In: IFSH (ed.), OSCE-Yearbook 1995/1996, Baden-Baden 1997, pp. 151-161.

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The OSCE Court of Conciliation and Arbitration*

Peaceful Settlement of Disputes as a Correlative of Force Prohibition

Force as a means of international politics, especially warfare, is prohibited since the foundation of the United Nations in 1945 at the latest. In the Final Act of Helsinki of 1 August 1975, the CSCE expressively repeats and reconfirms the prohibition of using force in conformity with international law. Under the subtitle of "Refraining from the threat or use of force", point II of the principles catalogue reads as follows:

> *"The participating States will refrain in their mutual relations, as well as in their international relations in general, from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations and with the present Declaration. No consideration may be invoked to serve to warrant resort to the threat or use of force in contravention of this principle (...)*
> *No such threat or use of force will be employed as a means of settling disputes, or questions likely to give rise to disputes, between them."*[1]

Who is condemning the "threat or use of force as a means of settling disputes" - as reads the last mentioned paragraph -, has to offer or order an alternative. The Final Act of Helsinki complies with this request in point V of the principles catalogue. Under the subtitle of "Peaceful settlement of disputes" it reads as follows among others:

> *"The participating States will settle disputes among them by peaceful means in such a manner as not to endanger international peace and security, and justice.*
> *They will endeavour in good faith and a spirit of co-operation to reach a rapid and equitable solution on the basis of international law.*

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* First published in: Institut für Friedensforschung und Sicherheitspolitik an der Universität Hamburg/IFSH [Institute for Peace Research and Security Policy at the University of Hamburg], OSZE-Jahrbuch [OSCE Yearbook] 1995, Baden-Baden 1995, pp. 241-253 (in German).

1 Final Act of the Conference on Security and Co-operation in Europe, Helsinki, 1 August 1975, in: Arie Bloed (Ed.), The Conference on Security and Co-operation in Europe. Analysis and Basic Documents, 1972-1993, Dordrecht/Boston/London 1993, pp. 141-217, here: p. 144.

> *For this purpose they will use such means as negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement or other peaceful means of their own choice including any settlement procedure agreed to in advance of disputes to which they are parties."*[2]

Thus, the Helsinki Final Act - as well as the Charter of the United Nations by the way, in its preamble and in article 2, paragraph 4 UNCh on the one hand and in article 33, paragraph 1 UNCh on the other - recognize, that the prohibition of applying force unalterably has a correlative being (mandatory) regulations on peaceful settlement of disputes. These regulations comprise among others: conciliation, arbitration and judicial settlement. Following inner society practice, the latter procedure obtains a prominent meaning for the coordination of (arbitration) jurisdiction. All the same it took more than 20 years since the signing of the Helsinki Final Act in 1975 that the OSCE Court was inaugurated in Geneva on 29 May 1995.

Brief Outline of the Genesis of the OSCE Conciliation and Arbitration Court

Among the most important roots for the development of OSCE arbitration is the "Draft Convention on a European System for the Peaceful Settlement of Disputes",[3] submitted by the Swiss delegation already at the beginning of the second stage of the Conference phase in Geneva on 18 September 1973. Later on this draft named after the Head of the Swiss delegation, Rudolf L. Bindschedler, was not adopted comprehensively by the Helsinki Final Act, but can be considered as a directive and basis for individual questions of the subsequent discussion. Examples are for instance the questions of compulsory procedures, the (rather traditional) differentiation between justifiable and non-justifiable disputes or the concurrency of the European system to other procedures of dispute settlement.
Bindschedler himself indicated the aim of the Swiss proposition: "to overcome the present anarchy of the States community".[4]
The rather modest formulation of principle V in the Helsinki Final Act was quite remote from this high demand, however. During the Follow-up Meeting of Belgrade in 1978 a Meeting of Experts on Peaceful Settlement of

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2 Ibid., p. 145.
3 Printed in: Europa-Archiv 2/1976, p. D38-D52 (in German).
4 Rudolf L. Bindschedler, Der schweizerische Entwurf eines Vertrages über ein europäisches System der friedlichen Streiterledigung und seine politischen Aspekte [The Swiss Draft Convention on a European System for the Peaceful Settlement of Disputes and its Political Aspects], in: Europa-Archiv 2/1976, p. 57-66, here: p. 60; cf. Bruno Simma/Dieter Schenk, Friedliche Streiterledigung in Europa. Überlegungen zum schweizerischen KSZE-Vorschlag [Peaceful Settlement of Disputes in Europe. Considerations on the Swiss CSCE Proposal], in: Europa-Archiv 14/1978, p. 419-430.

