



BACKGROUND PAPER

I. BRIEF HISTORY OF MODERN CONCILIATION

a) 1899-1945

Modern conciliation developed from inquiry commissions as a means of resolving inter-state disputes, as recognised in the 1899 Hague Convention and the later 1907 Hague Convention.¹ An early example of an inquiry which operated like a conciliation was the 1907 *Dogger Bank* inquiry, a dispute over mistakenly sunk ships. The *Dogger Bank* commission considered questions of fact and law, as well as “diplomatic considerations”.²

In 1919, the Swiss government, a strong proponent of conciliation, introduced a policy of concluding conciliation agreements in the belief that since conciliation commissions made proposals based on their findings, States could avoid the political costs associated with arbitration or judicial settlement.³ Switzerland concluded its first conciliation treaty with Germany in 1921, a trend later followed by other European States.⁴ As another example, Germany concluded four dispute settlement treaties in 1925, collectively known as the Locarno Treaties, with Belgium, France, Czechoslovakia and Poland.⁵ These conciliation treaties established permanent conciliation commissions and often stipulated compulsory conciliation for all non-legal disputes.⁶

The League of Nations further promoted conciliation as a mode of dispute resolution in 1922 by publishing a resolution on conciliation, encouraging states to submit their disputes to conciliation commissions.⁷ In 1928, the League also adopted the General Act on the Pacific Settlement of International Disputes (the 1928 General Act), which included conciliation as one of the means of dispute settlement.⁸

¹ Sven MG Koopmans, *Diplomatic Dispute Settlement: The Use of Inter-State Conciliation* (TMC Asser Press, 2008), p. 77.

² Koopmans, p. 78.

³ See Koopmans, p. 82.

⁴ See Koopmans, pp 82-3. Also see De Jonk Van Beek En Donk, *The New Swiss-German Treaty of Arbitration and Conciliation* (1922) 84 Advocate of Peace through Justice 101, 101-102.

⁵ See Koopmans, p. 84, fn. 85.

⁶ See Koopmans. p. 83.

⁷ *Resolutions et recommandations adoptees a la suite des rapports de la premiere commission* (1922) 9 League of Nations Official Journal, Special Supplement No. 9, pp 9-11.

⁸ See Chapter 1, 1928 General Act (available at https://treaties.un.org/doc/Treaties/1950/09/19500920%2010-17%20PM/Ch_II_1p.pdf).

With both states and the then major international body pushing for conciliation, nearly 200 conciliation treaties were concluded by 1940.⁹

b) 1945 – present

Article 33(1) of the 1945 UN Charter expressly includes conciliation as a method of dispute settlement. Subsequent UN General Assembly (UNGA) resolutions, such as the 1970 Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States and the 1982 Manila Declaration on the Peaceful Settlement of International Disputes, also mention conciliation.¹⁰ In 1995, the UNGA eventually adopted a set of model rules for conciliation.¹¹

In contrast to the early 20th Century, where conciliation was mostly included in bilateral dispute settlement treaties, conciliation was increasingly included in multilateral treaties from 1945 onwards.¹² Examples of these multilateral treaties include the 1969 Vienna Convention on the Law of Treaties and the 1982 United Nations Convention on the Law of the Sea. Various regional agreements, such as those in the Americas, Europe, and South-East Asia, also include conciliation as a method of dispute settlement.¹³ Another major regional body that has adopted conciliation rules is the Organization for Security and Co-operation in Europe (OSCE), which has also set up a court of arbitration and conciliation.¹⁴

Various other institutions have also come up with their own sets of rules for conciliation. These institutions include the Permanent Court of Arbitration (PCA), the International Centre for the Settlement of Investment Disputes (ICSID), and the *Institut de droit international*.¹⁵

Conciliation can thus be used to resolve not only state-to-state disputes but investor-state and even private commercial disputes. ICSID adopted a set of conciliation rules in 1968 for the resolution of investor-state disputes, and these rules have been since updated.¹⁶ For private commercial disputes, in 1980 the United Nations Commission on International Trade Law (UNCITRAL) adopted the UNCITRAL Conciliation Rules, providing a comprehensive set of procedural rules for conciliation arising out of commercial relationships between private parties.

Despite the proliferation of institutional rules and treaties providing for conciliation as a method of dispute settlement, several eminent jurists have observed that the actual use of conciliation declined sharply after 1945.¹⁷ In fact, the conciliation procedures in “the majority of these [treaties] have not been used” at all.¹⁸ That said, a reliable estimate of the actual use of conciliation might not be possible

⁹ See JG Merrills, *International Dispute Settlement* (5th edn, 2012), p. 60.

¹⁰ Annex, UNGA A/RES/37/10, para. 5.

¹¹ 1995 United Nations Model Rules for the Conciliation of Disputes between States, UNGA Doc A/RES/50/50.

¹² See Koopmans, p. 94.

¹³ See the 1948 American Treaty on Pacific Settlement (the Pact of Bogota); 1957 European Convention of the Peaceful Settlement of Disputes; 2010 ASEAN Protocol on Dispute Settlement Mechanisms.

¹⁴ 1997 Rules of the Court of Conciliation and Arbitration within the OSCE.

¹⁵ 1996 PCA Optional Rules for Conciliation; 2002 PCA Optional Rules for Conciliation of Disputes Relating to Natural Resources and/or the Environment; 2006 ICSID Convention Conciliation Rules; 1961 Regulations on the Procedure of International Conciliation.

¹⁶ See Chapter III of the International Convention on the Settlement of Investment Disputes; and the Rules of Procedure for Conciliation Proceedings.

¹⁷ See Alain Pellet, Peaceful Settlement of International Dispute, *Max Planck Encyclopedia of Public International Law*, para. 69.

¹⁸ Nicholas Butler, Arbitration and Conciliation Treaties, *Max Planck Encyclopedia of Public International Law*, para. 9.

since one of conciliation's trademarks is strict confidentiality. As such, it might well be that conciliation is used more frequently than observed.

