on the peaceful settlement of disputes and human rights. He is also a member of the Advisory Board of the *Security and Human Rights Monitor* publication.

In addition to his academic career, Emmanuel Decaux has held several functions within the United Nations. He was a member and then President of the UN Committee on Enforced Disappearances

between 2011 and 2019. Prior to that, he was a member of the UN Sub-Commission on the Promotion and Protection of Human Rights and a member of the Human Rights Council Advisory Committee.

Emmanuel Decaux also participated as a member of the French delegation to three meetings of the Human Dimension Conference (1989-1991) and to the first Human Dimension Implementation meetings organized by the OSCE Office for Democratic Institutions and Human Rights in Warsaw. Later he was nominated as an expert as part of the Moscow Mechanism on the Human Dimension on behalf of which he acted twice (in 2003 and 2011) as Rapporteur.

Vanda LAMM

Vanda Lamm is Professor emeritus of public international law at Széchenyi István University of Győr (Hungary). She was the Director of the Institute for Legal Studies of the Hungarian Academy of Sciences between 1991-2011. Vanda Lamm is a member of the *Institut de droit international*, which she served as a second Vice-President between 2009-2010. Vanda Lamm is a member of the Hungarian Academy of Sciences and since 2020 Vice-President of the Academy. Vanda Lamm is an appointed conciliator by Hungary and acted as a member of the Bureau of the OSCE Court of Conciliation and Arbitration between 2013 and 2019. She is also a member of the Permanent Court of Arbitration.

Mats MELIN

Mats Melin was President of the Supreme Administrative Court of Sweden from 2011 until his retirement in 2018.

Between 2004 and 2010, he was Chief Parliamentary ombudsman, elected by the Swedish parliament. Prior to that, he was a Justice of the Supreme Administrative Court (2001-2003) and Presiding Judge at the Court of Appeal in Stockholm (1999-2001). In addition, he was a member of the Consultative Council of European Judges (CCJE) from 2015 to 2018 and an elected member of the Bureau of the CCJE from 2016 to 2018. Before joining the Court of Justice of the European Union in Luxembourg from 1995 to 1999 as legal secretary, Mats Melin held various positions in Swedish courts and government departments, inter alia as legal adviser at the Ministry of Justice (1987-1994).

In 2015, he was appointed as a member of the Permanent Court of Arbitration and in 2016 as an arbitrator at the OSCE Court of Conciliation and Arbitration. He was elected as a member of the Court's Bureau in 2019.

Mats Melin holds an LLM of the University of Uppsala, obtained in 1980.

Carl Magnus NESSER

Ambassador Carl Magnus Nesser (LLM, Columbia University; MSc and LLM Lund University) is a Swedish diplomat and international lawyer. Serving as Director-General for Legal Affairs since October 2019, Ambassador Nesser oversees the Legal Secretariat, the Department of International Law, Human Rights and Democracy, the Consular Department and the Protocol Department at the Swedish Ministry for Foreign Affairs. He represents Sweden before international courts and judicial organs, including the International Court of Justice and the European Court of Human Rights.

He previously served as Head of the Ministers Office at the Ministry for Foreign Affairs in 2017–2019 and was posted as Ambassador to Israel in 2013–2017 and Ambassador to Iraq in 2010–

2012. Ambassador Nesser was Chief of Staff to the Swedish Minister for International Development Cooperation in 2012–2013, Minister and Deputy Head of the Permanent Delegation of Sweden to the OSCE in Vienna in 2008–2010, First Secretary at the Permanent Mission of Sweden to the United Nations in New York in 2003–2008 and worked in the Global Security Department of the Ministry for Foreign Affairs in Stockholm.

Ambassador Nesser worked as an associate in the corporate practice group of the Stockholm office of Kilpatrick Stockton (since renamed Kilpatrick Townsend), an Atlanta-based law firm, concentrating on commercial real estate transactions, international litigation/arbitration, and served as secretary of the board of directors of an international corporation. He served two terms as Chairman of the International Courts Committee of the American Bar Association, International Section. He passed the New York bar exam in 1999 and is admitted to practice law in the State of New York.

Ambassador Nesser speaks Swedish, English, French and German, as well as some Russian, Hebrew and Greek.

Stelios PERRAKIS

Stelios Perrakis is Professor emeritus of International and European Institutions at Panteion University, where he has served as Vice-Rector for international relations and European programmes. He has taught international and European law, human rights and humanitarian law at the Law School of the Democritus University of Thrace (1978-1993), at the University of Macedonia, and at the Department of International, European and Area Studies of Panteion University (1994-2015). He was a visiting professor and lecturer at several European universities and other academic institutions.

