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Lucius Caflisch/Laurence Cuny

The OSCE Court of Conciliation and Arbitration: Current Problems

Introduction

In his contribution to the OSCE Yearbook 1995/1996 Dieter S. Lutz reviewed the process that led to the founding of the OSCE Court of Conciliation and Arbitration and described its main features.[1] The purpose of the article on hand is to portray the Court's development since its establishment, look into issues that have been raised by its activities at this early stage and discuss its prospects for the future. But first we shall explain briefly what the OSCE Court actually is.
This body was called into being by the Convention on Conciliation and Arbitration within the CSCE, a document that was worked out in Geneva and adopted on 15 December 1992 in Stockholm.[2] It was signed on the same day by 34 of the (at that time) 54 CSCE participating States and entered into force on 5 December 1994, after Italy became the twelfth country to deposit its instrument of ratification - which is encouraging in itself. So far it has been ratified by the following 20 countries: Albania, Austria, Croatia, Cyprus, Denmark, Finland, France, Germany, Greece, Hungary, Italy, Liechtenstein, Monaco, Poland, Romania, San Marino, Slovenia, Sweden, Switzerland and Ukraine. In the meantime Tajikistan and Uzbekistan have joined the Convention, thus proving wrong those who criticized the Central Asian countries for their abstinence. The Court is continuing to seek ratifications and new members, and it hopes in the future to have between 30 and 35 participating countries in all.
The idea for such a court came up immediately after the great political changes in Eastern Europe and was aimed at the settlement of future disputes between OSCE participating States in a regional framework, using flexible and rapidly effective means. Its most important element is an obligatory conciliation procedure that applies to all disputes without exception - an important innovation, even if the result of the proceedings is not binding. Beyond that the Convention provides for a non-binding arbitration proce-

1 Dieter S. Lutz, The OSCE Court of Conciliation and Arbitration, in: Institute for Peace Research and Security Policy at the University of Hamburg/IFSH (Ed..), OSCE Yearbook 1995/1996, Baden-Baden 1997, pp. 151-161.
2 Stockholm Meeting of the CSCE Council, Stockholm, 15 December 1992, in: Arie Bloed (Ed.), The Conference on Security and Co-operation in Europe. Analysis and Basic Documents, 1972-1993, Dordrecht/Boston/London 1993, pp. 845-899, Annex 2: Convention on Conciliation and Arbitration within the CSCE, pp. 870-888.

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dure of the classical kind except that the States are given the option of recognizing the jurisdiction of an Arbitral Tribunal at any time through a unilateral declaration and on the basis of reciprocity.[3]

This study will deal with four points that appear important. First it will touch on practical aspects that have arisen since the founding of the Court. Then it will investigate the question of the applicable law - a matter of decisive importance in the context of the OSCE and of every regional court. After that we shall turn to the problems that emerge from the subsidiarity principle, a corner-stone of the system of the Court. Finally we will deal with the question of the Court's competence.

Practical Issues

The Court held its founding session on 29 May 1995 in Geneva.[4] Since that time the Bureau of the Court has worked out the Rules of the Court which, in conformity with Article 11, Paragraph 1, were approved by the States parties to the Convention and entered into force on 1 February 1997. The Rules deal mainly with the languages to be used by the Court and establish the rules of procedure to be followed by the Conciliation Commissions and Arbitral Tribunals set up in the framework of the Court. It should be noted that the rules of procedure enacted by the individual Conciliation Commissions and Arbitral Tribunals must in every case be presented to the Bureau for approval. This rule is designed to ensure a certain level of uniformity and, hence, the equality of the parties.

The Agreement between Switzerland and the Court on the latter's location was negotiated with the Bureau and approved by the States parties to the Convention. An exchange of notes on the facilities to be provided by Switzerland in accordance with Article 1, Paragraph 2, of the Financial Protocol[5] will be presented to the Swiss Parliament in the near future.

3 Four countries have so far made declarations in accordance with Article 26, Paragraph 2. They were Greece (21 August 1995), Denmark (23 August 1994), Finland (10 February 1995 and Sweden (25 November 1993).

4 The Bureau of the Court, which was elected at the founding session, is made up of: Robert Badinter (France), arbitrator, President; Hans-Dietrich Genscher (Germany), conciliator, Vice-President; Krzysztof Skubiszewski (Poland), conciliator; Hans Danelius (Sweden), arbitrator; Luigi Ferrari-Bravo (Italy), arbitrator. Substitute members of the Bureau are: Lucius Caflisch (Switzerland), conciliator; Kalevi Sorsa (Finland), conciliator; Ole Due (Denmark), arbitrator; and Myriam Skrk (Slovenia), arbitrator.