II. NATURE OF CONCILIATION

a) Observations on mediation, fact-finding and conciliation

It is difficult to draw a line between mediation, fact-finding (or inquiry), and conciliation, and any line might be of more theoretical than practical interest.¹⁹ Various commentators have made the following observations about conciliation, illustrating how similar it is to fact-finding and mediation:

- **Function:** Conciliation functions in similar ways to both fact-finding and mediation. Conciliation commissions are not only tasked to “set out clearly the facts of the case – but also to ... propose solutions mutually acceptable to the parties to the dispute”.²⁰
- **Elements:** Conciliation involves a third-party investigation of the facts of the dispute and the submission of a report embodying suggestions for a settlement.²¹ These elements are also present in inquiries and mediations.²²
- **Purpose:** Conciliation is “similar in purpose to mediation”, with an “emphasis ... on fact-finding”.²³ However, conciliation is “believed to be more structured than mediation”.²⁴
- **Terminology:** The PCA Optional Conciliation Rules observed that in modern international practice, “the word mediation is sometimes used to designate a process that is very similar to the procedures for conciliation”.²⁵ As such, the terms ‘mediation’ and ‘conciliation’ are often practically interchangeable.
- **Task:** Both mediators and conciliators have the authority and knowledge to “perform in-depth studies” and to “make proposals”.²⁶

b) Comparison of Key Features of Various Dispute Settlement Mechanisms

One notable commentator described conciliation as a “half-breed method for the settlement of disputes” standing “some way between diplomatic methods for the settlement of disputes ... and arbitral or judicial settlement”.²⁷ The comparative table below seems to support this description – while mediation, inquiry and arbitration are fairly distinct from one another, conciliation is a combination of all three methods. One of its strengths might very well lie in its hybrid nature – by blending features from various methods of dispute settlement, conciliation might avoid the shortfalls of each individual method.

¹⁹ See for instance, Merrills, p. 26 (“in practice such distinctions tend to be blurred”); also see Ivan Bernier and Nathalie Latulippe, *Conciliation as a Dispute Resolution Method in the Cultural Sector*, p. 1 (“it is sometimes hard with real-world examples to draw a clean line between them”) (available at: http://www.diversite-culturelle.qc.ca/fileadmin/documents/pdf/document_reflexion_eng.pdf).

²⁰ Rami Mani, “Peaceful Settlement of Disputes and Conflict Prevention” in Sam Daws and Thomas G. Weiss (eds) *Oxford Handbook on the United Nations* (Oxford University Press, 2008), p. 305.

²¹ Malcom Shaw, *International Law* (6th edn, 2008), p. 1022.

²² Shaw, p. 1022.

²³ Ian Brownlie, *The Wang Tieya Lecture in Public International Law: The Peaceful Settlement of International Disputes* (2009) 8 *Chinese Journal of International Law* 267, 272.

²⁴ Brownlie, 272.

²⁵ PCA Optional Conciliation Rules, p. 152 (available at: <https://pca-cpa.org/wp-content/uploads/sites/175/2016/01/Permanent-Court-of-Arbitration-Optional-Conciliation-Rules.pdf>).

²⁶ Koopmans, p. 49.

²⁷ Jean-Pierre Cot, *Conciliation*, *Max Planck Encyclopedia of Public International Law*, para. 3.

Dispute Settlement Method	Role of third-party	Led by Parties or Third-Party	External counsel involved?	Outcome	Institutional/ model rules available (notable examples)	Submissions	Hearings	Notable examples
Good Offices	The third-party is usually focused on bringing the parties back together to resume negotiations, not necessarily to resolve the dispute.	The outcome of the process very much depends on what the disputing parties want. The third-party seeks to decrease tensions, hopefully leading to renewed negotiations between the parties.	None	The process leads to the resumption of negotiations/ diplomatic relations, though sometimes, the dispute may also be resolved.	Yes: - ASEAN Rules of Good Offices	None	None	i. 1965: The USSR assisted in the peaceful settlement of the Kashmir problem. ii. 1970s: France assisted in the Vietnam conflict.
Mediation	The third-party seeks to align the interests of the parties, proposing ways to reach a mutually acceptable solution.	This process is usually led by the parties. Depending on the style of mediation, the mediator listens to the parties involved and proposes solutions. An evaluative approach could see the mediator assessing the situation from a legal perspective and giving a preliminary assessment of the parties' positions.	Depends	A mediation usually concludes with a settlement agreement entered into by the disputing parties.	Yes: - ICC - WIPO - IBA Rules for Investor-State Mediation - ASEAN Rules of Mediation	Not usually	Yes, but not as in arbitration. Sometimes, the mediator will hear both sides separately before bringing them together.	i. 1977 East African Community ii. 1985 Beagle Channel Case

Dispute Settlement Method	Role of third-party	Led by Parties or Third-Party	External counsel involved?	Outcome	Institutional/ model rules available (notable examples)	Submissions	Hearings	Notable examples
Inquiry/Fact-finding	The third-party investigates and reports on disputed issues of fact, and suggests appropriate remedies and adjustments. In some cases, fact-finding may also be used concurrently with other dispute settlement methods.	Third-party led. The findings and/or recommendations are based on the findings of fact made during the process.	It depends. Article 10 of the ICSID (AF) Rules require counsel to be present at each investigation.	Non-binding report	Yes: - ICSID (Additional Facility) Fact-Finding Rules	Not necessary	Investigation may require hearing of the parties and examining of the witnesses.	i. 1905 Dogger Bank ii. 1991 Letelier and Moffitt
Arbitration	The third party makes a final decision based on the law.	Third-party led. Arbitrators may encourage parties to settle if appropriate. The arbitrators' task is to decide the dispute based on the facts and law, rather than based on the parties' interests.	Yes	Binding award	Yes: - ICSID and ICSID (AF) - PCA 2012 Rules - UNCITRAL 2010 Rules - ASEAN Rules of Arbitration	Yes. Submissions (oral and written) and evidence submitted by the disputing parties.	Yes	i. 2004 Guyana v. Suriname ii. 2012 Railway Land (Malaysia/ Singapore) iii.

Dispute Settlement Method	Role of third-party	Led by Parties or Third-Party	External counsel involved?	Outcome	Institutional/ model rules available (notable examples)	Submissions	Hearings	Notable examples
Conciliation	Third-party considers all aspects of a dispute (legal, social, economic) and proposes a mutually acceptable solution, which may not be based on purely legal considerations.	A mix of both binding and non-binding dispute settlement methods—a good solution should take into account the interests of the parties, but the conciliators are the ones who propose the solution after hearing the disputing parties.	Usually yes	Non-binding recommendations	Yes: - ICSID and ICSID (AF) - PCA - UN Model Rules - ASEAN Rules of Conciliation	Yes	Yes	i. 1988 Jan Mayen ii. 2001 Belize-Guatemala iii. 2016 Timor-Leste/ Australia

III. CONCILIATION AS A METHOD OF DISPUTE RESOLUTION IN TREATIES

As discussed in Section I, in the early 20th century, conciliation was only included as a dispute settlement mechanism in bilateral treaties. This subsequently changed post-1945 as conciliation was also included in multilateral treaties.