Disputes was convened that took place in Montreux (Switzerland) from 31 October to 11 December 1978. According to the Final Document of the Belgrade Follow-up Meeting of 8 March 1978, the Meeting of Experts in Montreux was held with the intention of "pursuing the examination and elaboration of a generally acceptable method for peaceful settlement of disputes aimed at complementing existing methods".[5] But the hopes set on Montreux were disappointed. Three working documents were discussed indeed - among them the Bindschedler draft -, but no results were found. In the sober language of the CSCE Meeting of Experts of Montreux it reads:

> *"Divergent views were expressed and no consensus was reached on specific methods."*[6]

The participants of the Meeting of Experts therefore recommended to the governments of the CSCE participating States to "consider, at the Madrid Meeting, the possibility of convening another Meeting of Experts".[7]
This second Meeting of Experts took place in Athens from 21 March to 30 April 1984, on decision of the Madrid Follow-up Meeting of 6 September 1983.[8] Compared with the meeting in Montreux the results of Athens were even more disappointing.[9] Although the Swiss delegation submitted a very moderate working paper, no agreement was obtained. Especially the Soviet Union and some other Eastern European countries simply refused any involvement of third parties in dispute settlements. Obviously they feared their partiality. They argued, however, with the prohibition of intervening into the internal affairs of a state. The official Final Report of the CSCE Meeting of Experts only states:

> *"Particular emphasis was put on ways and means of including a third party element in such a method (for peaceful settlement of disputes - DSL). Divergent views were expressed and no consensus was reached on a method. It was recognized that further discussions should be pursued in an appropriate framework within the CSCE process".*[10]

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5 Concluding Document of Belgrade, Belgrade, 8 March 1978, in: Bloed (Ed.), cited above (Note 1), pp. 219-224, here: p. 220.

6 Report of Montreux, Montreux, 11 December 1978, in: Bloed (Ed.), cited above (Note 1), pp. 225-227, here: p. 225.

7 Ibid., p. 227.

8 Cf. Concluding Document of Madrid, Madrid, 6 September 1983, in: Bloed (Ed.), cited above (Note 1), pp. 257-287, here: p. 263.

9 Cf. Gerard J. Tanja, Peaceful Settlement of Disputes within the Framework of the CSCE, in: Helsinki-Monitor 3/1994, p. 42-54, here: p. 45.

10 Report of Athens, Athens, 30 April 1984, in: Bloed (Ed.), cited above (Note 1), p. 289.

This situation of stagnation and lack of results only changed when the revolutionary upheavals in Europe began in the second half of the eighties.[11] A transbordering East-West common interest in mechanisms of peaceful dispute settlement developed. It started with the third Follow-up Meeting of the CSCE in Vienna from 4 November 1988 to 15 January 1989. In the Concluding Document the participating States not only basically accepted the mandatory consultation of a third party as a possible procedure for the peaceful settlement of disputes, but they requested a further Meeting of Experts in order to examine the possibility of establishing mechanisms for arriving at binding third-party decisions. In the Concluding Document this reads as follows:

> *"The participating States confirm their commitment to the principle of peaceful settlement of disputes, convinced that it is an essential complement to the duty of States to refrain from the threat or use of force, both being essential factors for the maintenance and consolidation of peace and security (...) In this context they accept, in principle, the mandatory involvement of a third party when a dispute cannot be settled by other peaceful means.*
> *In order to ensure the progressive implementation of this commitment, including, as a first step, the mandatory involvement of a third party in the settlement of certain categories of disputes, they decide to convene a Meeting of Experts in Valletta from 15 January to 8 February 1991 to establish a list of such categories and the related procedures and mechanisms. This list would be subject to subsequent gradual extension. The Meeting will also consider the possibility of establishing mechanisms for arriving at binding third-party decisions."*[12]

But the results of the Valletta Meeting of Experts from 15 January to 8 February 1991 did not fulfil the expectations and hopes called in the frame of the Vienna Follow-up Meeting of 1989 - and by the way repeated with emphasis in the Paris Charter of 1990.[13] On the contrary they stayed far behind the mandate to consider or propose a compulsory procedure and binding decision-taking structures including third parties. National interests, arguments concerning costs and above all the fear to open up the door to an institutionalization of the CSCE, prevented far reaching thoughts.[14] That is why

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11 Cf. Arie Bloed, Two Decades of the CSCE Process: From Confrontation to Co-operation, in: Bloed (Ed.), cited above (Note 1), pp. 1-118, here: p. 33.

