

**THE INTERNATIONAL CONVENTION ON THE PROTECTION AND
PROMOTION OF THE DIVERSITY OF CULTURAL EXPRESSIONS**

*CONCILIATION AS A DISPUTE RESOLUTION METHOD
IN THE CULTURAL SECTOR*

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The Convention on the Protection and Promotion of the Diversity of Cultural Expressions contains, in Article 25, provisions allowing Parties to use a number of dispute resolution methods in the event of a dispute between them. These methods include seeking a solution through negotiation, jointly seeking the good offices of or mediation by a third party, and requesting the creation of a Conciliation Commission to provide the Parties with a dispute resolution proposal they must examine in good faith.

The purpose of this paper is to examine the conciliation procedure set out in the Convention in light of its use in existing international conventions and its real-world applications. Before beginning, we thought it useful to first define what conciliation is and clearly distinguish this peaceful dispute resolution method from other methods such as mediation and arbitration.

The definitions that follow are an attempt to categorize the various dispute resolution methods. Because these methods largely depend on the will of the Parties, it is sometimes hard with real-world examples to draw a clear line between them, at least with respect to some of their characteristics. Countless nuances blur the distinction between a given procedure and one or more dispute resolution methods. Complicating our analysis is the strong likelihood that the

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conciliator or conciliatory organ (e.g., in the first stage of dispute resolution) may serve as arbitrator in a later stage by handing down a binding decision¹.

1. Distinguishing Conciliation from Arbitration and Mediation

Because arbitration and mediation were already in use when conciliation first appeared, we thought it best to first examine these two ways of resolving disputes.

A. Arbitration

Arbitration is not one of the dispute settlement methods listed in Article 25 of the Convention. It is described here only to help us better understand the workings of conciliation proceedings.

Vocabulaire juridique, published under the direction of Gérard Cornu, defines arbitration as follows:

“A sometimes amicable or peaceful—but always adjudicative—method of resolution of a dispute by an authority (the arbitrator[s]) that derives its decisional power not from a permanent delegation of the state or an international institution, but from the agreement of both parties (who may be individuals or states)².”

Because arbitration is prefaced on agreement, the Parties can exert significant influence on the arbitrator’s scope of authority and sometimes also on arbitration proceedings, which may nonetheless be at the arbitrator’s discretion³.

¹ Cot, Jean-Pierre, *La conciliation internationale*, Éditions A. Pedone, Paris, 1968, p. 12.

² Presses Universitaires de France, 1992, p. 62. [Our translation]

³ Mangoldt, Hans von, “Arbitration and Conciliation,” in *Judicial Settlement of International Disputes: International Court of Justice Other Courts and Tribunals, Arbitration and Conciliation: An International Symposium*, Max Planck Institute for Comparative Public Law and International Law, Springer Verlag Berlin Heidelberg, New York, 1974, pp. 417–552, p. 426.

This dispute resolution method also always results in a decision. In addition, an arbitration ruling is generally based on law, though the arbitrator may sometimes decide in equity. Moreover, the arbitration ruling is of a binding nature⁴. In principle, the Parties must implement the arbitration ruling in good faith.

Though arbitration is not a permanently delegated institution of the state or an international body, in many respects it has much in common with legal rulings and their related procedures, as the terminology used reflects.

Like in the courts, arbitration is an adversarial system featuring a “plaintiff” and “defendant” and an arbitrator who decides “who is wrong” and “who is right” based on relevant facts and applicable rules of law⁵.

In terms of procedure, the Parties are normally given specific deadlines by which to file their written submissions and “proof”. “Hearings” to enable the arbitrator to hear both Parties and to provide a forum for adversarial debate are also held on specific dates. “Witnesses” or “experts” may be called on to testify⁶.

In addition, the arbitrator acts as a neutral and impartial judge without any political authority *per se*. He or she is also rather passive and does not actively investigate or uncover facts. For example, the arbitrator does not seek to bring the Parties together, point out the strengths and weaknesses of their respective positions, or encourage them to consider what would constitute a minimum acceptable solution to the dispute⁷.

In essence, as with adversarial proceedings, the arbitrator uses the information presented by both Parties during the adversarial arbitration proceedings and

⁴ *Ibid.*; Cornu, Gérard, *op. cit.*, note 2, p. 173.

⁵ Schwartz, Eric A., “International Conciliation and the ICC,” *ICSID Review Foreign Investment Law Journal*, Volume 16, Number 2, Fall 2001, pp. 98–119, p. 112.