Stelio Perrakis was the founder and Director of the European Center for the Training and Dissemination of Human Rights and Humanitarian Law at Panteion University between 2005 and 2019. In 1996 he was appointed Secretary General for European Affairs of the Hellenic Ministry of Foreign Affairs, position he held until 2000. From 2015 until 2019, he was Ambassador, Permanent Representative of Greece to the Council of Europe (2015-2019).

He acted as delegate and representative of Greece in international organizations and conferences (UN, EU et al.); agent in several cases before the CJEC/CJEU, as well as the International Court of Justice (*Jurisdictional Immunities of the State, Germany v. Italy, Greece intervening*, 2011). Stelio Perrakis was a member of several international organs and institutions, such as the European Commission against Racism and Intolerance (ECRI) of the Council of Europe (2003-2015), International Humanitarian Fact-Finding Commission (2002-2021), Commission of Inquiry on Lebanon of the UN Human Rights Council (2006), Administrative Board EU Fundamental Rights Agency (2012-2015), *ad hoc* Judge of the European Court of Human Rights and Arbitrator of the OSCE Court of Conciliation and Arbitration. First Vice President of the Hellenic Society of International Law and International Relations, he has served as President of HESILIR multiple times.

He is the author and editor of 350 publications (books, articles, comments etc.) on international law, European Law, human rights, humanitarian law, international organizations and Hellenic foreign policy. His most recent publication : *La protection internationale au profit des personnes vulnérables en droit international des droits de l'homme*, Recueil des Cours de l'Académie de Droit International de la Haye, Tome 420, Boston, Leiden, Brill|Nijhoff Publications, in 2021.

Anne RAMBERG

Anne Ramberg is a conciliator to the Court of Conciliation and Arbitration within the OSCE and an alternate member of its Bureau.

Mrs Ramberg was a practicing lawyer until 2000, when she was appointed Secretary General of the Swedish Bar Association, a position that she held for twenty years. Prior to that appointment she served as Chair of the Stockholm Section and Council Member of the Swedish Bar Association.

Her current positions include serving as an ad hoc judge at the European Court of Human Rights, Chair of the Uppsala university Board, Co-Chair of the International Bar Association Human Rights Institute (IBAHRI), member of the boards of Civil Right Defenders, the Raoul Wallenberg Institute, the Southern Africa Litigation Center and the International Bar Association Management Board. Anne Ramberg is chair of the Stockholm Prize in Criminology Foundation and Commissioner to the FIS Ethics Commission. She is also a member of the Advisory Council of the International Legal Assistance Consortium (ILAC).

Mrs Ramberg has held several national and international positions in the legal area such as member of the Board of the Stockholm University, member of the Ethics Advisory Council of the National Police Board, member of the Judicial Appointments Council, Chair of the Stockholm Center for the Rights of the Child, board member of the Swedish section of the Nordic Conference of Jurists, member of the Swedish Press Council, Chair of Chief Executives of European Bar Associations, (CEEBA), Co-Chair of the Rule of law Action Group and member of the International Bar Association (IBA) Management Board, member of the Council on Basic Values established by the Swedish government, member of the Advisory Council Swedish Economic Crime Authority, alternate to the Appeal Board for Aid for Credit Institutions, Council member and Treasurer of the International Legal Assistance Consortium (ILAC), Council member of the CEELI Institute, board member of several trusts and other associations such as, Micael Bindefeld Foundation in Memory of the Holocaust, the Association for Legislative Theory and of one of the most prestigious Law Libraries in Sweden, council member of the IBAHRI, the IBAHRI TRUST, and the Rule of Law Forum. She was a trustee of the IBA Eyewitness Company. Mrs Ramberg has been appointed as an expert in several governmental legislative commissions. She was also a board member of a prestigious law research foundation and the editor of the periodical magazine published by the Swedish Bar Association.

Anne Ramberg received her law degree (LLB) from the University of Stockholm in 1976 and has written extensively on a variety of legal issues both in legal and general publications. Anne Ramberg holds H.M. the King's Medal for "distinguished contribution to the Swedish Judicial System." She was appointed *juris doctor honoris causa* at Uppsala University 2016.