12 Concluding Document of Vienna, Vienna, 15 January 1989, in: Bloed (Ed.), cited above (Note 1), pp. 327-411, here: pp. 331-332.

13 Cf. Charter of Paris for a New Europe, Paris, 21 November 1990, in: Bloed (Ed.), cited above (Note 1), pp. 538-566, here: p. 544.

14 To the divergent positions of the participating States, see Tanja, cited aboce (Note 9), pp. 46f; Peter Schlotter/Norbert Ropers/Berthold Meyer, Die neue KSZE. Zukunftsperspektiven einer regionalen Friedensstrategie [The New CSCE. Future Perspectives of a Regional

the Report of the Meeting of Experts in La Valletta does not (yet) provide for an own CSCE jurisdiction or arbitration - let alone a compulsory and binding one. Under point 9.d of their Report the participants of the Meeting rather propose just to *"consider* accepting the compulsory jurisdiction of the International Court of Justice, either by treaty or by unilateral declaration under Article 36, paragraph 2, of the Statute of the Court, and minimizing, where possible, any reservations attached to such a declaration"[15] (emphasis - DSL).

The mechanism for dispute settlement finally decided upon during the Meeting in La Valletta and named after the location of the meeting (Valletta Mechanism), is in the last analysis nothing more than the informal consulting of the conflicting parties by third persons, whose names are listed in the CSCE Conflict Prevention Centre in Vienna - a mechanism that "will not be established or continued, as the case may be, if another party to the dispute considers that because the dispute raises issues concerning its territorial integrity, or national defence, title to sovereignty over land territory, or competing claims with regard to the jurisdiction over other areas, the Mechanism should not be established or continued".[16]

On the other hand it must not be underestimated that the CSCE States in La Valletta were able for the first time to agree upon a common document on peaceful settlement of disputes. Moreover, by the presented document they made a first step to disengage themselves from the principle of consensus: the mechanism can also be called upon unilaterally. Insofar the Meeting of Experts of La Valletta can be considered as a positive start including or - according to the perspective - claiming the chance to continue. This chance presented itself in 1992 during the second Helsinki Summit, when France and Germany submitted their common project of establishing a court of conciliation and arbitration. The Helsinki Summit of July 1992 was preceded by the meeting of an informal working group discussing the indicated French-German project between 11 and 22 May 1992. There were fundamental objections by the United States, Great Britain and Turkey. The Central and East European states generally agreed with the explanations of the project. Among the objections - also expressed during the Helsinki Summit - was *inter alia* the fear that a regional system of peaceful dispute settlement might handicap the unity and development of international law, furthermore that the work of already existing mechanisms could be duplicated (problem of complementarity resp. subsidiarity), finally, by the introduction of a legally

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15 Peace Strategy], Opladen 1994, p. 39.

16 Report of the CSCE Meeting of Experts on Peaceful Settlement of Disputes, Valletta, 8 February 1991, in: Bloed (Ed.), cited above (Note 1), pp. 567-581, here: p. 572.
Ibid., p. 576.

binding instrument the character of the CSCE would be altered towards a legalistic, possibly even institutionalized "approach", and last not least the unity of the CSCE would be broken up as not all of the CSCE participating States would enter new conventions.[17]
In spite of these objections and criticisms the participating States of the Helsinki Summit valued their own discussion as alltogether positive. The Helsinki Decisions state *inter alia*:

> *"The participating States consider their commitment to settle disputes among themselves by peaceful means to form a cornerstone of the CSCE process (...)*
> *The participating States welcome the work done to this end by the Helsinki Follow-up Meeting. In particular they were encouraged by significant progress made on issues relating to creating a conciliation and arbitration court within the CSCE, enhancing the Valletta mechanism and establishing a CSCE procedure for conciliation, including directed conciliation, for which proposals were submitted.*
> *In the light of the important subject matter and of the discussions held here in Helsinki, they have decided to continue to develop a comprehensive set of measures to expand the options available within the CSCE to assist States to resolve their disputes peacefully (...)*
> *Accordingly, intending to reach early results, they have decided to convene a CSCE meeting in Geneva, with a first round from 12 to 23 October 1992, to negotiate a comprehensive and coherent set of measures as mentioned above. They will take into account the ideas expressed regarding procedures for a compulsory element in conciliation, setting up of a court of conciliation and arbitration within the CSCE, and other means.*
> *The results of the meeting will be submitted to the Council of Ministers at the Stockholm Meeting on 14 and 15 December 1992 for approval and, as appropriate, opening for signature."*[18]

In contrast to the previous meetings of experts and working groups the meeting of experts decided in Helsinki and executed in Geneva from 12 to 23 October 1992 fulfilled all expectations and hopes. Anyhow, the CSCE Council, on 14 and 15 December 1992 in Stockholm, accepted the recommendations concerning the peaceful settlement of disputes worked out in Geneva. Correspondingly, the decisions of the Stockholm Council Meeting include four elements: beside measures aiming at enhancing the Valletta Provisions

17 Cf. Tanja, cited above (Note 9), pp. 48f.
18 CSCE Helsinki Document 1992: The Challenges of Change, Helsinki, 10 July 1992, in: Bloed (Ed.), cited above (Note 1), pp. 701-777, here: pp. 729-730.

through modification of the procedure for selecting Dispute Settlement Mechanisms, these are: "Provisions for a CSCE-Conciliation Commission", furthermore "Provisions for Directed Conciliation" as well as the "Convention on Conciliation and Arbitration within the CSCE", containing the establishment of a Court of Conciliation and Arbitration.[19]

Structure and Functioning of the OSCE Court

In the "Convention on Conciliation and Arbitration within the CSCE" of 1992 the States parties to this Convention, "being States participating in the Conference on Security and Co-operation in Europe" agree to establish a "Court of Conciliation and Arbitration" as a permanent institution, located in Geneva and consisting of conciliators and arbitrators. According to this the procedures are conciliation and arbitration procedures.
Together, the conciliators and arbitrators shall constitute the Court of Conciliation and Arbitration within the CSCE (in the Convention also referred to as "the Court"). Conciliators, arbitrators and the Registrar of the Court shall perform their functions in full independence. They shall enjoy, while performing their functions in the territory of the States parties to the Convention, the privileges and immunities accorded to persons connected with the International Court of Justice.
Arbitrators and conciliators are recruited by the States parties to the Convention which appoint respectively two conciliators, one arbitrator, and one alternate. The conciliators shall be appointed for a renewable period of six years. They must be persons holding or having held senior national or international positions and possessing recognized qualifications in international law, international relations, or the settlement of disputes. The arbitrators and their alternates are appointed for a period of six years, too, which may be renewed once. They must possess the qualifications required in their respective countries for appointment to the highest judicial offices or must be jurisconsult of recognized competence in international law. The Registrar - different from the conciliators and the arbitrators - shall not be appointed by the States parties, but by the Court.
The decisions of the Court shall be taken by a majoritiy of the members participating in the vote. The same rule shall apply to decisions of the Bureau, to the decisions of the Conciliation Commissions and the Arbitral Tribunals.

19 Stockholm Meeting of the CSCE Council, Stockholm, 15 December 1992, in: Bloed (Ed.), cited above (Note 1), pp. 845-899; Annex 1: Modification to Section V of the Valletta Provisions for a CSCE Procedure for Peaceful Settlement of Disputes, ibid., p. 869; Annex 3: Provisions for a CSCE Conciliation Commission, ibid., pp. 889-892; Annex 4: Provisions for Directed Conciliation, ibid., pp. 893-894; Annex 2: Convention on Conciliation and Arbitration within the CSCE, ibid., pp. 870-888.

