Report of conference: CIL Working Conference on Conciliation

17-18 January 2017

1. Introductory session

Over the course of two days, the Centre for International Law (CIL) organised a closed-door working conference to discuss conciliation of international disputes, i.e. state-level disputes. While there exist many rules for conciliation and conventions including conciliation as the method of dispute resolution, the fact remains that conciliation is little-used in both State-State and investor-State disputes. For instance, in contrast to the more than 500 ICSID arbitration cases, there are only 10 ICSID conciliation cases known to date. The working conference was also opportune due to the invocation of conciliation by Timor-Leste against Australia under the United Nations Convention on the Law of the Sea ('UNCLOS').

CIL convened this conference to map out the current landscape of non-binding international dispute resolution methods, with the goal of identifying key issues, determining further areas of research, starting to create a network of expertise, and laying the groundwork for a larger-scale conference.

In attendance at the Working Conference were:

Professor Lucy Reed, director of the CIL; Professor Robert Beckman, head of Ocean Law and Policy at CIL; J Christopher Thomas QC, head of International Dispute Resolution (Practice Skills) at CIL; Nicholas Lingard, Partner at Freshfields Bruckhaus Deringer; Deborah Lee Hart, Executive Director at the Arbitrators' and Mediators' Institute of New Zealand; Daphne Hong, Director-General at the International Affairs Division, Attorney-General's Chambers Singapore; Davinia Aziz, Deputy Senior State Counsel, IAD, AGC; Yau Pui Man, State Counsel, IAD, AGC; Sarah Jane Grimmer, Secretary-General of the Hong Kong International Arbitration Centre; Marcus Lim, Executive Director of the Singapore International Mediation Institute; Dr Petra Butler, Professor at the Victoria University of Wellington; Tan Ai Leen, Senior Labour and Litigation Counsel at TE Connectivity; Dorcas Anderson Quek, Assistant Professor at the Singapore Management University; Alvin Yap, Associate at Eversheds; Jansen Calamita, Head of Investment Law and Policy at CIL; Dr Hao Duy Phan, Senior Research Fellow at CIL; Shaun Kang, Research Associate at CIL; Christine Sim, Research Associate and Practice Fellow at CIL; Seraphina Chew, Research Assistant at CIL.

The participants came from varied backgrounds, each chosen precisely because of their experience in a different aspect of dispute resolution. While discussing the bookends of international dispute resolution: negotiation to arbitration and the major shades in between, the focus of the conference was on **conciliation** specifically, and how it fit within the spectrum of dispute resolution.

In her opening session, Professor Lucy Reed highlighted some key questions for the participants to consider. These questions include: who would be a suitable third-party, when might conciliation be used during the course of a dispute, what role an institution like the Permanent Court of Arbitration (PCA) might have to play, transparency concerns in settlements, and what, if any, the applicable rules and procedure were. Professor Reed acknowledged the existence of disputes that were "unsettleable"; rather, the task was to identify categories of cases that were open to settlement.

One of the first comments was raised by Marcus Lim, who observed that there was no clear line between mediation and conciliation. However, Professor Reed responded that in her opinion, it was "good that the lines blur" because conciliators could consider all types of factors. In fact, there were two commonalities for all non-binding dispute resolution methods: first, the disputing parties retained significant control over the process, and second, they could specify what they wanted from the process.

Further reinforcing how these various methods operated less as distinct categories and more as points along a sliding spectrum bookended by negotiation and arbitration, many participants (6 of 16) indicated in an informal poll conducted by Christine Sim that they agreed with Professor Reed that mediation and conciliation were interchangeable.

2. Lessons to be drawn from the ICSID and UNCLOS regimes

The first day of the conference then turned to presentations by Professor Robert Beckman and Christopher Thomas QC.

a. *UNCLOS Conciliation*

Professor Beckman first explained how conciliation fit within the context of UNCLOS, and discussion turned on what broader lessons could be drawn from the UNCLOS regime for conciliation. One key observation was how UNCLOS ensured that every dispute was subject to **compulsory dispute settlement**, whether it be binding as with arbitration, or non-binding as with conciliation. This echoed observations made by Professor Reed and Deborah Hart during the opening session about the success of court-ordered mediations in the USA and New Zealand. Moving forward, one way to encourage the use of conciliation might be by making it compulsory in the absence of any alternatives agreed to by the parties.