5 The Financial Protocol was adopted in Prague on 28 April 1993 in conformity with Article 13 of the Convention on Conciliation and Arbitration within the CSCE. Protocol financier adopté conformément à l'article 13 de la Convention relative à la conciliation et à l'arbitrage au sein de la CSCE, Prague, 28 avril 1993, in: Revue générale de droit international public. t.99,1995, pp. 237-241.

The composition of the Court results from a list of conciliators and arbitrators nominated by the States parties to the Convention within two months after ratification of or accession to the 1992 Convention. In fact, however, a number of countries still have to make their nominations.[6]

Applicable Law

The question of the applicable law acquires special importance when one realizes that the Court was established for the purpose of conciliating disputes between OSCE participating States at the regional level. On this basis one might be inclined to assume that special significance was being attached to CSCE commitments, which represent "soft law" and reflect the values to which the OSCE States have committed themselves. But that is not the case at all, and for that reason the essential provisions of the Convention deserve a closer look.[7]
With regard to *conciliation*, Article 24 states the following:

> "The Conciliation Commission shall assist the parties to the dispute in finding a settlement in accordance with international law and their CSCE commitments."

A number of authors have expressed astonishment that this provision, unlike the draft presented to the CSCE by France and Germany, contains no reference to equity. Such a reference would certainly have been helpful since conciliation proceedings are meant to lead to acceptable solutions for each of the affected States, although they have the option, after the proceedings have been concluded, of accepting or rejecting the solution proposed by the Commission.
The reference to international law in Article 24 seems inappropriate if it is supposed to mean that the Commission may only express its views in legal terms, without enjoying any discretionary powers, because that would be contrary to the essence of conciliation. Still, one should not overrate the importance of the reference; it will presumably be given a restrictive interpre-

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6 For the list of members of the Court on 15 March 1997, see: L. Cuny, Le règlement pacifique des différends au sein de l'OSCE: La Cour de conciliation et d'arbitrage, Geneva 1997, Annex 6.

7 On the question of the applicable law, cf. A. Pellet, Note sur la Cour de conciliation et d'arbitrage de la CSCE, in: E. Decaux/L.-A. Sicilianos (Eds.), La CSCE, dimension humaine et règlement pacifique des différends, Paris 1993, pp. 189-217; L. Caflisch, Vers des mécanismes pan-européens de règlement pacifique des différends, in: Revue générale de droit international public, t.97,1993, pp. 1-36; L. Condorelli, En attendant la "Cour de conciliation et d'arbitrage de la CSCE": Quelques remarques sur le droit applicable, in: C. Dominicé/R. Patry/C. Reymond (Eds.), Etudes en l'honneur de Pierre Lalive, Basel 1993, pp. 437-456.

tation by the Commissions engaged in conciliation, in the sense that it requires no more than the observance of *ius cogens* and of obligations *erga omnes*. Otherwise - i.e. if the conciliators had to abide by each and every rule of positive international law - the only difference between the solutions proposed by the Conciliation Commissions and those decided by Arbitral Tribunals would lie in the voluntary nature of conciliation and the compulsory character of the latter. Such a situation would be damaging both to the institution of conciliation and to that of arbitration.
The way in which the Convention describes the law to be applied by *Arbitral Tribunals* is much more problematic, however. Article 30 says:

> "The function of the Arbitral Tribunal shall be to decide, in accordance with international law, such disputes as are submitted to it. This provision shall not prejudice the power of the Tribunal to decide a case *ex aequo et bono*, if the parties to the dispute so agree."

In this provision there is no reference at all to CSCE commitments, which are thus *a priori* not part of the law to be applied by the Tribunal. This seems regrettable and has even been called dangerous by legal scholars because it would stand in the way of conferring legal status on OSCE commitments.[8] It would have been preferable to give every OSCE Arbitral Tribunal the express power to rely on values developed in this institution and to take account of OSCE commitments in the course of settling disputes. The lack of such an express power will, to be sure, not deter Arbitral Tribunals from taking account of OSCE commitments that have become customary law. But would it prevent the application of OSCE commitments that have not (yet) achieved this status? Although it is difficult to answer such questions before a sufficient basis of practice has developed, one can and must hope that the Court will give OSCE commitments their appropriate place, even though Article 30 is silent about them.