That means that the consensus principle, otherwise typical for the OSCE, is replaced by majority decision.
The work of the Court shall further and strengthen existing possibilities and means of peaceful settlement of disputes, but not replace them. Therefore the Court shall take no further action in the case if the dispute prior has been submitted to another court or tribunal or if the parties to the dispute have accepted in advance the exclusive jurisdiction of a jurisdictional body other than the Court. In the event of disagreement between the parties to the dispute with regard to the competence of the Commission or the Tribunal, the decision in the matter shall rest with the Commission or the Tribunal.
OSCE participating States which have not signed the Convention may subsequently accede thereto. In turn, any State party to this Convention may, at any time, denounce the Convention by means of a notification addressed to the Depositary, which is the government of Sweden. The denunciation will become effective one year after the notification. However, proceedings which are under way at the time the denunciation enters into force shall be pursued to their conclusion.
In detail the conciliation and arbitration procedures work as follows: any State party to the Convention may lodge an application with the Registrar requesting the constitution of a *Conciliation Commission* for dispute between it and one or more other States parties. The constitution of a Conciliation Commission may also be requested by agreement between States parties, notified to the Registrar. The Conciliation Commission will be built by the parties to the dispute (partially). To do so each party to the dispute shall appoint from the existing list of conciliators one conciliator to sit on the Commission. After the President of the Court has consulted the parties to the dispute as to the composition of the rest of the Commission, the Bureau shall appoint three further conciliators to sit on the Commission. When more than two States are parties to the same dispute, the States asserting the same interest may agree to appoint one single conciliator. If they do not so agree, each of the two sides to the dispute shall appoint the same number of conciliators up to a maximum decided by the Bureau.
The conciliation proceedings shall be confidential. However, if the parties to the dispute agree thereon, the Conciliation Commission may invite any State party to the Convention which has an interest in the settlement of the dispute to participate in the proceedings.
If, during the proceedings, the parties to the dispute reach a mutually acceptable settlement, they shall record the terms of the settlement in a summary of conclusions signed by their representatives and by the members of the Commission. The signing of the document shall conclude the proceedings.
When the Conciliation Commission considers that all the aspects of the dispute and all the possibilities of finding a solution have been explored, it shall

draw up a final report. The report shall contain the proposals of the Commission for the peaceful settlement of the dispute. Then, the parties to the dispute shall have a period of 30 days in which to examine the report of the Conciliation Commission and inform the Chairman of the Commission whether they are willing to accept the proposed settlement. That means, the report of the Conciliation Commission and its proposals are not compulsory automatically. If a party to the dispute does not accept the proposed settlement, the other party or parties are no longer bound by their own acceptance thereof.

The objective of conciliation is to assist the parties to the dispute by the way of the Conciliation Commission in finding a settlement in accordance with international law and their CSCE commitments. The progressive character of the procedure is obvious: the State parties to the Convention may lodge an application with the Registrar requesting the constitution of the Conciliation Commission for *any kind of disputes*. However, the competence of the conciliators is limited. The constitution of a Conciliation Commission needs an application. The work of the conciliators remains in the area of advising functions. Proposals of the Commission are not automatically compulsory. In the case the parties of the dispute refuse to accept the proposed solution, that means the implementation of the proposals, then the Court has no further competence to settle the conflict beside the possibility to forward the subject to the CSCE Council (now: OSCE Ministerial Council).

Different from conciliation, in the course of the *arbitration procedure* the function of the Arbitral Tribunal is to decide the disputes as submitted to it in accordance with international law. If the parties to the dispute agree so, the Tribunal has also the power to decide a case *ex aequo et bono*. In any case, however, the arbitral procedure comes to a final award with a legally binding character.

Similar to the Conciliation Commission the Arbitral Tribunal shall be constituted ad hoc upon request. The arbitrators appointed by the parties to the dispute are *ex officio* members of the Tribunal. When more than two States are parties to the same dispute, the States asserting the same interest may agree to appoint one single arbitrator. In addition, the Bureau shall appoint, from among the arbitrators a number of members to sit on the Tribunal so that the members appointed by the Bureau total at least one more than the *ex officio* members. Any State which is a party to a dispute submitted to an Arbitral Tribunal and which is not party to the Convention, may appoint a person of its choice to sit on the Tribunal, either from the existing list of arbitrators or from among other persons who are nationals of an OSCE participating State.