Conciliation was initially used as a way of avoiding the political costs of formal adjudication, but eventually became a matter of ideological differences between States. For example, during the negotiation of the 1969 Vienna Convention on the Law of Treaties, the western States favoured the inclusion of a “comprehensive binding settlement procedure”, in this instance arbitration.²⁸ In contrast, other States opposed binding third party adjudication, citing ideological and cultural reasons.²⁹ Eventually, compulsory conciliation was adopted in a “last minute compromise” as the method of dispute settlement for the Convention.³⁰ Since many multilateral treaties “often copy provisions of preceding multilateral agreements in the same field”, the conciliation provisions in the 1969 Vienna Convention eventually became “standard drafting policy” for subsequent treaties.³¹

Based on a recent CIL study on all **236** multilateral treaties deposited with the UN Secretary-General,³² the following trends were observed regarding the inclusion of conciliation as a compulsory third-party dispute settlement mechanism:

- *First*, to put things in context, out of the **140** treaties that contain a compulsory third-party dispute settlement mechanism, **16%** (**22** treaties) refer to conciliation (*see below: Chart 1*). In comparison, **43%** refer to compulsory arbitration, and **24%** refer to compulsory International Court of Justice (ICJ) adjudication.
- *Second*, there is a clear subject-matter bias. Of these **22** treaties, **16** are environmental treaties (*see List 1 in the Annex and Chart 2*). The **6** other treaties concern the law of treaties, navigation, and transport and communication.

²⁸ Koopmans, p. 138.

²⁹ See Koopmans, p. 138.

³⁰ Koopmans, p. 138.

³¹ Koopmans, pp 95, 139. Some later treaties include the 1978 Vienna Convention on Succession of States in Respect of Treaties and the 1975 Convention on the Representation of States in Their Relations with International Organisations of a Universal Character.

³² As of August 2015.

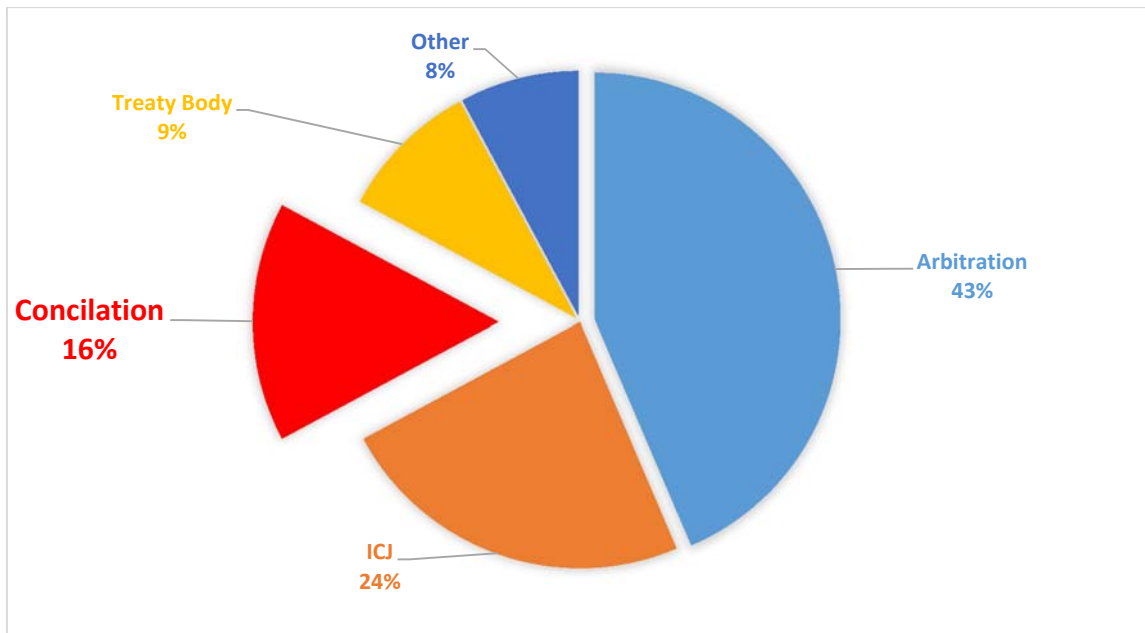


Chart 1: This chart presents a breakdown of the types of third-party fora provided in a survey of 140 treaties containing compulsory third-party dispute settlement methods.

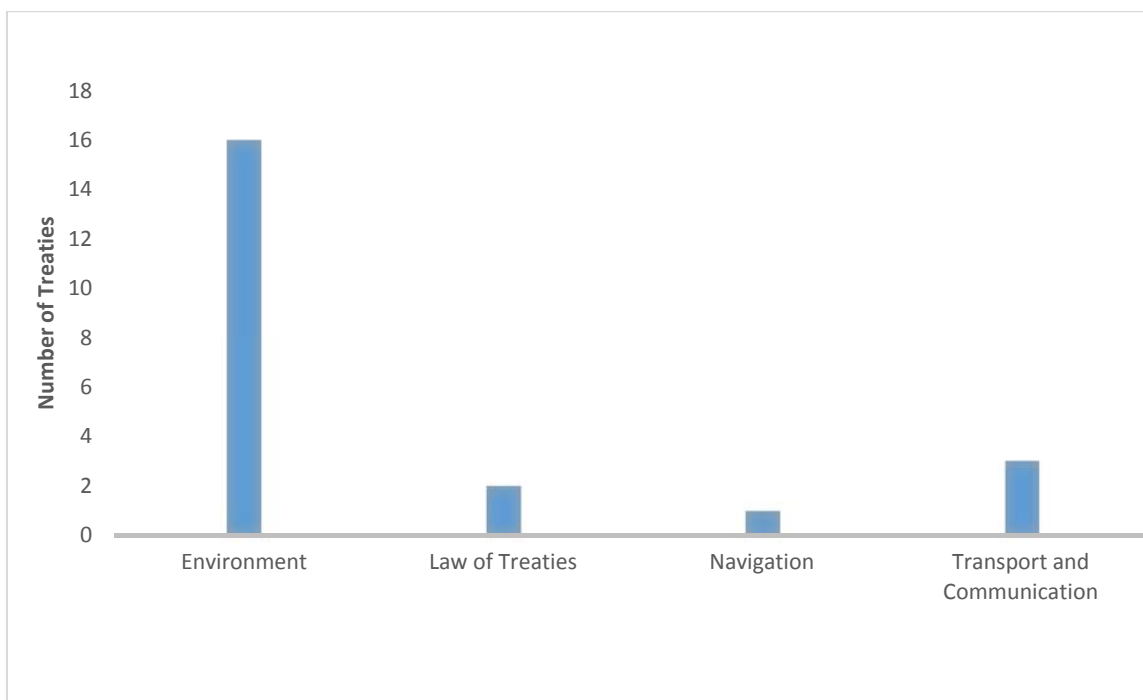


Chart 2: This chart presents a breakdown of the types of treaties with compulsory conciliation.