Inga REINE

Inga Reine obtained a degree in law from the Latvijas Universitātē (University of Latvia) in 1996 and a master's degree from the European Inter-University Centre for Human Rights and Democratisation (EIUC) (Italy) in 1998.

She started her professional career as a lawyer at the Latvian National Human Rights Office from 1995 to 1999, before joining the Organization for Security and Cooperation in Europe (OSCE) as an adviser in the mission in Kosovo from 1999 to 2002 and in the mission in Montenegro from 2002 to 2003. Between 2003 and 2012, she continued her career as a lawyer at the Latvian Ministry of Foreign Affairs and represented the Latvian government at international human-rights organisations. During that period, she was also appointed as a member of the Steering Committee for Human Rights (CDDH) of the Council of Europe.

In 2012, Inga Reine was appointed as a head of division at the Permanent Representation of Latvia to the European Union in Brussels, a post which she held until 2015. She also served there as a legal adviser from 2012 to 2016.

Inga Reine was appointed as a Judge at the General Court of the Court of Justice of the European Union on 8 June 2016.

Vasilka SANCIN

Vasilka Sancin is Professor of public international law, Head of the Department of International Law, Director of the Institute for International Law and International Relations at the University of Ljubljana, Faculty of Law (Slovenia). She was appointed as conciliator to the OSCE Court of Conciliation and elected as a member of the Bureau in 2019. She is also a member of the UN Human Rights Committee (2019-2022), its Vice-Chair and special rapporteur on Follow-up to Concluding Observations (2021-2022), and an expert for the OSCE Moscow mechanism on human rights. Among other professional affiliations, she is a President of the Slovene Branch and a member of the Executive Council of the International Law Association (ILA), a member of the UNODC Anti-Corruption Academic (ACAD) Initiative and the European Centre for Responsibility to Protect. She is, as an independent expert, a member of the National Inter-ministerial Commission for Human Rights and the Inter-governmental Working Group on International Humanitarian Law. She teaches as a visiting professor or guest lecturer at numerous foreign institutions and is member of editorial boards of various legal journals and author or editor of numerous books and articles.

Christian STROHAL

Ambassador Christian Strohal was career diplomat at the Ministry for Foreign Affairs of Austria, where held various assignments and responsibilities. He was the Director of the Office for Democratic Institutions and Human Rights of the OSCE from 2003 to 2008.

Ambassador Strohal joined the Austrian Ministry of Foreign Affairs in 1976 as a diplomat where he was, inter alia, appointed to London, Geneva and Rabat. He was a member of the delegations of Austria at the conferences of the Helsinki Process of the CSCE, later to become the OSCE. From 1985 to 1988 he worked as head of the section of human rights. From 1988 to 1992 he was deputy head of the Austrian Mission to the United Nations in Geneva. In 1992/93 he was special envoy for the preparation of the World Conference on Human Rights in Vienna.

In 1994, Christian Strohal was appointed head of the Human Rights Department of the Federal Ministry for Foreign Affairs. He held this position until 2000, when he was appointed Ambassador to Luxembourg. In March 2003, he took up the responsibility as the Director of the Office for Democratic Institutions and Human Rights (ODIHR) of the OSCE in Warsaw. In 2008, he became the Permanent Representative of Austria to the United Nations in Geneva, followed by the assignment as Permanent Representative to the OSCE in Vienna in 2013. He has been special representative for the Austrian Chairmanship of the OSCE in 2017.

As part of his professional duties, Ambassador Strohal undertook various tasks at the United Nations. He was Chairman of the Western Human Rights Group of the United Nations Human Rights Commission (HRC) from 1990 to 1992, and Vice-President of the HRC in 1997/98. He served as Vice-President of the UN Human Rights Council from 2011 to 2012 and President of the Governing Bodies of the International Organization for Migration (IOM) and President of the Compensation Commission of the UN Security Council (2009-2010). Between 2007 and 2012, he also served as Austria's independent adj. member of the Administrative Council of the European Union Fundamental Rights Agency.

He has published a number of articles on questions of human rights and international security policy, and lectured i.a. at the University of Vienna, the Diplomatic Academy in Vienna, the Geneva

Academy on International Humanitarian Law and Human Rights and the European Inter-University Center for Human Rights in Venice, as well as at Princeton University.

Christian Strohal studied law, economics and international relations in London, Geneva and Vienna, where he received his doctorate in 1975.

For his commitment to human rights, Ambassador Christian Strohal was awarded the 2008 Felix Ermacora Human Rights Award and the Pro Merito Medal of the European Commission for Democracy through Law from the Venice Commission. He is a member of the International Institute for Human Rights.