The arbitration proceedings, which shall be held *in camera*, consist of an oral and a written part. The proceedings shall conform to "the principles of a fair trial". The award shall be final and not subject to appeal. However, the

parties to the dispute or one of them may request that the Tribunal interprets its award as to the meaning or scope. An application for revision of the award may be made only when it is based upon the discovery of some fact which is of such a nature as to be a decisive factor and which, when the award was rendered, was unknown to the Tribunal and to the party or parties to the dispute claiming revision.
The OSCE arbitration, however, is *not compulsory*, which means that one party to a dispute is not entitled to appeal to the OSCE Court unilaterally. It is true, that an appeal for arbitration may be made at any time. However, precondition is an agreement between two or more States parties to the Convention or between one or more States parties to the Convention and one or more other OSCE participating States. This agreement will be made by a notice addressed to the Depositary (Sweden) in which they declare that they recognize as compulsory, *ipso facto* and without special agreement, the jurisdiction of an Arbitral Tribunal, subject to *reciprocity*. Such a declaration may be made for an unlimited period or for a specified time.
Finally, the compulsory competence of the Arbitral Tribunal has another substantial restriction insofar as the States parties to the Convention may cover by their declaration "all disputes" or exclude disputes "concerning a State's territorial integrity, national defence, title to sovereignty or land territory, or competing claims with regard to jurisdiction over other areas". That means that precisely those questions touching the problems of force and war can be removed from a decision of the OSCE Court.

Present Situation and Evaluation

On 5 December 1994, after the deposit of the twelfth instrument of ratification resp. accession, the Convention on Conciliation and Arbitration within the CSCE entered into force. Finally, the OSCE Court of Conciliation and Arbitration was opened on 29 May 1995 solemnly in Geneva.
In the frame of the opening festivities the election of the President, the Vice-President and three further members, furthermore the adoption of the Rules of the Court and finally the appointment of a Registrar were performed. Robert Badinter, the former President of the French Constitutional Court, was elected President. Hans-Dietrich Genscher, the former Foreign Minister of the Federal Republic of Germany, was appointed as Vice-President. Genscher had been nominated as one of the conciliators of the Court from German side.
The Convention on Conciliation and Arbitration within the OSCE was signed by 35 of the 53 OSCE participating States by mid-1995. Out of these 35 States (only) 15 OSCE participating States have ratified the Convention.

Until now the appointment of conciliators and arbitrators has been done only by nine of the states involved. Among the States having ratified the convention and thus being part of the Court, are the following: Croatia, Cyprus, Denmark, Finland, France, Germany, Italy, Liechtenstein, Monaco, Poland, San Marino, Slovenia, Sweden, Switzerland, and Tajikistan. Among the States who so far refused signing let alone ratifying the Convention, are Great Britain and the United States, but also the Netherlands, Spain, Turkey as well as the Czech Republic and Belarus.

Who wishes to exclude the use of force as a means of international politics on principle, must not content himself just with prohibiting force and war. Institutional consequences must be drawn helping to facilitate the observance of the prohibition of force. One of the crucial points of any civilized conflict settlement - if not the most important one - is the access to compulsory jurisdiction and arbitration. Therefore, the establishment of the OSCE Court cannot be appreciated highly enough concerning the prevention of force and war. This is valid all the more as the sphere of competence of the Court extends to any type of dispute and covers all of Europe (and not only Western Europe). Both - the range of dispute settlement and the comprehensive understanding of Europe - can be considered as important components on the way towards an pan-European Peace and Security Community.

It must be criticized, however, that the competence of the OSCE Court again is not compulsory, that furthermore the provided conciliation is not binding and that the access to the arbitration can be done with reservation. Finally, it must not be underestimated that the new OSCE organ has no possibility of intervention in the case of domestic conflicts, thus excluding those cases that lead continuously to violence and war in the changed reality after the end of the East-West conflict. Last not least: the Court - contrary to its name - is located between conciliation and arbitral award, i.e. it is even situated one step below the level of Arbitral Tribunal and Court and is not even a Court in the true sense of the word.

Thus the OSCE Court still does not correspond to the "general, comprehensive, mandatory, international arbitration" as for instance article 24 paragraph 3 of the Constitution of the Federal Republic of Germany bears in mind. To dismiss the Court as mere alibi institution would be wrong, however. The new OSCE organ can rather play the important role of opening doors on the way towards an effective, comprehensive and compulsory instrument of dispute settlement. The participating States of the OSCE, among them the Germans, who have considerably pushed forward the establishment of the OSCE Court, remain challenged to continue contributing to its effective and successful use and its further development.