⁶ *Ibid.*

⁷ *Id.*, pp. 111 and 115.

makes a decision based on relevant facts and applicable rules of law, nothing more.

B. Mediation

According to Hans von Mangoldt, mediation can be seen as the assistance provided by a state or international organization, which exercises its political authority as a third party to the dispute in proposing a solution. Mediation can be set in motion by one of the Parties or even by the mediator him or herself. The latter case seems to be the most frequent⁸.

Consequently, unlike with arbitration, the mediator's personality, value, authority, tact, and experience, as well as the confidence he or she inspires and his or her ability to influence or exert political pressure on the Parties are crucial to successful mediation⁹. This is why it is mainly States that act as mediators.

Mediation is not an adversarial proceeding. There is no "plaintiff" or "defendant" as with arbitration, and the mediator does not seek to determine "who is wrong" and "who is right." In terms of proceedings, the mediator is also not bound by specific rules. He or she therefore has as much latitude as necessary to propose a satisfactory dispute settlement.

Mediators must play a much more active and intrusive role than arbitrators. They must attempt to identify the Parties' underlying interests as well as their positions. To do so, they may not only meet with the Parties jointly but also separately at confidential meetings. This type of proactive mediator involvement has contributed greatly to the success of some mediations¹⁰. If mediators believe an

⁸ Mangoldt, Hans von, *loc. cit.*, note 3, p. 431.

⁹ *Id.*, p. 430; Cot, Jean-Pierre, *op. cit.*, note 1, p. 6.

¹⁰ Schwartz, Eric A., *loc. cit.*, note 5, p. 111.

in-depth understanding of all aspects of the dispute is crucial to resolving it, they may also conduct an investigation¹¹.

Mediators have all the leeway they need to issue a report that may—on occasion—take the law into account. However, mediators will most often propose a settlement that also takes into account other factors. Such proposals are not binding: the Parties are not obliged to implement it. Which is why, as mentioned above, the mediator’s intrinsic qualities are so important.

C. Conciliation

Vocabulaire juridique, published under the direction of Gérard Cornu, defines conciliation as follows:

“An intervention to resolve an international dispute by a body without political authority that has the trust of the parties involved and is responsible for examining all aspects of the dispute and proposing a solution that is not binding for the Parties¹².”

It is therefore crucial that the conciliation body have the trust of the Parties. Without this trust, its involvement will be in vain. In addition, because it is responsible for examining all aspects of the dispute, it must identify the facts of the case. It can take into account not only applicable rules of law but also all non-legal aspects of the case. Its proposals can be based in whole or in part on the law. However, legal considerations may only be secondary and may even be absent altogether. Moreover, because the Parties are not bound to implement the body’s solution, they are free to reject its proposals. The freedom of states remains unfettered¹³.

¹¹ Mangoldt, Hans von, *loc. cit.*, note 3, p. 429.

¹² *Op. cit.*, note 2, p. 173. [Our translation]

¹³ Cot, Jean-Pierre, *op. cit.*, note 1, pp. 8 and 9.

For the conciliation body's dispute resolution proposal to be successful, its underlying reasoning—arrived at by an in-depth examination of all aspects of the case—must be sufficiently persuasive to convince the Parties that it is a good solution to their dispute and lead them to resolve their issues accordingly¹⁴.

Conciliation is therefore somewhat similar to arbitration in that the conciliation body does not have the *a priori* political authority to influence the Parties or exert political pressure on them in order to settle the dispute. The conciliation body must also be neutral and impartial, failing which it would be impossible to earn the Parties' trust.

Yet, in other respects, conciliation is also similar to mediation: it, too, is not designed to determine who is wrong or right; the conciliation body has full say in the procedure used (the body may meet the Parties jointly or separately at confidential meetings); the body plays an active role in that, when examining all aspects of the dispute, it may attempt to identify the Parties' underlying interests and their positions; and the settlement proposed is not necessarily based on law and is not binding.

Georges Malinverni has taken a closer look at the role of conciliation within international organizations, using international economic organizations as an example.

In his view, the purpose of dispute resolution within international organizations is not to determine who is wrong or who is right, but mainly to settle a dispute that could keep the organization from running smoothly. He believes conciliation is particularly well suited to this goal¹⁵. Malinverni also believes that international conciliation involving international organizations has certain unique characteristics. Its goal is not solely to end a dispute but also to prevent the

¹⁴ Mangoldt, Hans von, *loc. cit.*, note 3, p. 430.