Professor Beckman made another key observation about what value conciliation could add to the existing arsenal: that of permitting **extra-legal considerations** to form the basis of any recommendations. Speaking from experience, he pointed out that many States held "unreasonable historic positions" that were difficult to retreat from. The real issue at the heart of many maritime boundary disputes was that of valuable natural resources – particularly of the petroleum variety – lying in the disputed areas. If parties went to arbitration or adjudication, the dispute would be decided in accordance with the law of maritime delimitation, with the consequential risk of "losing out on the real issue at dispute". As such, he disagreed with the description of conciliation as merely non-binding arbitration, reiterating the flexibility of conciliators to consider circumstances other than the law.

b. *ICSID Conciliation*

The discussion then turned to conciliation under the ICSID regime. Christopher Thomas QC started by contrasting the ICSID regime, comprising of secondary rules, with the many substantive provisions in UNCLOS. ICSID was a "mechanism for resolving disputes", and was not concerned with the primary obligations that could lead to said disputes. While the negotiating history of ICSID indicated that the Executive Directors placed "equal emphasis" on conciliation and arbitration, the latter is overwhelmingly used in practice. He also observed that the drafters viewed conciliation as "contentious proceedings".

He observed how **similar ICSID conciliation was to arbitration**. Most provisions did not distinguish between conciliation and arbitration, and many of the procedural rules for conciliation overlapped with those for arbitration. However, there were a few key differences:

- Default by one party would lead to the termination of the conciliation proceedings.

- Conciliators could have *ex parte* communications with either party, which would be "anathema" in arbitral proceedings.
- The conciliation rules imposed a duty of "good faith" on the disputing parties, a duty that is absent in the arbitration rules.
- The conciliation commission had stronger procedural powers with regard to matters such as the production of documents and conducting site visits.

Christopher Thomas QC then briefly discussed the only successful ICSID conciliation that is publicly known to date, that of *Tesoro Petroleum v. Trinidad and Tobago*. He observed that the sole conciliator in that case carried out a function very similar to that of an "early neutral evaluation", and suggested that much of the success of the conciliation process rested on the **gravitas of the third-party**. He also observed that a greater use of conciliation might allay one criticism of investor-State arbitration, that of arbitrators "telling States what to do", since conciliation only results in non-binding recommendations.

Participants offered various views and thoughts in response to the two presentations.

One major concern arising from the ICSID discussion was that of the similarities between conciliation and arbitration. If the processes for both were similar, parties might find it a waste of time and cost to go through conciliation only to replicate much of that in arbitration. Christopher Thomas QC also pointed out the "tremendous lack of intellectual ferment" in discussing conciliation.

c. *Way-forward*

Sarah Grimmer pointed out that there was philanthropic space that could be filled in conciliation. Parties might have a greater incentive to use conciliation if it cost less than arbitration. She cited HKIAC as one example, where the institution offered free use of its premises in cases where a developing State was involved as a disputing party. She also mentioned the PCA's Financial Assistance Fund as another example, where developing countries could receive financial assistance with the costs of any PCA administered dispute.

Sarah also offered a further suggestion of *pro bono* conciliators sitting concurrently in an ongoing arbitration. These could be eminent international law specialists who have reached a certain stage of their careers where money was not a concern, and whose experience would add to their gravitas. As the conciliation would be running concurrently, it would be important to isolate the conciliator from the arbitral tribunal in order to preserve the integrity of the arbitral process.

In response to this suggestion, Christopher Thomas QC further added that the real benefit of having a concurrent conciliation process would be to have the **actual decision makers** together in one room, in order for them to be fully appraised of the merits of the dispute. This could increase the probability of the dispute settling as the decision-makers are often not in the position to properly assess the dispute early on in the proceedings.

One common concern was the non-binding nature of the conciliation report. The non-binding nature of conciliation was both a boon and weakness. Christopher Thomas QC suggested that, should there be subsequent arbitration proceedings, it might be helpful for the arbitrators to be aware of the conciliation report and process. The conciliation report would also be helpful for the arbitral tribunal if the conciliator had taken an evaluative approach, since the tribunal could rely on the report to reduce the time required for the arbitral process. However, Sarah opined that this was not much of a 'threat' since States could always delay the dispute at the enforcement stage.

Professor Reed opined that part of the success of the Timor-Leste/Australia conciliation might have to do with the commitment of resources by the PCA (two senior counsel were put full-time on the case), how the members of the conciliation commission worked well together, and the "clear, succinct" nature of the decision on competence. She suggested that arbitration could learn something from this particular conciliation.

As another concrete step forward, Professor Reed suggested using consent clauses for conciliation in future investment treaties.