IV. NOTABLE USES OF CONCILIATION FOR INTER-STATE DISPUTES

Since the start of the 20th Century, there have been around 20 cases of inter-state conciliation. There might have been more, but conciliation—as with many non-binding dispute settlement mechanisms — is usually confidential and there might have been others, the existence of which are not publicly known. Further, there is some uncertainty over the categorisation of certain disputes: for instance, in the 1986 case involving the distribution of the assets and liabilities of the East African Community (EAC), Sir Arthur Watts, the Special Negotiator for Succession Issues saw himself playing the role of a mediator in resolving state succession issues of the former Yugoslavia.³³ However, Koopmans argues that “his functions may also be considered those of a conciliator” and views the process as conciliation rather than mediation.³⁴

Apart from categorisation issues, the known conciliation cases to date have mostly been brought pursuant to bilateral treaties or *ad hoc* agreements. Only one, the recent Timor-Leste/Australia conciliation, was brought under a multilateral convention (UNCLOS). This supports the conclusion that conciliation as a dispute settlement mechanism, despite its inclusion in a number of significant international treaties (discussed above in Sections I and III), is rarely used.

A review of three relatively recent and more well-documented conciliations suggests that the process confers a greater degree of procedural flexibility as compared to arbitration. This paper will discuss these three cases briefly below.

a) 1988 Jan Mayen (Delimitation of continental shelf)

Title to the volcanic island of Jan Mayen, located closer to Iceland (292 nautical miles) than to Norway (550 nm), was largely undisputed until 1978, when Icelandic fishermen made a huge catch of capelin off its shores. Prior to that, Norway had manifested its claim to Jan Mayen through an Act of Parliament in 1929, but did not establish any exclusive fishing or economic zones around the island. After the capelin catch, Norwegian fishermen lobbied the government to establish an EEZ. There were also indications that there might be petroleum reserves in the continental shelf around Jan Mayen. As a result, Norway eventually claimed the right to establish an EEZ, though qualified its statement by its recognition that it would not do so without Iceland’s acceptance.³⁵ Iceland opposed the claim, and as a result, the two countries entered into negotiations.

Negotiations led to the conclusion of the 1980 Agreement between Norway and Iceland on Fishery and Continental Shelf Questions (‘1980 Fishery Agreement’). Articles 2 and 3 set up a Fisheries Commission, whose job was to “submit proposals and recommendations of the two Governments concerning the fishing of migrating stocks in the area, including recommendations in respect of the total allowable catch for such stocks and the distribution of this total allowable catch”. Any “unanimous recommendations ... become binding after two months if neither Party’s Government has raised any objection”.³⁶

Article 9 of the 1980 Fishery Agreement specified the setting up of a “Conciliation Commission”, whose mandate was to submit “recommendations with regard to the dividing line for the shelf area between Iceland and Jan Mayen”. The Conciliation Commission could “adopt its own rules of

³³ See Koopmans, p. 49.

³⁴ Koopmans, p. 49.

³⁵ See Ulf Linderfalk, *The Jan Mayen Case (Iceland/Norway): An Example of Successful Conciliation* (2016), p. 15 (available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2783622).

³⁶ Article 3, 1980 Fishery Agreement.

procedure”, and while the recommendations were non-binding, the two States would “pay reasonable regard to them” during further negotiations.

In terms of procedure, the Conciliation Commission decided that there was no need for oral or written pleadings since both the Icelandic and Norwegian members of the Conciliation Commission had “participated in all previous diplomatic negotiations” between the two nations.³⁷ This contributed to saving time and cost of the proceedings. The Commission also arranged for geological experts to produce a “report concerning the continental shelf area between Jan Mayen and Iceland”, a report which concluded that the “overall potential [for oil] cannot be considered good”.³⁸ In reaching its conclusions, the Conciliation Commission relied on this expert report and also considered the following: the ICJ case of the *North Sea Continental Shelf*, the then draft *Convention on the Law of the Sea*, state practice of drawing boundary lines, and agreements for joint development and cooperation.³⁹

Thus, the Conciliation Commission eventually decided not to “propose a demarcation line for the continental shelf”, but instead recommended that the parties adopt “a joint development agreement covering substantially all of the area offering any significant prospect of hydrocarbon production”.⁴⁰ This was in part motivated by “the desire to further promote cooperation and friendly relations between Iceland and Norway”.⁴¹

The two countries adopted the Conciliation Commission’s proposal “in its entirety” and concluded a second agreement in 1982 to seal this.⁴² The agreement entered into force in 1983 and the dispute was settled.

While a number of commentators laud Jan Mayen as an example of a successful conciliation, it may not be indicative of the prospects for the success of other conciliations. For instance, Churchill cautions that the successful outcome of the Jan Mayen conciliation might not translate readily into the effectiveness of conciliation for other maritime disputes. He observes that “relations between Iceland and Norway have traditionally been very good”, and perhaps more significantly, “the likelihood of hydrocarbon deposits being found in commercial quantities in the disputed area was slight”.⁴³ Richardson, the chairman of the Conciliation Commission, echoed similar sentiments by observing that “the low hydrocarbon potential of the dispute area relieved a certain amount of tension and eased the way for a cooperative regime”.⁴⁴ Further, “[s]haring a common Nordic heritage ... undoubtedly helped to bring Iceland and Norway together”.⁴⁵ More recently, Linderfalk also suggested “good relations between the two parties” as one of the factors explaining “their willingness to settle the dispute”.⁴⁶

³⁷ Conciliation Commission on the Continental Shelf area between Iceland and Jan Mayen; Report and recommendations to the governments of Iceland and Norway, decision of June 1981, (1981) Volume XXVII RIAA 1, 9 (“Jan Mayen Report”).

³⁸ Jan Mayen Report, p. 19. See pp. 11-21 for the full report.

³⁹ See Jan Mayen Report, pp 22-4.

⁴⁰ Jan Mayen Report, p. 24.

⁴¹ Jan Mayen Report, p. 24.

⁴² Linderfalk, pp 1-2.

⁴³ RR Churchill, Maritime delimitation in the Jan Mayen area (1985) 9 Marine Policy 16, 24-5.

⁴⁴ Elliot L Richardson, Jan Mayen in Perspective (1988) 82 American Journal of International Law 443, 451.

⁴⁵ Richardson, p. 451.

⁴⁶ Linderfalk, p. 19.