¹⁵ Malinverni, Georges, *Le règlement des différends dans les organisations internationales économiques*, A. W. Sijthoff – Leiden, Institut universitaire des Hautes Études Internationales, Genève, 1974, pp. 135–136.

dispute from worsening and ensure respect for the principles on which the organization is founded¹⁶.

Consequently, in seeking an amicable solution, the organization—through its conciliation body—is generally not content to issue a single recommendation. It most often prefers to issue multiple recommendations¹⁷. Malinverni has also noted that, in international economic organizations, it is sometimes necessary to temporarily tolerate an infraction if it can help turn around a country's economy. In terms of the economy, states may also be unable to fulfill all their treaty obligations because of circumstances beyond their control. In these cases in particular, joint and coordinated action by several member states can be indispensable in reaching a satisfactory settlement. And because international organizations are involved, the solution must ultimately comply with the rules governing the member states¹⁸.

Malinverni's study is interesting in that it shows that though conciliation proceedings involving an international organization must comply with the rules governing member states as much as possible, this dispute resolution method can also yield one or more original and realistic solutions, which encourages party states to participate in their implementation. In our opinion, this greatly increases the likelihood that the Parties involved will in fact implement the solutions proposed.

Further on we will see real-world examples of conciliation in the context of other types of conventions or international organizations. But first we will examine the addition by states of conciliation to various international conventions as a possible dispute settlement method.

2. Conciliation's Rise as a Method of Dispute Settlement

¹⁶ *Id.*, p. 142.

¹⁷ *Id.*, p. 143.

¹⁸ *Id.*, pp. 141, 142, 144 and 149.

As a dispute settlement option, conciliation only appeared on the world stage after the First World War in the Locarno Treaties of 1925 and the General Act of Arbitration of 1928¹⁹. Though it resembles good offices and mediation at first glance (it aims to find common ground between both Parties and propose a non-binding solution), it can only be understood, as mentioned above, by contrasting it with the two other settlement methods: “It was very broadly designed as a reaction against the good offices and mediation practices used in the 19th century (as exemplified by the Concert of Europe), which made it too easy for large powers to disguise the pressure tactics they used on small and medium-sized states²⁰.” Conciliation was seen as being more legal and formal in nature because the conciliation body was more impartial.

The 1960s brought renewed interest in this method of dispute resolution. For example, conciliation was included in the 1962 Protocol establishing the Conciliation and Good Offices Commission responsible for Seeking the Settlement of Any Disputes which may arise between States Parties to the UNESCO Convention against Discrimination in Education. Every two years at UNESCO’s General Conference, the Executive Council forwards to UNESCO a list of people presented by the Parties to this Protocol in view of their election or reelection as Commission members²¹. To date, however, no dispute has yet been settled under the Protocol in question. Conciliation is also mentioned in articles 12 and 13 of the 1965 International Convention on the Elimination of All Forms of Racial Discrimination (which came into force in 1969). Here again it appears that conciliation has not been used to date. A slightly more recent example is the 1982 United Nations Convention on the Law of the Sea, which stipulates that maritime delimitations must be established through agreement and, failing that, through international conciliation or judicial adjudication. Noting little recourse to the latter, Richard Meese suggested in an article published in

¹⁹ Jean-Pierre Cot, *La conciliation internationale*, Pédone, Paris, 1928.

²⁰ See: <http://www2.univ-lille2.fr/droit/dipa/dipa15.html>

²¹ UNESCO, doc. 33/C/NOM/7

1998 that states would benefit from using international conciliation more often for some of the remaining delimitations²².

Starting in the 1990s, a number of international instruments in new areas of law adopted conciliation as a dispute resolution method²³. This was the case for the UN Convention on Biological Diversity (1992), the United Nations Model Rules for the Conciliation of Disputes between States (1996), the Rotterdam Convention on the Prior Informed Consent (PIC) Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (1998), the Permanent Court of Arbitration Optional Rules for Conciliation of Disputes Relating to Natural Resources and the Environment (2002), and the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Conciliation (2002). But notwithstanding the interest shown in conciliation in international agreements, actual cases where conciliation was used remain rather rare.