The Subsidiarity Principle

The subsidiarity principle was a fundamental condition for the acceptance of the Convention on Conciliation and Arbitration within the CSCE. During the negotiations many States expressed their concern over a proliferation of mechanisms for the peaceful settlement of disputes and indicated their preference for the strengthening of existing means of settlement, which often are

8 Cf. Condorelli, op. cit. (Note 7), pp. 465-467.

not adequately used.[9] To take account of this criticism, the Court was conceived on the basis of subsidiarity, a fact which emerges clearly from the Preamble of the Convention, where the contracting States affirm

> "that they do not in any way intend to impair other existing institutions or mechanisms, including the International Court Justice, the European Court of Human Rights, the Court of Justice of the European Communities and the Permanent Court of Arbitration".

This idea is developed and implemented in Article 19 entitled "Safeguarding the Existing Means of Settlement". This provision deals with the classical exceptions to *lis pendens* and *res iudicata*. Existing courts or mechanisms have, in principle, priority over the procedures set forth in the 1992 Convention. As clear and complete as they are, however, the provisions in Article 19 do not prevent conflicts of competence from developing whenever the States affected choose two different methods of dispute settlement. For this reason, the Conciliation Commissions and Arbitral Tribunals are authorized, under Article 19, Paragraph 6, to decide on their own competence. This, however, raises the problem of the consistency of the case-law of Conciliation Commissions or Arbitral Tribunals, whose composition varies from one case to another.

Moreover, Article 19 is not exhaustive. Two basic problems remain unsolved. First, Article 19, Paragraph 1, letter b, only covers cases where the parties to the dispute have agreed to seek a settlement exclusively by other means. Wherever the parties have not clearly expressed their determination to regard the method chosen by them as exclusive, the provision in question is likely to raise problems. Second, the rule is only applicable to existing mechanisms and offers no solution for conflicts between the mechanisms of the Convention and others that might be created later. One can assume that in these cases the provisions of the Convention will be applied unless the States involved in the dispute have agreed otherwise.

Article 19, Paragraph 4, offers a partial solution to these problems by allowing the States parties to the Convention to make reservations designed to give their existing or future undertaking in the field of peaceful dispute settlement priority over those emerging from the Convention. This provision reads as follows:

> "A State may, at the time of signing, ratifying or acceding to this Convention, make a reservation in order to ensure the compatibility

9 Cf. G. Nesi, La soluzione pacifica delle controversie in Europa: Recenti sviluppi nella CSCE, in: La Comunità Internazionale, Vol. 48, 1993, pp. 235-277. See also the ideas of G.J. Tanja, Peaceful Settlement of Disputes within the Framework of the CSCE, in: Helsinki Monitor 3/1994, pp. 42-54.

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> of the mechanism of dispute settlement that this Convention establishes with other means of dispute settlement resulting from international undertakings applicable to that State."

This option is all the more significant because it is contained in a Convention which, under its own Article 34, permits no reservations. Six countries have already made use of it (Denmark, Germany, Liechtenstein, Poland, Romania and Switzerland) to give their bilateral obligations - even future ones - priority over the mechanisms of the Convention. This practice was justified by pointing out that such obligations are often more compelling than those under the Convention and, in particular, by explaining that States prefer to settle their disputes in the framework of their normal bilateral relations rather than by calling on a multilateral body. Germany and Romania are the only countries whose reservations also cover the means provided for in multilateral treaties - a decision which in Germany's case may be related to its status as host country of the International Tribunal of the Law of the Sea.[10]
Thus Article 19 turns out to be relatively tricky. One can but hope that in practice the application of the subsidiarity principle by the Court will not impede the settlement of disputes between States parties to the Convention.

The Court's Competence

In contrast to the Valletta mechanism and to what a number of countries - particularly Great Britain - would have wished, the OSCE Convention does not exclude any category of disputes from its procedures. Thus Article 18 states with regard to conciliation:

> "Any State party to this Convention may submit to a Conciliation Commission any dispute with another State party which has not been settled within a reasonable period of time through negotiation."

Thus States have no possibility of excluding from conciliation proceedings disputes involving vital interests, national defence or territorial integrity. This represents noteworthy progress.

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10 On the scope of Article 19, Paragraph 4, see also Ch. Leben, La mise en place de la Cour de conciliation et d'arbitrage au sein de l'OSCE, in: Revue générale de droit international public, t. 100,1996, pp. 135-148.

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As for the Arbitral Tribunals, declaration by States parties recognizing the competence of the Arbitral Tribunal, which can be made on the basis of Article 26, Paragraph 2,

> "may cover all disputes or exclude disputes concerning a State's territorial integrity, national defence, title to sovereignty over land territory, or competing claims with regard to jurisdiction over other areas".

Although it goes quite far, this list has the merit of delimiting precisely the categories of disputes that can be withdrawn from the Court - something which Article 36, Paragraph 2, of the Statute of the International Court of Justice failed to do. Among the four declarations so far made, only the declaration of Greece makes a reservation regarding disputes relating to national defence.