Other factors for success include regional security concerns,⁴⁷ a willingness to make concessions,⁴⁸ and the “great authority” of the Conciliation Commission.⁴⁹

Linderfalk analysed in detail the reasons why the two States chose conciliation over other methods of dispute settlement, notably binding methods. These were: (1) the uncertain state of international law regarding delimitation of maritime zones at the time of the dispute (the 1970s); (2) a desire for a “swift outcome”; (3) the desire to avoid setting a precedent since a conciliation report was not “limited to the application of international law”; (4) the good relationship between the dispute parties; and (5) the nature of the dispute, which was less a simple ‘yes or no’ issue as much as one which could “be resolved [by] adopting any of a wide range of different solutions”.⁵⁰ However, none of these factors explained why the parties chose conciliation over other non-binding methods of dispute settlement. Mediation or good offices could have addressed many of these concerns as well.

b) 2001 Belize/Guatemala

The border dispute between Belize and Guatemala is a long-running one, dating back to the early 19th Century.⁵¹ Much of the present dispute stems from uncertainty over the validity of various agreements between the colonial powers that once controlled the region before Guatemala and Belize both gained independence. Indeed, the first mediation in the 1960s was not between Belize and Guatemala, but rather between Guatemala and the United Kingdom as the colonial master of then British Honduras. Despite gaining independence in 1981, Belize’s status as a sovereign state was only recognised by Guatemala in 1991, after Belize had already become a member of the United Nations and the Organisation of American States. At this time, the border dispute remained unresolved. In late 1999, Guatemala reasserted its claim that large parts of Belizean territory rightfully belonged to Guatemala.

In March 2000, the two states agreed to a temporary impasse (a ‘*pactum de contrahendo/negotiando*’) under the auspices of the Organization of American States (OAS), in order to resume talks in an attempt to resolve their territorial differences. As part of the process, they agreed to appoint two facilitators to assist them in finding “a peaceful and definitive resolution” of the dispute.⁵² The facilitators were also lawyers, albeit in different spheres (private and public practice). Both presented written arguments to the facilitators from March to May 2001, and Belize also made an oral presentation. The submissions focused on legal arguments. The two facilitators, Paul Reichler (appointed by Guatemala) and Shridath Ramphal (appointed by Belize), duly considered the parties’ submissions and published recommendations on 30 August 2001. They made additional recommendations in December 2001.

Following the recommendations, Belize and Guatemala continued talks and took steps to settle the dispute. These steps included signing another temporary agreement on confidence building measures in February 2003, establishing the “Group of Friends of Belize and Guatemala”, and carrying out resettlement projects for families living in the disputed territory. However, in August 2003, Guatemala

⁴⁷ See Richardson, p. 451 (“Norway’s interest in keeping Iceland within the NATO fold may also have reinforced Norway’s conciliatory attitude.”); also see Linderfalk, pp 11-3.

⁴⁸ See Article 9, 1980 Fishery Agreement, expressly instructing the Commission to take into consideration “Iceland’s strong economic interests in these sea areas”; also see Jan Mayen Report, p. 24 (“Iceland is totally dependent on imports of hydrocarbon products.”); Richardson, p. 450 (“Jan Mayen’s fishery resources are substantial and the fishing industry is much more important to Iceland than to Norway.”); Linderfalk, p. 14 (“Norway sacrificed a few contemporary capelin for the purpose of securing potential oil reserves.”).

⁴⁹ Linderfalk, pp 22-3.

⁵⁰ See Linderfalk, pp 16-20.

⁵¹ For a helpful timeline illustrating key moments in the dispute, see the dedicated OAS page on the Belize and Guatemala Dispute (available at: <http://www.oas.org/sap/peacefund/belizeandguatemala/>).

⁵² Terms of Reference for the Facilitators in the Beliza/Guatemala Territorial Differendum.

rejected the facilitators' recommendations. Following another half a decade of failed negotiations, by May 2008, both countries had agreed to submit the dispute to the ICJ following the holding of simultaneous referenda. Unfortunately, in April 2013, Guatemala suspended its referendum.

In May 2015, the disputing states signed a Protocol under the auspices of the OAS, agreeing to hold the referenda, whether simultaneously or separately.⁵³ However, neither party has as yet held its referendum. The dispute remains unresolved to date, with recent violent border incidents.⁵⁴

c) 2016 Timor Leste/Australia

The maritime dispute between Timor Leste and Australia is largely over oil and gas reserves. Prior to Timor Leste's independence, Australia and Indonesia had agreed to share the proceeds from the "zone of cooperation", primarily the Greater Sunrise field, by concluding the 1989 Timor Gap Treaty. Following Timor Leste's independence, the Timor Gap Treaty was replaced by the 2002 Timor Sea Treaty, and later supplemented by the 2003 Agreement relating to the Unitization of the Sunrise and Trubadour Fields and the 2006 Certain Maritime Arrangements in the Timor Sea Treaty (CMAT). The CMAT is supposed to be valid for 50 years, during which the "applicable obligations and rights as between Australia and Timor Leste governing the exploration and exploitation of petroleum resources" would be determined by the CMAT, the Timor Sea Treaty, and the Sunrise International Unitisation Agreement (IUA).⁵⁵

None of these agreements determine the maritime boundaries of either Australia or Timor Leste⁵⁶—they deal mainly with how revenues from the Joint Petroleum Development Area (JPDA) and Greater Sunrise Area will be divided. As such, the maritime boundaries are yet to be fixed. Under these agreements, revenues in the JPDA are split 90% for Timor-Leste and 10% for Australia. Revenues in the Greater Sunrise area are split equally. Most significantly, the CMAT imposed a moratorium: neither state "shall assert, pursue or further by any means in relation to the other Party its claims to sovereign rights and jurisdiction and maritime boundaries for the period of this Treaty".⁵⁷

However, in April 2016, Timor Leste commenced conciliation proceedings against Australia pursuant to Article 298(1)(a)(i) and Annex V, section 2 of UNCLOS, seeking the "interpretation and application" of certain UNCLOS articles to the delimitation of the exclusive economic zone and the continental shelf between the two countries, as well as the establishment of permanent maritime boundaries.⁵⁸

The Conciliation Commission was composed of two conciliators appointed by Timor Leste and Australia each, with the four party-appointed conciliators agreeing on the appointment of the Chairman, H.E. Ambassador Taksoe-Jensen, after consulting with the parties. All party-appointed conciliators have extensive experience in law. Shortly after the Commission was constituted, Australia submitted

⁵³ Protocol to the Special Agreement Between Belize and Guatemala to submit Guatemala's Territorial, Insular and Maritime Claim to the International Court of Justice.

⁵⁴ See 'Belize-Guatemala border tensions rise over shooting', BBC News, 22 April 2016 (available at: <http://www.bbc.com/news/world-latin-america-36114383>) (last accessed: 6 November 2016).

⁵⁵ Article 7(1), CMAT. See Article 12(1), CMAT for the period of validity.

⁵⁶ See Article 2, IUA and Article 2, CMAT.

⁵⁷ Article 4(1), CMAT.