Marcus used the SIMI as an example of how non-binding methods of dispute settlement could benefit from a structured training and qualification process. This applies to not only the third-party mediator/conciliator but also to counsel. He observed that different skills were required in mediation in contrast to litigation or arbitration, and it should not be assumed that good arbitration counsel would also be suitable for mediation. He suggested exploring skills development for mediation/conciliation advocates, along with a training framework for the mediators/conciliators themselves.

Ai Leen suggested that a practical way to promote the use of conciliation would be to start with the existing case dockets of the PCA and ICSID, i.e. to encourage parties in ongoing disputes to consider settling their disputes.

Dr Hao pointed out a major difference between the reports required by the ICSID and UNCLOS systems. While the ICSID Conciliation Commission only needed to record the failure of the conciliation process,[1] the UNCLOS commission was required to "record … its conclusions on all questions of fact or law relevant to the matter in dispute and such recommendations as the commission may deem appropriate for an amicable settlement".[2] He suggested that it would be helpful if a conciliation commission was always required to include recommendations in its report.

[1] See Rule 30(2) where the Commission is only required to "draw up its report noting the submission of the dispute to conciliation and recording the failure of the parties to reach agreement"; also see Rule 32, ICSID Conciliation Rules, which lists what the report must contain.
[2] Article 7, Annex V, Section 1, UNCLOS.

3. Overview of Topics Discussed

Relationship between Conciliation Process and Substantive Rules

- *UNCLOS has substantive rules reinforced by dispute settlement provisions in Part XV*
- *ICSID only has dispute settlement provisions*
- *Is conciliation suitable for other international norms such as human rights?*

Relationship between Dispute Settlement Mechanisms

- *Binding vs Non-binding dispute settlement mechanisms*
- *Are mediation, conciliation, and negotiations used as the "next best option" to binding dispute settlement?*

Work on the Mechanisms

- *Tweaking procedures?*
- *Structural reform?*

Stakeholders

- *States*
- *Disputing Parties*
- *Counsel*
- *Arbitrators / Judges*
- *Institutions (eg. PCA)*

Aspects of a Dispute

- *Legal questions*
- *Factual findings*

Enabling Conciliation

- *Where is a safe place to conduct a conciliation? Neutral countries?*
- *When is a good time? Early in the dispute?*
- *What is required of the conciliators?*
- *Where will disputing parties get funding for the conciliation?*

Purpose of the conciliation

- *To identify interests of the parties*
- *To identify factors relevant to settlement*

Definition of Conciliation

- *Not truth and reconciliation commissions*
- *Consensual process*
- *Third-party assisted*
- *Issuance of recommendations / report*

Skills and Training Required for Conciliation

- *Mediation training, diplomatic training, psychology*
- *Drafting proposed terms of settlement*
- *Wielding moral authority over the parties*

Suitability of Conciliation

- *Are both parties interested in settling? Are their demands reasonable?*
- *Do both parties have bargaining power?*

4. Obstacles and Pathways to Using Conciliation

During the course of the working conference, participants discussed many potential factors for and against the suitability of using conciliation to resolve international disputes. The following table summarises several factors that were discussed.

Obstacles to Conciliation	Pathways to Conciliation
• Risks • Lack of resources • Bureaucracy • Fear of responsibility • Political pressure and sensitive disputes • Historic positions taken • Inability to implement settlements	• Time and costs savings • Previous commitment to the process • Amenability of the subject matter • In-built treaty mechanisms for conciliation or negotiations • Reputation / face-saving • External events may trigger re-evaluation of positions • Other long-term interests or relationships • Pressure by third interested states / parties

5. What can conciliation learn from other forms of ADR?

a. *Negotiation*

Nicholas Lingard opened the day by discussing negotiation. While negotiation did not involve a third-party, he drew out certain points which could be useful for conciliation. First, in framing negotiations with States, there were two important considerations of **leverage and incentives**. If both were present, a State would be more likely to settle a dispute.

Nicholas then set out **two possible rubrics** for approaching settlement talks. One was for both parties to start with their best cases and move toward a "zone of potential agreement". This would make settlement harder as the starting positions might be too far apart. The other rubric was for the State to start with its "best agreeable case", which would increase the chances of settling as one party begins within the zone of potential agreement. When at least one party starts with a "rational position", there was a higher chance of successful settlement.

Third, he observed the importance of having a "**formal framework** for all dispute resolution methods".