Attila TANZI

Attila M. Tanzi, Ph.D., is Chair of International Law at the University of Bologna (2006-ongoing); President, Italian Branch of the International Law Association; Associate Member 3VB Chambers, London (2018-ongoing). He is a member of the Supervisory Board of the Tashkent International Arbitration Centre (TIAC), Uzbekistan (2018-ongoing) and Permanent Arbitrator of the *Asociación Europea de Arbitraje* (Madrid, Spain) (2019-ongoing). He has been visiting professor at Queen Mary University of London (2014-2016), Université Paris II-Panthéon Assas (2018), University of Vienna (2018-2019) and Université Paris Nanterre (2021) as well as visiting lecturer in Argentina, Chile, Colombia and India. He was external scientific fellow at Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law (2020).

He is instructed by governments, international organisations and corporations on matters of international law. He has been counsel, advocate or arbitrator in inter-state, investor-state, or commercial disputes. He is currently a member of the Permanent Court of Arbitration and a conciliator at the OSCE Court of Conciliation and Arbitration. He is Chairman of the Implementation Committee of the of the UNECE 1992 Convention on Protection and Use of Transboundary Watercourses and International Lakes (2013-ongoing). He has been Chairman of the Legal Board of the same Convention (2004-2012) and Chairman of the Compliance Committee of the 1999 UNECE Protocol on Water and Health (2007-2010).

He has published extensively in English, French, Italian and Spanish in various areas of international law, including international investment law, international environmental law, international procedural law, the law of State responsibility and jurisdictional immunities.

Christian TOMUSCHAT

Christian Tomuschat is Professor emeritus of the Faculty of Law of Humboldt University, Berlin. Education at the universities of Heidelberg and Montpellier. From 1972 to 1995 he was professor for constitutional and international law at the University of Bonn. He lectured at the Hague Academy of International Law in 1993 and 1999 (General Course).

He was a member of the Human Rights Committee under the International Covenant on Civil and Political Rights (1977-1986) and of the International Law Commission (1985-1999, President in 1992). From 1997 to 1999, he coordinated the Commission for Historical Clarification in Guatemala. He served as judge on the Administrative Tribunal of the Inter-American Development Bank (1995-1997) and on the Administrative Tribunal of the African Development Bank (1999-2008). He became a member of the *Institut de droit international* in 1997.

From September 2013 to October 2019, he discharged the functions of the President of the Court of Conciliation and Arbitration within the OSCE and is currently a member of its Bureau.

He is author of numerous books and articles. Among his latest publication is "Human Rights Between Idealism and Realism" (3rd. ed. Oxford 2014). He is also one of the co- editors and authors of the Commentary on the Statute of the ICJ (2nd ed. Oxford 2012).

During the period of his presidency of the Court, Professor Tomuschat co-authored two books on the topic of conciliation: “Conciliation in International Law – The OSCE Court of Conciliation and Arbitration” (Brill / Nijhoff, 2017), and “Flexibility in International Dispute Settlement – Conciliation Revisited” (Brill / Nijhoff, 2020).

Pål WRANGE

Pål Wrangle is Professor of public international law at Stockholm University and the Director of the Stockholm Center for International Law and Justice. Professor Wrangle has published widely on international law, international relations, and theory. Prior to 2010, he was a principal legal advisor at the Swedish Ministry of Foreign Affairs, where he advised and represented Sweden in various issues related inter alia to the use of military force, collective security and general international law issues. Wrangle is Alternate Arbitrator at the Court of Conciliation and Arbitration at the Organization for Security and Co-operation in Europe, Member of the Permanent Court of Arbitration, and Member of the Foreign Minister’s International Law and Disarmament Delegation.



**30th Anniversary of the Adoption of the Stockholm Convention
on Conciliation and Arbitration within the OSCE**

The 1992 Stockholm Convention in a Europe in Crisis

Seminar co-organised by the Ministry for Foreign Affairs of Sweden, the University of Stockholm and the OSCE Court of Conciliation and Arbitration

Thursday, 24 November 2022

Aula Magna (room Spelbomskan) Frescati, University of Stockholm
Hybrid format – in-person and on-line – in English and French (without translation)

OPENING

09:30-10:00

- H.E. Tobias BILLSTRÖM, Minister for Foreign Affairs of Sweden (pre-recorded message)
- H.E. Ambassador Adam HAŁACIŃSKI, Chairman of the OSCE Permanent Council, Permanent Representative of Poland to the OSCE (on-line)
- Emmanuel DECAUX, President of the OSCE Court of Conciliation and Arbitration