⁵⁸ Notification Instituting Conciliation Under Section 2 of Annex V of UNCLOS (11 April 2016); *Conciliation between the Democratic Republic of Timor-Leste and the Commonwealth of Australia* (PCA Case No. 2016-10) Decision on Competence, 19 September 2016 (Conciliation Commission: H.E. Ambassador Peter Taksøe-Jensen (Chairman), Dr. Rosalie Balkin, Judge Abdul G. Koroma, Professor Donald McRae, Judge Rüdiger Wolfrum).

an “Application for Bifurcation”, which Timor Leste opposed.⁵⁹ In the first procedural meeting, the Conciliation Commission decided to bifurcate the proceedings, and both parties exchanged written memorials on the competence of the Conciliation Commission.⁶⁰

After conducting hearings in August 2016 at the Peace Palace in the Hague, the Conciliation Commission found in September 2016 that it had competence to continue the proceedings. As of today, the dispute continues. The Conciliation Commission held the first round of consultation with the parties in October 2016 in Singapore. The second round of consultation will be held in January 2017 in Singapore. Under UNCLOS, the proceedings are expected to be completed within 12 months of the Commission’s constitution. In its Decision on Competence, the Commission decided that it would issue its report by 19 September 2017.

Unlike most conciliations, the Timor Leste/Australia conciliation is relatively transparent. The PCA, which is acting as the registry, streamed the opening session live, with the recording available on the website along with the transcript and presentations of both countries.⁶¹ Based on the recording, the jurisdictional proceedings showed much resemblance to arbitral proceedings. For instance, the format of the room was such that the two sides and their counsel sat side by side but apart from each other, facing the tribunal. As in arbitration, counsel did not stand to address the tribunal. Their presentations were formal and structured around legal arguments. Counsel for Timor Leste included respected international lawyers who frequently appear in international arbitrations, such as Professor Vaughan Lowe QC. Counsel for Australia was its solicitor general Mr Justin Gleeson SC, General Counsel of its Attorney General’s Department Mr Bill Campbell QC, with barristers Sir Daniel Bethlehem KCMG QC and Professor Chester Brown.

V. NOTABLE USES OF CONCILIATION FOR INVESTOR-STATE DISPUTES

To date, there have been only 10 known conciliation cases under the auspices of ICSID, and one administered by the PCA. Unlike the inter-state cases discussed above, relatively little information is publicly available about these investor-state disputes. This paper will discuss a few notable ICSID conciliation cases.

In addition to the 10 known ICSID conciliation cases, there was also a recent conciliation initiated under the United Nations Framework Convention on Climate Change under its Optional Rules on Disputes relating to Natural Resources and/or Environment. According to the PCA Secretary-General’s report, the PCA administered this case in 2014 concerning the Clean Development Mechanism under the Framework Convention.⁶² However, this conciliation appears to be confidential and no other publicly available information could be found about the dispute, including the identities of the state parties.

The full list of the 10 ICSID cases is below:

Case name	Status	Outcome
1. Xenofon Karagiannis v. Albania, 2016	Pending	NA

⁵⁹ Australia’s Response to the Notice of Conciliation (2 May 2016); *Conciliation between the Democratic Republic of Timor-Leste and the Commonwealth of Australia* (PCA Case No. 2016-10) Decision on Competence, 19 September 2016, paras 34-35.

⁶⁰ Conciliation between the Democratic Republic of Timor-Leste and the Commonwealth of Australia (PCA Case No. 2016-10) Decision on Competence, 19 September 2016, para. 36.

⁶¹ The recording, transcripts and presentations are available here: <https://pcacases.com/web/view/132> (last accessed 31 November 2016).

⁶² Permanent Court of Arbitration, ‘Intervention by H.E. Hugo H. Siblesz Secretary-General of the Permanent Court of Arbitration’, p. 2 fn. 13 (available at: https://unfccc.int/files/meetings/paris_nov_2015/application/pdf/cop21cmp11_hls_speech_pca.pdf).

Case name	Status	Outcome
2. Hess Equatorial Guinea and Tullow v. Equatorial Guinea, 2012	Pending	NA
3. Republic of Equatorial Guinea v. CMS Energy Corporation and others, 2012	Concluded	Report rendered, settlement failed
4. RSM Production Corporation v. Cameroon, 2011	Concluded	Unsuccessful, proceeded to arbitration
5. Shareholders of SESAM v. Central African Republic, 2007	Concluded	Unknown
6. Togo Electricite v. Republic of Togo, 2005	Concluded	Unsuccessful, proceeded to arbitration
7. TG World Petroleum Limited v. Niger, 2003	Concluded	Settled before constitution of commission
8. SEDITEX Engineering v. Madagascar, 1994	Concluded	Report rendered, settlement unknown
9. Tesoro Petroleum Corporation v. Trinidad and Tobago, 1983	Concluded	Settled after commission issued report
10. SEDITEX Engineering v. Madagascar, 1982	Concluded	Settled before constitution of commission but resubmitted in 1994

a) 1983 Tesoro Petroleum Corporation v. Trinidad and Tobago⁶³

The dispute arose out of an equity joint venture between Tesoro and the government of Trinidad and Tobago in the oil exploration and exploitation industry. Tesoro, and Trinidad and Tobago each held fifty-percent ownership of the shares in the joint venture. In the agreement, if Tesoro wished to sell its shares, it was under an obligation to make a first offer to the government. Disputes arose over taxation and the blocking of dividend declarations, so that relations between the joint venture owners soured and Tesoro decided to sell its shares.

Tesoro invoked the ICSID conciliation clause contained in the joint venture agreement. The parties jointly appointed a sole conciliator, Lord Wilberforce, and the proceedings were conducted in English. Both the investor and State were represented by lawyers. The sole conciliator set a procedural schedule, and set timelines for the investor to file an opening memorial, the government to file a counter-memorial, and gave the investor the opportunity to file a reply memorial.⁶⁴ After the exchange of written memorials, the parties made oral presentations. The conciliator then had to consult with the parties before deciding that no further hearing was necessary. He invited both parties to submit in confidence, their views on what might constitute an acceptable settlement. Although the conciliator had decided that no further hearings were needed, a second round of memorials were filed, including a rejoinder memorial by the government, a rebuttal memorial by the investor, and a response memorial by the government.

⁶³ *Tesoro Petroleum Corporation v. Trinidad and Tobago* (ICSID Case No. CONC/83/1) (available at: <https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/casedetail.aspx?CaseNo=CONC/83/1&tab=PRO/>)

⁶⁴ Lester Nurick and Stephen J Schnably, 'The First ICSID Conciliation: *Tesoro Petroleum Corporation v. Trinidad and Tobago*', 1 ICSID Rev.-FILJ 340, 347-9.