Lastly, echoing the comments made by Marcus, Nicholas suggested that **specialist third-parties** were required as the different methods of non-binding dispute settlement required the third-party to have different sets of skills and expertise. The first step would be to identify what expertise and skills are required, and to then develop the necessary training framework.

b. *Arbitration*

Proceeding to the other book-end, Tan Ai Leen turned to arbitration. In her presentation, she first examined the reasons for arbitration's resounding popularity and what conciliation would require in order to be more frequently used. In her opinion, the major reason for arbitration's success was its "giant **stick**" – enforcement. She asked whether there was any incentive or threat to settle – in the absence of either, why would the disputing parties settle? Another problem with conciliation was that of marketing. One of conciliation's key features is its confidentiality, so much so that even the existence of any proceedings might not be known at all. How, she questioned, do you market something that is highly confidential?

Ai Leen identified another area to work on: **changing the mind-set of the users**. As conciliation was a non-binding process, it would be difficult to get parties who did not trust one another to even attempt the process. She opined that what was important was to **build trust in the process**.

Lastly, Ai Leen suggested that one practical way forward for conciliation was to concentrate on adopting the good, minimising the bad, and avoiding the ugly in arbitration. In this respect, it was perhaps conciliation's selling point that it was able to pick and choose features from all the other dispute settlement mechanisms. In concluding, Ai Leen returned to the "central question" she raised at the beginning, which was about finding a "stick" for conciliation. In her opinion, the only way forward was for there to be a new convention or to revise the 1959 New York Convention.

Professor Reed responded to the query of what 'bite' conciliation had by observing that it might "never be more than the threat of a binding dispute resolution process like arbitration" coming into play should conciliation fail. However, rather than thinking about push factors, she suggested that **incentives** like economic factors would be more helpful in 'pulling' users to conciliation.

c. *Neutral Evaluation*

Assistant Professor Quek discussed the evaluative aspect of conciliation through her presentation on early neutral evaluation. This was a process used in the domestic Singapore courts for certain classes of disputes, where the evaluators sought to give parties an early and realistic analysis of the merits of their cases. The purpose was not so much to directly encourage settlement as much as to **facilitate** it by giving the parties a reliable indicator of their likelihood of success should they pursue a binding process like litigation. In her words, "evaluation is the centre of ENE".

Assistant Professor Quek was more cautious as to what lessons conciliation could draw from ENE. While noting the "hybrid" nature of conciliation, which included an element of "impartial examination of the dispute", she warned against a "mismatch of expectations". Conciliators should not view themselves solely as impartial evaluators, but be sensitive to what the parties want. The flexibility of the conciliation process was both its strength and weakness. It was useful for disputes where there were "delicate political issues". However, users might also find conciliation less attractive if the way it is run changes on a case-by-case basis.

ENE is thus similar to the 'evaluative' approach described by Professor Reed and Christopher Thomas QC on the first day, an approach adopted by the sole conciliator in the case of *Tesoro*. Christopher Thomas QC observed that having a state court judge, as in ENE, helped bolster the **credibility** of the evaluation process. He suggested that in the context of international disputes, the third-party evaluator might not want to do a "full-on evaluation of relative success" but rather highlight the strengths and weaknesses of each party's case.

d. *Inter-State mediation*

Alvin Yap made a number of key points during his presentation on inter-State mediation. First, in his view, there were two "determining factors for success" in mediation: the **identity** of the mediator and **domestic politics** (for the disputing State(s)). Both of these factors were applicable in conciliation as well, given that both were non-binding methods of dispute settlement.

Second, he stressed how **things might change** over the process. He cautioned against assuming that the spokesperson for the government spoke for the government as a whole, and highlighted the importance of appreciating how instructions might change over time. Here, Sarah Grimmer agreed that regime change could be a significant factor in the likelihood of a dispute being settled.

Ai Leen posed the question of what would happen when one party defaults on an agreement, returning to the key concern of **enforceability** (or the lack thereof) that she raised in her presentation. Alvin confirmed that the lack of an overarching enforcement regime meant the 'success' of the process depended on "political will".

e. *Summary*

In her closing session, Deborah Hart considered all the prior presentations on each method of dispute settlement. She noted that it was important, when searching for the skills required of a conciliator, to determine whether conciliation was one process that could draw upon the whole "continuum" of dispute resolution or only a discrete part of it. In her view, that was conciliation's selling point: "being able to pick and choose what [each party] wants" from all the other methods of dispute resolution. Responding to Ai Leen's question, Deborah suggested that the recommendations of the conciliators were conciliation's 'teeth', especially if the commission has "gravitas". After hearing all the other presenters, Deborah thought that conciliators should be "the most widely skilled" of all dispute resolvers, and that users needed to think carefully about who to appoint. Here, she suggested looking past eminence and going beyond the usual retired judges. She suggested the importance of having an appointments process with "clear guidelines and requirements" to ensure an open and transparent selection process. She questioned why conciliation was viewed as being "highly legalistic and formal", and suggested that this was due to counsel's "lack of imagination" and their preference of staying in their comfort zone of arbitration. She concluded by pointing out that we should not be discouraged that conciliation is not used more at the moment.