3. Conciliation in Practice

From their appearance on the world stage after WWI up to the early 1960s, thirteen conciliation commissions were created²⁴. Most of them were for disputes between European states. There have been only two examples of conciliation between non-European states (both examples involved Latin American states). And there have been two cases involving a European state (France both times) and a non-European state (an African state in one case and an Asian state in the other). Topics of contention included the interpretation of bilateral treaties, events relating to the Second World War, violations of national sovereignty, the existence of rights and privileges, and compensation for injury to foreign

²² Richard Meese, "Délimitations maritimes: règlement juridictionnel et conciliation internationale," *Indemer – Annuaire du droit de la mer*, 1998, Vol. III.

²³ See Ivan Bernier, with the collaboration of Hélène Ruiz Fabri, "Implementing the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions: Future Actions", *Ministère de la Culture et des Communications, Gouvernement du Québec*, 2006, p. 26.

²⁴ The information about this period is taken from HANS VON Mangoldt, "Arbitration and Conciliation," in *Judicial Settlement of International Disputes*, *Beiträge zum ausländischen öffentlichen Recht und Völkerrecht*, Vol. 62, Max Planck Institute for Comparative Public Law and International Law, 1974, pp. 484–487.

nationals or violation of their vested interests. Overall, the conciliation commissions during this period seem to have played a rather limited but still useful role, given that eight of them produced a settlement for the disputes in question.

A number of observations can be made regarding the use of conciliation as a dispute resolution method during this period. Unlike arbitration, conciliation does not seem to have raised prior problems regarding the legality of the dispute or certain aspects of it because its very nature does not preclude taking factors other than legal ones into account. In fact, conciliation even makes it possible to settle a dispute through reciprocal concessions without forcing the Parties to renounce their basic positions. In addition, even when conciliation is mandatory—i.e., when it can be requested by a single Party—it is rarely successful in practice if a Party refuses to cooperate with the Conciliation Commission, because default proceedings are incompatible with the spirit and workings of the conciliation process. A final observation is that because conciliation was often followed by arbitration proceedings in case of failure, arbitration commissions tended to incorporate legal considerations in their reasoning and serve as legal advisor to the Parties by informing them of their chances of success.

The period spanning the mid-1960s up to the present is characterized by an increase in the number of sectoral arrangements offering conciliation as a dispute resolution mechanism, which in some cases led to conciliation requests. The most used was the International Chamber of Commerce (ICC). Between 1988—the year the ICC's new rules on conciliation came into force—and 1993, 54 conciliation requests were received, 9 led to a settlement proposal, and 5 led to a resolution. In all cases, however, the dispute did not involve states but private parties. The second-most used arrangement is the International Centre for Settlement of Investment Disputes (ICSID). Since its foundation in 1965 up to the present, five conciliation cases have been reported. Two were resolved, a

third led to a resolution proposal that was not accepted by the Parties but later served as the basis of a solution, and the final two were withdrawn during the process²⁵. Among the cases that were resolved, there is a very recent one involving a Canadian business, TG World, and the Nigerian government concerning an oil exploration contract. The year after conciliation proceedings started in 2004, the Parties reached an agreement allowing TG World to continue its operations in Niger²⁶.

A third international mechanism that has been used to settle a dispute through conciliation is the one instituted by the Organization of American States (OAS). The dispute in question, which was territorial in nature, involved Guatemala and Belize. On September 19, 2002, after three years of work, the territorial dispute conciliation process officially ended. The event was hailed by the UN Secretary General and the European Union, and a public ceremony in Washington on September 30, 2002, attended by representatives of Guatemala, Belize, Honduras, the OAS, and others marked the occasion. Unfortunately, the proposed settlement has not yet been confirmed as the referendums it called for not having yet been held. The dispute therefore cannot be said to be definitively settled, even though the governments involved continue to take steps to build mutual trust. As the proposed settlement provides a reasonably good illustration of the type of solution conciliation makes possible, we thought it appropriate to briefly describe its content based on the summary in the 2002 Annual Report of the Organization of American States²⁷.

²⁵ See Christoph H. Schreur, *The ICSID Convention: a Commentary*, Cambridge University Press, Cambridge, 2001, p. 416 and Damon Vis-Dunbar, "Conciliation of investment disputes remains under-utilized," International Institute for Sustainable Development, Investment Treaty News (ITN), July 19, 2006: http://www.iisd.org/pdf/2006/itn_july19_2006.pdf (last visited on November 21, 2006).

