

# *Court of Conciliation and Arbitration within the OSCE*

## **Conciliation in the Globalized World of Today International Colloquium**

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### **Concept Note**

The Stockholm Convention on Conciliation and Arbitration within the OSCE of 15 December 1992, enjoyed initially a considerable amount of support. During the first decade since its coming into existence, it was accepted by no less than 33 of the participating States of the OSCE. In recent years however, the Court has not attracted the expected attention and the actual balance shows a vacuum.

It is a matter of public knowledge that conflicts of interest and even conflicts of a violent character have not completely disappeared under the impact of the great turnaround that occurred from 1989 to 1992, the optimism of which is reflected in the Paris Charter for a New Europe of 1990. Consequently, it would be erroneous to maintain that the Court has lost its *raison d'être* because Europe has become a continent without any controversies suitable for being dealt with in formalized proceedings under the aegis of the Court.

It stands to reason that governments, when having to decide how to settle an international dispute, weigh carefully the pros and cons of the available methods. The first step to take is invariably to engage in negotiations, which is the simplest and most economical method to deal with a controversy of international dimensions. The political organs of the OSCE are able to help any party pursuing negotiations by providing their political and legal expertise as a neutral and impartial third party.

The Court also stands ready to offer its assistance when bilateral negotiations have failed to produce constructive results. It is open to all States parties to the Stockholm Convention by providing two different mechanisms, conciliation and arbitration. *Arbitration* is a well-known procedure, which has been studied by numerous scholars and has stood the test of time after it came prominently onto the international stage in 1872 through the *Alabama* arbitration between Great Britain and the United States. The United Nations has assembled the available arbitral jurisprudence in its series *Reports of International Arbitral Awards* (hitherto 30 volumes). Thus, the lessons from a practice spanning more than a century have become the common intellectual heritage of all international lawyers. Governments wishing to turn to the OSCE Court with a request for arbitration may count on comprehensive sources from which to inform themselves about the ways in which an arbitral proceeding operates. The relevant Rules established by the Court do not differ in any significant way from the descriptions to be found in international textbooks.

*Conciliation* has less well-defined contours. It involves the intervention of a body of conciliators who seek to assist the parties in settling a dispute that has not been overcome by negotiations. It is the task of the conciliators to clarify the factual elements of the dispute, to

evoke the relevant legal standards and finally to define the terms of a settlement by taking into account the broader political context of the case. It would appear that the first treaty to provide for conciliation was concluded in 1920 between Sweden and Chile. During the twenties and the thirties of the last century conciliation was frequently in use. The General Act for the Pacific Settlement of International Disputes of 1928 mentions conciliation as one of the prominent methods in that field (Articles 1 to 16). After the advent of the United Nations, the need for conciliation procedures seems to have decreased to some extent, given the many avenues for peaceful settlement of disputes provided by the United Nations machinery.

A Conciliation Commission established under the Stockholm Convention enjoys a considerable amount of discretion when proposing a formula that might be able to satisfy the parties involved inasmuch as, alongside international law, it is also empowered to take into account the relevant OSCE commitments. Furthermore, the primary objective of conciliation is to bring about a peaceful solution to the pending case. The fact that any suggestion put forward by a Conciliation Commission lacks a binding character adds a further softening element to the procedure. The States involved are free either to accept or to reject the terms found by a Conciliation Commission. Another great advantage of conciliation is that the proceedings shall be kept confidential if the parties so wish. It is not entirely clear whether the outcome must be brought to the knowledge of a broader public. In any event, however, the governments involved will necessarily become aware of how an impartial body appraises the terms of a fair and equitable solution. This insight alone may foster a spirit of compromise and understanding.

Most voices in the legal literature praise conciliation as a simple, inexpensive and effective procedure for the settlement of international disputes. In fact, the parties in a conciliation procedure do not have to fear a surprising determination that goes against all of their expectations. During the course of the proceedings, contacts between the Conciliation Commission and the parties continue to take place. Any conciliation commission, true, is a third party but it does not operate disconnected from the parties whose fate is under its consideration. Therefore, the parties do not give the case under review out of their hands as is the case in judicial proceedings after the final pleadings have been made.

In spite of these obvious advantages of conciliation proceedings, little resort is made to conciliation in the actual international practice. The number of relevant cases is relatively low as can be learned from the works dealing specifically with conciliation. It is highly significant in this regard that the mechanism established under the Vienna Convention on the Law of Treaties, under which complaints as to the validity of a treaty have to be brought to the attention of a Conciliation Commission, has never come into operation. Four later United Nations conventions of 1975, 1978, 1983 and 1986 providing for similar procedural facilities have not fared any better. They are still awaiting their first case. As far as procedural technicalities are concerned, legal certainty is not in doubt. The rules of the Stockholm Convention do not differ in any significant regard from, e.g., the rules adopted in 1961 by the *Institut de droit international* or the recent (2002) Optional rules for conciliation of disputes relating to natural resources and/or the environment framed by the Permanent Court of Arbitration. But it seems that the real impact of conciliation proceedings does indeed give rise to concerns, in particular because of the lack of a sufficiently broad basis of empirical practice.

The planned colloquium seeks to elucidate the main factors that either favour conciliation or impede its acceptance. It is hoped that thereby a contribution can be made to dissipating any wrong assumptions about its inherent qualities and emphasizing its vast potential. Therefore, it seems worthwhile exploring the presently available elements that permit a rational assessment of the virtues of conciliation. The State parties to the Stockholm Convention may become better aware of the rich substance of this Convention than generally assumed by them. Conciliation is perfectly in line with the general spirit of the OSCE which promotes peaceful settlements of all kinds of international disputes.

It may well be that conciliation proceedings under the regime of the Stockholm Convention are not able to resolve any major tensions that exist between or among participating States. However, conciliation seems ideally suited to bring about compromise solutions regarding issues that, although not threatening the existence of a State or its territorial integrity, nonetheless strain good neighbourly relations and may, in the long run, develop into serious obstacles to mutual understanding and cooperation. Disputes about environmental issues constitute one type of controversies that seem to be well-suited for consideration by a Conciliation Commission under the auspices of the Court.

In sum, many reasons militate for attempting to analyze, in the first place, conciliation as one of the two mechanisms which are put at the disposal of the 33 States that have ratified the Stockholm Convention. Since the aim is to attain results that can be translated into practice, it has seemed advisable to call on rapporteurs who have a strong academic background in international law but who, on the other hand, have gained in their professional career some practical experiences as diplomats or members of institutions of international organizations.