The following table summarises the qualities and skills that a conciliation panel should possess, as discussed during the working conference.

Qualities and Skills of a Conciliation Panel
• Ability to define their role. Do the conciliation procedures envision the conciliators to be "angels of peace" or evaluators? • Impartiality • Independence • Language skills • Fairness • Competence in the subject matter • Ability to identify the parties' interests • Personal trust between the conciliator and the parties • Ability to use moral pressure to assist parties in reaching a compromise • Cultural and political sensitivity • Legal skills • Understanding of how to design and implement a settlement agreement • Sensitivity in drafting a settlement proposal • Ability to design pragmatic solutions • Patience • Advocacy skills used to "sell" the settlement proposal to the parties • Case management skills

6. The Future of Conciliation

a. *Options for International Dispute Settlement*

The next participant offered insight into how a State considered its options for international dispute settlement. From the onset, she clarified how important it was to choose a dispute settlement mechanism that results in a decision disputing parties would accept. Otherwise, it would be pointless to pursue that mechanism, and it would also further challenge the international rule of law.

The participant provided a number of reasons for the present under-utilisation of conciliation:

1) The lack of a binding outcome: if the parties wanted something non-binding, they would have settled through negotiations.
2) The formal, structured conciliation process: this echoed a concern raised on the first day that the conciliation process was too similar to arbitration. If the same time and cost was involved in conciliation, the parties would rather go straight to arbitration and obtain a binding outcome.
3) It was difficult for State parties to submit a highly politicised dispute to conciliation, where they would have to assume responsibility for any potential settlement.
4) Conciliation was a largely unknown process, and the question remained of how the process would run. Further, the lack of literature on, visibility, and knowledge of conciliation and commented on the paradox of how "success begets success". The relative scarcity of successful conciliations might be a factor in its relative disuse.

After briefly listing the reasons for conciliation's unpopularity, the participant suggested that conciliation could play a role in **maximising the number of options** for dispute settlement available to States. The participant commented that many States preferred to retain more control over the process, and conciliation gave them that. The dialogic approach in conciliation was specifically "good for long-term relationships".

The suggestions included ways to encourage the use of conciliation:

1) Providing for conciliation in treaties, such as compulsory conciliation in UNCLOS.
2) Care in the selection of conciliators: while it was a given that conciliators should be independent and impartial, the standing of the conciliators was "crucial" given the non-binding nature of conciliation. The conciliators should be known to all the disputing parties, and be someone who could appreciate the **context of the dispute** (all elements, social, political, cultural). In effect, a "village elder" who will be respected.
3) Clear procedural rules and institutional support: parties would appreciate having default procedural rules. In the midst of resolving a dispute, parties would not want to have to further negotiate procedural rules.

In conclusion, the partiocipant observed how there was a "structural bias" in the international system, with Western states leaning towards "binding, adversarial methods". This "rule-based mindset" was contrary to the spirit of conciliation, where legal rules formed just part of what conciliators could consider.

Dr Petra Butler countered the suggestion that conciliation could be used to maximise the options available to States. This was of limited use to small States, which faced "unique challenges", most significantly in the area of their human capacity. She cited an example of a State where there was only one qualified lawyer for the entire population.

Professor Reed stated that while many disputes were *sui generis*, it was possible to identify **categories** of disputes that were open to settlement. Conciliation was just part of a suite of options that could lead to cost (including political) savings.

b. *Institutional Administration of Conciliation Proceedings*

Sarah Grimmer provided suggestions on the ways an institution like the PCA could provide support, highlighting a few key areas. One was in the selection of conciliators. The Members of the Court of the PCA could draw on their extensive experience to propose potential conciliators. Another important area was in translation. Sarah cited a dispute administered by the PCA where the review panel worked in three languages and with a strict deadline for the publication of the final report. Lastly, she stated her belief that many arbitrators already possessed the skill set required for conciliation, pointing to how presiding arbitrators exercised diplomacy when mediating between the other members of the tribunal.