PART I: THE GREAT EXPECTATIONS

10:00-12:00

Chair

Mats MELIN

former President of the Supreme Administrative Court of Sweden
Member of the Bureau of the Court

- **The origins of the Stockholm Convention: assets and obstacles**
Hans CORELL, Ambassador (ret.), former Under-Secretary General for Legal Affairs and Legal Counsel of the United Nations
- **Challenges faced by the Court**
Vanda LAMM, Professor emeritus of International Law, Széchenyi István University, Győr, Vice-President of the Hungarian Academy of Sciences, former Member of the Bureau of the Court (on-line)
- **Missed opportunities**
Vasilka SANCIN, Professor of International Law, Faculty of Law, University of Ljubljana, Member of the Bureau of the Court

- **The place of methods of peaceful settlement of disputes in today's world: arbitration, conciliation, mediation**

Laurence BOISSON DE CHAZOURNES, Professor of International Law,
Director of the Center for International Dispute Settlement, IHEID /
University of Geneva (on-line)

- **The competition and complementarity between European organisations in different dispute settlement mechanisms**

Stelios PERRAKIS, Professor emeritus, International and European Institutions,
Panteion University, former Ambassador - Permanent Representative of Greece
to the Council of Europe

- **The European Union: judge and party**

Inga REINE, Judge at the General Court of the Court of Justice of the
European Union, appointed arbitrator at the OSCE Court by Latvia

DISCUSSION OF PART I

PART II: THE NEW CHALLENGES

14:00-16:30

Chair

Anne RAMBERG

former Secretary-General of the Swedish Bar Association
Member of the Bureau of the Court

- **The spirit of Helsinki and the geopolitical dimension of the peaceful settlement of disputes within the OSCE**
Emmanuel DECAUX, Professor emeritus, University of Paris II Panthéon-Assas,
President of the OSCE Court of Conciliation and Arbitration
- **The complementarity of the mechanisms offered by the OSCE**
Christian STROHAL, Ambassador (ret.), former Director of the OSCE
Office for Democratic Institutions and Human Rights
- **Practical lessons drawn from the Permanent Court of Arbitration**
Attila TANZI, Professor of International Law, University of Bologna,
appointed conciliator at the OSCE Court (on-line)

- **Adaptation of the Stockholm Convention to changed circumstances**
Christian TOMUSCHAT, Professor emeritus, Faculty of Law,
Humboldt University, Berlin, Former President and Member of the
Bureau of the OSCE Court
- **The future of impartial third-party recourse facing the law
of the strongest**
Pål WRANGE, Director, Stockholm Centre for International Law and Justice,
University of Stockholm

DISCUSSION OF PART II

CONCLUDING REMARKS

16:15 -16:45

Ambassador Carl Magnus NESSER
Director-General for Legal Affairs at the Swedish Ministry for Foreign Affairs

ACCRONYMS

ACP	African, Caribbean and Pacific Group
AU	African Union
BENELUX	Union between Belgium, the Netherlands and Luxembourg
CAHDI	Committee of Legal Advisers on Public International Law
CFSP	Common Foreign and Security Policy
CJEU	Court of Justice of the European Union
CMATS	Certain Maritime Arrangement in the Timor Sea Treaty
CPT	European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
CSCE	Conference on Security and Co-operation in Europe
ECHR	European Convention on Human Rights
ECRI	European Commission against Racism
ECtHR	European Court of Human Rights
EFTA	European Free Trade Agreement
EU	European Union
HR	Human Rights Law
ICJ	International Court of Justice
ICL	International Criminal Law
IHFFC	International Humanitarian Fact Finding Commission
IHL	International Humanitarian Law
ISDS	Inter-state dispute settlement
ITLOS	International Tribunal for the Law of the Sea
MUNLawS	Model United Nations Club, Faculty of Law, University of Ljubljana
OAS	Organization of American States
OSCE	Organization for Security and Co-operation in Europe
OSCE Court	Court of Conciliation and Arbitration within the OSCE
PCA	Permanent Court of Arbitration
SC	Stockholm Convention of 1992
TFEU	Treaty on the Functioning of the European Union
UNCITRAL	United Nations Commission on International Trade Law
UNCLOS	United Nations Convention on the Law of the Sea
WTO	World Trade Organization