²⁶ See International Institute for Sustainable Development, Investment Treaty News (ITN), July 19, 2006 : <http://www.iisd.org/investment/itn>

²⁷ Organization of American States, General Secretariat 2002 Annual Report, Prevention of conflicts, p. 28 (doc.cap02a-3): <http://www.oas.org/SGInfAnual/2003/English/Cap02a.pdf>

CONCILIATION REPORT
REGARDING THE BOUNDARY LINE
BETWEEN GUATEMALA AND BELIZE

In its proposal, the Panel of Facilitators defines the coordinates of the land boundary between the two countries and calls upon the two countries to form a technical committee for the demarcation and densification of the boundary and for its maintenance thereafter. The Panel examined the case of the village of Santa Rosa and suggested that its inhabitants either remain where they were or be moved to a place of their choosing, funded by the Development Trust Fund.

The following basic principles were proposed with regard to the maritime issues: the maritime boundary between the territorial seas of Belize and Guatemala is the Equidistance Line; Belize accepts the Bay Closing Line for the bay of Amatique between Cabo Tres Puntas and the South Bank of the River Sarstoon; Guatemala and Honduras accept Belize's published Straight Baseline System; Guatemala and Belize accept Honduras' published Straight Baseline system. Under the proposal, Guatemala was granted an access corridor of unrestricted navigational rights extending for two miles on either side of the Belize-Honduras territorial sea equidistance line boundary. The proposal also provides for establishment of a Tripartite Regional Fisheries Management Commission for the Gulf of Honduras under the rotating chairmanship of Belize, Guatemala, and Honduras. The Tripartite Commission will, subject to international law, have vested in it authority for the management, long-term conservation, and sustainable use of straddling fish stocks and highly migratory fish stocks located in the Exclusive Economic Zones of Belize, Guatemala, and Honduras.

Because the Gulf of Honduras is an ecologically diverse transboundary area shared by Belize, Guatemala, and Honduras, the economic authorities of the three countries in this area took steps to preserve its viability. The mechanism proposed to coordinate and harmonize the preservation of these shared resources is a tri-national, multi-use Ecological Park. The Ecological Park's essential purpose will be conservation of the area's resources, especially the marine resources, and development of sustainable eco-tourism. One particular feature of the regime is that while the three zones are subject to the administrative control exercised by the respective countries when the Treaties of Settlement enter into force, the citizens of the respective countries will be assured of their rights to access and use those areas, while also respecting the conservationist purpose of the Ecological Park and in accordance with the general laws of the respective countries and any decisions taken by the Belize-Guatemala-Honduras Ecological Park Commission.

The proposal also created a Development Trust Fund to promote development in Belize and Honduras. This fund will be used specifically to relieve extreme poverty and landlessness in the provinces along the border, to establish a special human settlement, to develop and protect the Belize-Guatemala-Honduras Ecological Park, and to put these proposals and the settlement treaties into practice.

What is remarkable about this report, prepared under the auspices of the OAS, is the obvious effort made to encourage the countries involved to see beyond their immediate conflict in order to arrive at solutions based on respect and cooperation, such as the creation of a tripartite regional fisheries management

commission, the development of a multiuse ecological park, and the creation of a development trust fund.

On a final note, disputes can be resolved through conciliation outside of any multilateral institutional framework. An interesting example is the 1980 conciliation convention between Norway and Finland that was aimed at making recommendations on the boundaries of the continental shelf in the Jan Mayen sector. The conciliation commission issued a report containing unanimous recommendations, which the two Parties accepted as a basis for additional talks leading up to an agreement in October 1981²⁸.

CONCLUSION

Conciliation's value in dispute resolution is that it allows legal as well as economic, political, and social factors to be taken into account and proposes a forward-thinking solution that does not seek to declare a winner but rather help the Parties reach an agreement. Such an approach seems particularly well suited to the cultural sector, where interaction encourages cultural expressions to flourish.

In addition, even though the conciliation report may tend to comply with the rules governing member states, it may also propose a panoply of original and realistic solutions and encourage States parties to participate in implementing them.

Thus, with respect to conciliation under the Convention on the Protection and Promotion of the Diversity of Cultural Expressions, the tools set out in its provisions—such as Cooperation for development (art. 14) or the International Fund for Cultural Diversity (art. 18), to name a few—could easily be used here.

²⁸ Richard Meese, "Délimitations maritimes: règlement juridictionnel et conciliation internationale" *Indemer – Annuaire du droit de la mer*, 1998, Vol. III.

With time, jurisprudence regarding disputes of a cultural nature—developed from a cultural standpoint by cultural experts—could be compiled and used to resolve future disputes, provided, naturally, that the conciliation reports are made public.