Based on the discussions during the working conference, we summarise several points for future examination.

Institutional Support
• Providing a list of suitable conciliators • Providing a standing list of conciliators • Handling conflict checks • Appointments: ranking and striking of names • Express disqualification procedures • Deciding on disqualification in order to relieve co-conciliators from having to decide • Development and filling in gaps in existing conciliation rules (eg. Proposing clauses for the parties' adoption) • Drafting confidentiality agreements • Drafting and scrutinising the recommendations and report of the commission • Arranging insurance, witness safety, documents exchanges

c. *Improving Conciliation Proceedings*

Several ideas were discussed for improving the conciliation process. The following table summarises the potential areas where the conciliation process could be improved.

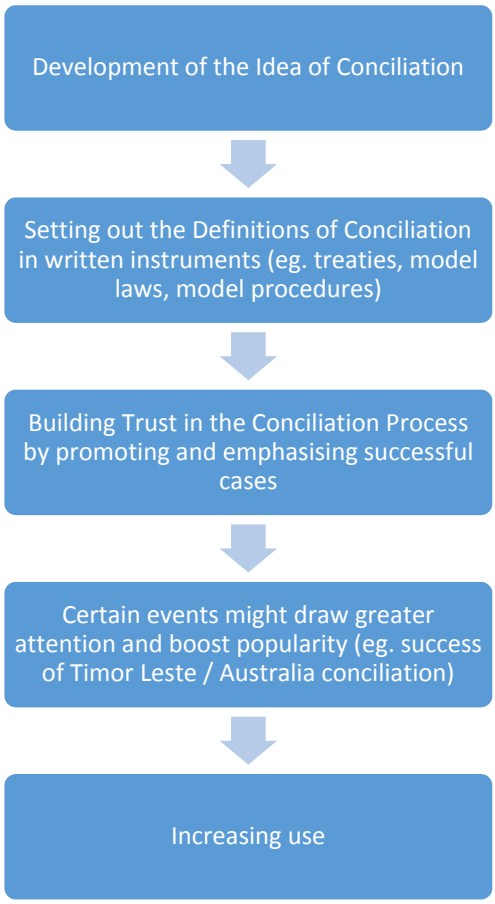
How to refine the conciliation process?
• Define the purpose of conciliation • Improve flexibility in written statements, formal exchanges of evidence and documents • Reduce costs • Consider book-end dispute settlement options • Improve the quality of recommendations • Discuss the suitability of conciliation with the disputing parties • Create a feedback loop for parties to keep negotiating • Make default conciliation rules available to prevent disputes over the procedures • Increase availability of and options for funding • Training lawyers to use the conciliation process better • Consider options for enforcing a settlement agreement • Providing expert witness conferencing

- Consider setting a timeline for the process
- More express provisions on the qualities of conciliators to increase independence and impartiality of the panel
- Improve confidentiality of the process
- Provide optional modifications of the conciliation process for political or culturally sensitive disputes

7. Ideas for going forward

During the broader discussion on various forms of ADR, Professor Reed, referring to success of court-ordered mediation in the United States, suggested that "compulsion is a big step towards success". Echoing this sentiment, Deborah Hart observed the success of court-ordered mediation of family disputes in New Zealand. While many of these disputes were perceived to be unresolvable outside of adversarial proceedings, with one or both of the parties being unwilling to participate in the mediation, many cases ended up settling.

The development of conciliation as a concept, followed by refinement of the process, increasing use and potential popularity as a dispute settlement mechanism was discussed.



8. Questions Raised

Interesting questions were raised over the course of the working conference, which might be topics for exploration in future CIL research.

(i)	Is there a definition of conciliation?
(ii)	Is conciliation effective in domestic jurisdictions? Is there data to support this?
(iii)	Should conciliation commissions give detailed reasons for their recommendations?
(iv)	How should commissions deal with applications for interventions by third parties?
(v)	Should commissions be constituted from standing panels or ad hoc?
(vi)	What are the ideal conditions for settlement by conciliation?
(vii)	What law should the commission apply?
(viii)	Should the commission's final report state the commission's recommendations? (compare ICSID's report with UNCLOS' report)
(ix)	Is conciliation suitable for small States?
(x)	How can the confidentiality of conciliation proceedings be maintained? What sanctions are there for breaching confidentiality agreements?
(xi)	What are the procedural powers of a conciliation commission?
(xii)	Can settlement agreements resulting from conciliation be enforceable?

Reported by Shaun Kang, Seraphina Chiew and Christine Sim (CIL)