More than six months after the oral hearing, the sole conciliator issued his recommendation which analysed the merits of the parties' arguments and proposed a specific settlement detailing the payment of dividends to the shareholders based on an "estimate of the parties' changes of success on the issue in the dispute".⁶⁵ A further eight months of negotiations followed, involving communications with the conciliator. In response to the parties' communications, the conciliator modified one aspect of his recommendation, and a settlement agreement was successfully reached between the parties based on proposals formulated by the conciliator.⁶⁶

b) 1994 SEDITEX v. Madagascar II⁶⁷

In 1994, seemingly as an endorsement of ICSID conciliation, SEDITEX and Madagascar returned to conciliation in *SEDITEX v. Madagascar II*. It was registered to be conducted in French pursuant to a contract containing a dispute resolution clause referring to ICSID conciliation, in relation to the textiles industry. The parties appointed a commission of three conciliators: a Belgian national André J E Faurès as the President, a Malagasy national Raymond Ranjeva, and a French national Dominique Carreau. All three were international arbitrators or judges. The constitution of the commission took a little more than two months. Both the investor and State had legal representation.

The parties exchanged two rounds of memorials. This was followed by a conciliation session during which the President of the Commission requested that parties make secret proposals with a view to complete settlement of the dispute, which would remain confidential to the Commission only. After the Commission received these secret proposals, they directed parties to respond to precise questions posed by the Commission. With these answers, the Commission drafted recommendations for a proposed settlement, and invited the parties' observations. When significant divergences in the parties' positions persisted, the Commission held another in-person conciliation session. During this session, the Commission set out the unresolved questions and requested parties to make specific proposals for resolving them. However, the Commission found that parties were still unable to reach agreement after 30 days. The proceedings ended with a report of the commission on 19 July 1996.⁶⁸

c) 2011 RSM Production Corporation v. Republic of Cameroon⁶⁹

In 2011, the case of *RSM Production Corporation v. Republic of Cameroon* was registered. The investor RSM invoked an ICSID conciliation clause in an oil and gas mining contract. Both disputing parties were represented by legal counsel. A commission was constituted consisting of three conciliators. The investor appointed J Caleb Boggs III of United States nationality, Cameroon appointed Jean-Pierre Ancel of French nationality, and ICSID's Administrative Council Chairman appointed Marino Baldi, a Swiss diplomat, to chair the commission. The conciliation proceedings were conducted in two languages, English and French.

In what appears to be a first for ICSID conciliation, the commission had to decide on the request for joinder of a third party. Shortly after the first hearing, Cameroon submitted a request to the commission

⁶⁵ Nurick and Schnably, 346-7.

⁶⁶ *Tesoro Petroleum Corporation v. Trinidad and Tobago* (ICSID Case No. CONC/83/1); Nurick and Schnably.

⁶⁷ *SEDITEX Engineering Beratungsgesellschaft für die Textilindustrie m.b.H. v. Madagascar* (ICSID Case No. CONC/94/1) (available at: <https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/casedetail.aspx?CaseNo=CONC/94/1&tab=PRO>).

⁶⁸ Christoph Schreuer, Loretta Malintoppi, August Reinisch, Anthony Sinclair, *The ICSID Convention : A Commentary* (2nd edn, 2009), pp 447-8; Emmanuel Gaillard, *La Jurisprudence du CIRDI: Volume No. 1*, (Editions Pedone, 2004), pp 417-9.

⁶⁹ *RSM Production Corporation v. Republic of Cameroon* (ICSID Case No. CONC/11/1) (available at: <https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/casedetail.aspx?CaseNo=CONC/11/1&tab=PRO>).

to order joinder of a third party to the conciliation proceedings. RSM was also given an opportunity to submit observations on the request. It appears that the commission denied the request for joinder of a third party, as only the claimant and respondent were later directed to file their statements of facts.

The commission then held four days of hearings in Paris. After the hearings, the commission declared the proceedings closed in accordance with Article 34(2) of the ICSID Convention and Rule 30(2) of the ICSID Conciliation Rules as “it appear[ed] to the Commission that there is no likelihood of agreement between the parties”.⁷⁰ The commission then rendered its report on 11 June 2013.

Following the failure of the conciliation, the investor RSM commenced arbitration on 1 July 2013.⁷¹ The resolution of this dispute dragged on until 2016 when the arbitration was discontinued.⁷²

d) 2012 Equatorial Guinea v. CMS Energy Corporation⁷³

In 2012, in an interesting twist in ICSID disputes, a State made the first move and initiated conciliation proceedings in *Republic of Equatorial Guinea v. CMS Energy Corporation* pursuant to an ICSID Additional Facility Conciliation clause contained in an oil and gas mining contract. The respondent CMS Energy was incorporated in the United States. Equatorial Guinea and CMS jointly appointed a sole conciliator, Claus von Wobeser, who had Mexican nationality. Both the State and investor had legal representation, and the proceedings were held in English.

The sole conciliator held the first session in New York. Each party then filed written statements of “its position” pursuant to Article 33 of the ICSID Conciliation (Additional Facility) Rules. Following the exchange of written statements, the conciliator arranged for a two-day site visit to the place connected with the dispute, pursuant to Rule 30(4)(c) of the ICSID Conciliation (Additional Facility) Rules.⁷⁴ After the site visit, the parties each filed a second written statement on “its position”. Parties then prepared for a hearing in New York which lasted three days. Ten months after the hearing, the sole conciliator arrived at the view that “there [was] no likelihood of settlement between the parties”.⁷⁵ Therefore, after three years of effort, in 2015, the conciliation came to an end with a conciliation report rendered by the sole conciliator.

e) 2012 Hess Equatorial Guinea and Tullow Equatorial Guinea Ltd v. Equatorial Guinea⁷⁶

In 2012, another conciliation case was brought involving Equatorial Guinea. Hess Equatorial Guinea, Inc. and Tullow Equatorial Guinea Limited commenced ICSID conciliation against the Republic of Equatorial Guinea under a hydrocarbons concession contract.

The investor and State are both represented by legal counsel. This case is still pending: the parties have requested suspension of the constitution of the commission six times since the request for conciliation.

⁷⁰ Rule 30(2), ICSID Conciliation Rules.

⁷¹ *RSM Production Company v. Republic of Cameroon* (ICSID Case No. ARB/13/14); Kyriaki Karadelis, ‘RSM files against Cameroon after conciliation fails’, *Global Arbitration Review*, 25 June 2013 (available at: <http://globalarbitrationreview.com/article/1032440/rsm-files-against-cameroon-after-conciliation-fails>).

⁷² *RSM Production Company v. Republic of Cameroon* (ICSID Case No. ARB/13/14) (available at: <https://icsid.worldbank.org/apps/icsidweb/cases/pages/casedetail.aspx?CaseNo=ARB/13/14&tab=PRD>).

⁷³ *Republic of Equatorial Guinea v. CMS Energy Corporation and others* (ICSID Case No. CONC(AF)/12/2) (available at:

[https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/casedetail.aspx?CaseNo=CONC\(AF\)/12/2](https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/casedetail.aspx?CaseNo=CONC(AF)/12/2)).