An interesting feature is the arrangement for access to the mechanisms of the Court for OSCE participating States which have not become parties to the Convention of 1992. The Court, although it is not an institution of the OSCE, was founded within that Organization, and its founders, to ensure maximum effectiveness, decided to create ties between the States parties to the Convention and the other OSCE participating States. The most important objective is to allow the latter to submit disputes to the Conciliation Commissions (Article 20, Paragraph 2) or the Arbitral Tribunals (Article 26, Paragraph 1). This approach gives the 1992 Convention a certain flexibility. It makes it possible for the countries which are participating States of the OSCE but not States parties to the Convention to gather practical experience with the Convention's mechanisms before they ratify it or accede to it.

Conclusion

The purpose of this contribution was to call attention to the existence within the OSCE of an organ for the settlement of inter-European disputes which has both a diplomatic and a juridical character. The Convention of 1992 has raised hopes that have so far not been fulfilled. To make better use of this excellent instrument, a number of steps have been taken; but others would appear to be necessary and desirable.

In order to make itself better known, the Court, at the initiative of its President, called an information meeting in June 1996 within the framework of the Permanent Council of the OSCE. In the same year it also held sub-regional seminars in Warsaw and Tashkent so as to hasten ratification of or accession to the Stockholm Convention. More such seminars are planned.

The measures and events described above are also intended to encourage countries to bring their disputes before the Court. It is true that the mere existence of such an institution has a deterrent effect. Faced with the threat of an intervention by a Conciliation Commission or an Arbitral Tribunal, the parties to a dispute will do everything in their power to settle it through negotiations so as to avoid confrontations with a third party - conciliators or arbitrators. But despite this deterrent effect, which is certainly a positive factor that may lead to the settlement of some disputes, it would be desirable in the coming years to have a number of cases brought to the Court so as to allow it to demonstrate its capabilities - in other words, to show that it is more than just a "paper tiger".

It would also be desirable to extend the competence of the Court and, hence, its effective range of action, to pan-European matters.

An expansion of this kind could probably never lead to a situation in which individuals or non-state entities would be able to turn to the Court, especially about matters concerning the protection of minorities or human rights. But might it not be possible to enlarge the group of countries entitled to use the Court to include countries which are not participating States of the OSCE? The idea underlying the establishment of this institution was to create a mechanism for the peaceful settlement of disputes for a group of countries bound together by common convictions and values. States which do not participate in the OSCE are outside this community, so that any expansion in that direction could lead to difficulties.

But it is hard to see why the Court should not take on disputes between countries which, although they are not States parties to the Convention of 1992, are indeed participating States of the OSCE, the condition being, of course, that all the States involved in a dispute have agreed. Undoubtedly the wording of the Convention does not as such permit this conclusion, but in a case of that kind, one could derive the Court's competence exclusively from the agreement of all the States involved in the conflict.

Article 30 of the original draft that gave rise to the 1992 Convention[11] had provided for the possibility - following the example of the International Court of Justice in The Hague[12] - that the political organs of the CSCE, such as the Ministerial Council or the Committee of Senior Officials (now the Senior Council), might call on the Court for legal advice. This proposal failed owing to resistance from Great Britain and the United States, which had decided not to become parties to the 1992 Convention. They were of the view that giving the Court the competence to issue advisory opinions (*avis consultatifs*) to CSCE organs would amount to imposing the Court on third

11 This text was tabled at the Follow-up Conference in Helsinki on 3 July 1992; Document CSCE/HM/6.

12 Cf. Article 96 of the United Nations Charter and Articles 65 and 66 of the Statute of the Court.

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parties, i.e. on CSCE participating States that are not parties to the 1992 Convention. The Court would in this way cease to be merely an organ of the States parties to the Convention and become one of the entire CSCE.

This line of argument is questionable. Advisory opinions would not be binding on the Ministerial Council, the Permanent Council and possibly other organs. These entities would be entitled to take such opinions into account or to ignore them. At the political level, the "legal status" the OSCE would acquire as a result of the Court's right to issue advisory opinions ought to be welcomed. More than any other "regional arrangement" in the collective security system established by the United Nations, the OSCE ought to see itself as a regional system for maintaining order resting on a *legal* foundation.

It is too early to predict the prospects for success of the new Court of Conciliation and Arbitration. However, the Court is making serious efforts to publicize its work and to expand the group of its potential "customers". A number of OSCE participating States are supporting these efforts. But if the Court is to reach its full potential, the countries concerned will have to bring disputes before it, and that calls for a measure of political will on their part which has so far been lacking. The best tool in the world will rust if it is not used.