Court of Conciliation and Arbitration within the OSCE

60th Meeting of CAHDI - 24 March 2021
10. Peaceful Settlement of Disputes

Speech of Judge Erkki Kourula
Vice-President of the Court of Conciliation and Arbitration within the OSCE

Thank you, Madame Chairperson,

I would also like to thank you for inviting me together with President Decaux to briefly address this august body, in the work of which I had the honour to participate some twenty years ago. I followed its work closely while I was four years the Permanent Representative of Finland in the Council of Europe at the turn of the millennium.

At that time we often had discussions whether an issue should be dealt with in the Council or be left to the OSCE. This time I am happy to advocate the potential role of the OSCE Court of Conciliation and Arbitration for the peaceful settlement of disputes.

Outreach activities are certainly not one of the main tasks for the members of any court but since the election of the new Bureau in November 2019 it was felt appropriate to try and increase the visibility of the Court among the European and international organisations, and in particular within the OSCE itself. We would like to make the Court's existence more widely known in judicial discussions among the legal experts like you in the European and international contexts.

That is why we are here and would like to raise a few points why the Court is a useful tool in dispute settlement. We certainly wish that you will carry the message home why the Court provides an option, when States parties are faced with difficult bilateral or multilateral issues with no imminent peaceful solution in sight.

As President Decaux just stated, there is a place in Europe for a court, the mandate of which is to settle, by means of conciliation and arbitration, disputes between States submitted to it. They may include conflicts in respect of territorial integrity, maritime delimitation, as well as environmental and economic issues, just to give you a few examples. The Conciliation Commissions and Arbitral Tribunals are created on an *ad hoc* basis. Thus the Court is not a permanent body but rather a *stand-by* institution, which can be activated on request. Its structure in terms of personnel and finance is thus relatively modest.

The Court's added value is the flexibility of its main mechanisms. There is no single operating mode but rather several formula to be resorted to with respect to conciliation as well as arbitration. Indeed, even advisory jurisdiction of minor scale as a possible addition to the jurisdiction was discussed during the drafting of the Convention, and the idea has been revisited later as part of quiet diplomacy.

Madame Chairperson,

As to the structure, the Court has two kinds of members, appointed by states parties, in line with two different procedures, i.e. conciliators and arbitrators. It is not necessary to give an account of the appointment procedure, especially as many of you probably are on one of the lists as experienced experts.

The members elect the President of the Court, since autumn 2019 Professor Decaux, as well as a Bureau, complemented by alternates. The Bureau is the executive body that maintains contacts with the OSCE community, takes care of outreach activities, and represents the Court in external relations, in particular on occasions like today when we are guests here in the CAHDI meeting.

As stated, two avenues are offered: conciliation and arbitration, the main emphasis probably being put on conciliation. If an opportunity arises they can be complementary. Conciliation can be unilaterally activated, by application, by any state party to the Stockholm Convention for a dispute between two states that have ratified it. In this manner conciliation becomes compulsory for all states parties of the Convention, which was regarded as a principal innovation.

Moreover, the procedures are open, on a voluntary basis, to OSCE participating states that have not yet ratified the Convention, on the basis of an agreement between the states concerned.

The Commission helps the parties to find a settlement in accordance with international law and OSCE commitments. The fact that it can also apply the OSCE commitments provides a special competence in the matter and greater flexibility than other conciliation procedures.

The work of the Conciliation Commission may result in a mutually acceptable settlement or, alternatively, no mutual settlement is reached. In the former case, the terms of settlement are recorded in a summary of conclusions signed by the representatives of the parties to the dispute and the members of the Conciliation Commission.

In the latter case, the Commission prepares a final report with the proposal for the peaceful settlement. The report is notified to the parties who have to decide whether or not they accept the proposed settlement. This is important because the transmission of the report to the OSCE Council provides pressure on the parties to reconsider their positions. A state is obliged to explain its reasons for the rejection of the proposed settlement.

Madame Chairperson,

In contrast to conciliation, the nature of arbitration between states is to adjudicate the dispute submitted to the OSCE Court with the authority of a final decision. The arbitration procedure can be initiated by agreement between states parties to the Convention or by OSCE participating states.

In this connection it may be recalled that States can also declare that they recognise as compulsory the jurisdiction of an Arbitral Tribunal, which is subject to reciprocity. Such a declaration, *optional clause*, may be made for a limited period or a specified time. During the existence of the Court six states, Greece, Denmark, Finland, Sweden, Malta and North Macedonia (FYROM) have made such a declaration. These declarations have, however, all expired. So a request for the constitution of an Arbitral Tribunal by means of an application is not possible at the moment.

In accordance with the principle of a fair trial, all the parties to the dispute have the right to be heard during the arbitration proceedings. Hearings are held in *camera* unless otherwise agreed. The Tribunal shall have the necessary fact-finding and investigative powers to carry out its tasks. Thus it can also act as a commission of inquiry as provided in its rules of procedure.

The Tribunal takes its decision in accordance with the rules of international law. However, this does not prevent the Tribunal to show flexibility and decide a case *ex aequo et bono* if the parties to the dispute so agree. It is not clear whether the Arbitral Tribunal can also decide on the basis of the OSCE commitments. The text of the Convention seems to exclude this although rules of international law cover many commitments of the OSCE.

The award of the Arbitral Tribunal shall state the reasons on which it is based. The award of the Tribunal is binding on the parties. It is final and not subject to appeal.

Madame Chairperson,

During the preparatory work of the Stockholm Convention it was stressed that existing methods for pacific settlement of disputes should remain open. In the Preamble of the Convention the states parties emphasise that they do not intend to impair other existing institutions and mechanisms, including the International Court of Justice, the European Court of Human Rights, the Court of Justice of the European Union and the Permanent Court of Arbitration.

For the purpose of safeguarding the existing means of settlement, the Convention contains a number of cases when a Conciliation Commission or an Arbitral Tribunal shall not take further action. They include*, inter alia*, disputes, which have been submitted to a tribunal or court, prior to having been submitted to the Court, or which have already been decided (principles of *lis pendens* and *ne bis in idem* apply).

Madame Chairperson,

The Court has a number of advantages. As the previous President, Professor Tomuschat, has stated: modest cost of the procedure; fairly low number of personnel; a certain measure of control of disputing states in the choice of conciliators and arbitrators; competence of the Conciliation Commission to decide also on the basis of the OSCE commitments; and possible involvement of the OSCE Council in the conciliation procedure.

The OSCE Court of Conciliation and Arbitration offers especially to the States parties, and perhaps in particular to the like-minded states, a means of dispute settlement within the OSCE framework to be reckoned with.

Thank you, Madame Chairperson