⁷⁴ Rule 30(4)(c), ICSID Conciliation (Additional Facility) Rules.

⁷⁵ Article 37(2), ICSID Conciliation (Additional Facility) Rules.

⁷⁶ *Hess Equatorial Guinea, Inc. and Tullow Equatorial Guinea Limited v. Republic of Equatorial Guinea* (ICSID Case No. CONC(AF)/12/1) (available at :

[https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/casedetail.aspx?CaseNo=CONC\(AF\)/12/1](https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/casedetail.aspx?CaseNo=CONC(AF)/12/1)).

The latest suspension agreement is until 31 March 2017. The investor continues to operate oil and gas exploration and extraction in Equatorial Guinea, and the investor and State appear to have improved long term relations.⁷⁷

VI. PRELIMINARY OBSERVATIONS ON THE SUCCESS OF CONCILIATION

While the study on inter-state conciliation above has been limited to three boundary disputes, a few observations can be made about factors contributing to a successful conciliation. A key factor seems to be the willingness of the disputing parties to submit the dispute to conciliation or participate in the proceedings, in the case of compulsory conciliation under UNCLOS. Since conciliation is by nature non-binding, its success – measured by whether the dispute is settled – depends on whether the disputing parties agree to resolve their differences (this is regardless of whether they actually implement the recommendations of the conciliators).⁷⁸

However, that alone is insufficient. Belize and Guatemala agreed to submit the dispute to the facilitators, and even took various steps to resolve their territorial differences. Tensions between the two countries remain to this day, and no final resolution has been achieved. In contrast, in the Jan Mayen case, the dispute was quickly and amicably settled. A history of good relations between the disputing parties is also crucial.

Ultimately, as with all non-binding methods of dispute settlement, the success of conciliation depends entirely on the parties. If the political and/or economic incentives are insufficiently attractive, it is unlikely that parties will agree to settle. For instance, the likelihood of valuable petroleum reserves in the continental shelf around Jan Mayen was low. In contrast, the disputed area between Timor Leste and Australia has a proven track record of oil and gas reserves, including the Greater Sunrise field which has yet to be exploited. In the latter case, the potential gains (and losses) are much higher than in the former, which might be a factor in influencing the outcome of the proceeding.

As the brief study of the ICSID conciliation cases suggests, not much is known about the largely confidential processes of investor-state conciliations to date. Only the *Tesoro* conciliation was written about in detail in an article by the counsel representing Trinidad and Tobago, Lester Nurick and Stephen Schnably. Based on their description, investor-state conciliation appears to be little different from arbitration.⁷⁹ This is true for the other conciliations briefly mentioned above, where the disputing parties engaged legal counsel, exchanged submissions and participated in hearings, and the conciliation commissions were largely composed of legal professionals. The key difference between investor-state arbitration and conciliation seems to lie in the conciliators' lack of power to issue a binding award.

No general conclusion can be drawn from the outcomes of the ICSID conciliation cases, though it is noteworthy that as with inter-state conciliation, the success of an investor-state conciliation depends largely on the willingness of the parties to reach an agreement. This can be seen in the cases where the parties successfully settled: *Tesoro* and *TG World*. In *TG World v. Nigeria*, the disputing parties were able to reach a mutually beneficial agreement where the investor was compensated for losses incurred and granted the right to continue exploiting the dispute oil field, albeit with a reduced share.⁸⁰ While the proceedings in *Hess Equatorial* are suspended rather than formally concluded, the parties maintain

⁷⁷ Offshore Energy Today, 'E Guinea, Hess strengthen partnership' Press Release, 10 April 2014 (available at: <http://www.offshoreenergytoday.com/e-guinea-hess-strengthen-partnership/>).

⁷⁸ See for instance Bernier and Latulippe, p. 10 ("default proceedings are incompatible with the spirit and workings of the conciliation process.").

⁷⁹ See Nurick and Schnably, pp 346-7.

⁸⁰ See TG World Energy Corp. 2004 Annual Report (available at: <http://www.tgworldenergy.com/Resources/TG%20Annual%202004.pdf>).

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a functioning relationship. In contrast, the other cases were unsuccessful in large part because of the parties' unwillingness to settle.

ANNEX

1. Treaties with compulsory third-party mechanisms providing for referral to conciliation

- 1) 1969 Vienna Convention on the Law of Treaties
- 2) 1974 Convention on a Code of Conduct for Liner Conferences
- 3) 1978 Vienna Convention on Succession of States in Respect of Treaties
- 4) 1985 Vienna Convention for the Protection of the Ozone Layer
- 5) 1987 Montreal Protocol on Substances that Deplete the Ozone Layer
- 6) 1992 Convention on Biological Diversity
- 7) 1992 United Nations Framework Convention on Climate Change
- 8) 1994 Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution on Further Reduction of Sulphur Emissions
- 9) 1994 United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa
- 10) 1997 Kyoto Protocol to the United Nations Framework Convention on Climate Change
- 11) 1998 Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution on Heavy Metals
- 12) 1998 Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution on Persistent Organic Pollutants
- 13) 1998 Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade
- 14) 1999 Protocol to the 1979 Convention on Long-range Transboundary Air Pollution to Abate Acidification, Eutrophication and Ground-level Ozone
- 15) 2000 Cartagena Protocol on Biosafety to the Convention on Biological Diversity
- 16) 2001 Stockholm Convention on Persistent Organic Pollutants
- 17) 2003 Intergovernmental Agreement on the Asian Highway Network
- 18) 2006 Intergovernmental Agreement on the Trans-Asian Railway Network
- 19) 2010 Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity
- 20) 2010 Nagoya-Kuala Lumpur Supplementary Protocol on Liability and Redress to the Cartagena Protocol on Biosafety
- 21) 2013 Intergovernmental Agreement on Dry Ports
- 22) 2013 Minamata Convention on Mercury
- 23) 2015 Paris Agreement on Climate Change

2. Treaties including conciliation as an optional dispute settlement mechanism

- 1) 1948 American Treaty on Pacific Settlement
- 2) 1949 General Act for the Pacific Settlement of International Disputes
- 3) 1957 European Convention of the Peaceful Settlement of Disputes
- 4) 1975 Convention on the Representation of States in Their Relations with International Organizations of a Universal Character
- 5) 1978 Statutes of the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation
- 6) 1981 Revised Treaty of Basseterre Establishing the Organisation of Eastern Caribbean States Economic Union
- 7) 1982 United Nations Convention on the Law of the Sea
- 8) 1994 WTO Dispute Settlement Understanding
- 9) 2010 ASEAN Protocol on Dispute Settlement Mechanisms (Not in force)