

Fordham International Law Journal

Volume 14, Issue 3

1990

Article 3

Conciliation As A Mechanism For The Resolution Of International Economic And Business Disputes

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Abstract

This Article will examine the use of conciliation as a mechanism for the resolution of disputes arising out of trade, investment, and other business relationships in this broadly framed transnational system. Part I presents an overview of dispute resolution methods. Part II provides a definition of “international conciliation.” Part III discusses the various uses of international conciliation as a method for the resolution of international conflicts; this Part highlights several relevant international agreements and organizations. Part IV argues in favor of conciliation as a means for achieving the settlement of international economic and business disputes.

CONCILIATION AS A MECHANISM FOR THE RESOLUTION OF INTERNATIONAL ECONOMIC AND BUSINESS DISPUTES

Linda C. Reif *

INTRODUCTION

The hallmark of dispute¹ settlement in the international system is its consensual nature. Disorder in relations between entities which have formal status on this level, primarily the nation-state and certain international organizations, cannot be remedied unless all the parties involved consent both to the implementation of the process of dispute resolution and the specific mechanism to be engaged. This remains true whether the particular method selected is adjudicative or diplomatic in nature. This configuration of the international order is the product of its decentralized format where all states are, in principle, juridically equal and where there is no superior governmental entity with the authority to prescribe, adjudicate, and enforce the law.

Another layer can be added if one expands the boundaries of the international order to include, pursuant to transnational law concepts,² the activities of private entities—individual or juridical—who are participating in international activities out of which disputes arise. Their transactions are often business-related, involving international trade, investment, or finance.

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1. *See generally* Case of the Mavrommatis Palestine Concessions (Greece v. U.K.), 1924 P.C.I.J. (ser. A) No. 2, at 11 (Aug. 30) (providing leading definition of term "dispute"). The court stated that "[a] dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons." *Id.*

2. P. JESSUP, *TRANSNATIONAL LAW* (1956). Judge Jessup, in his seminal work on the subject, defined "transnational law" as including "all law which regulates actions or events that transcend national frontiers. Both public and private international law are included, as are other rules which do not wholly fit into such standard categories" and "transnational situations" as those involving "individuals, corporations, states, organizations of states, or other groups." *Id.* at 2-3.

These relationships may attract an international or national scheme of dispute settlement pursuant to treaty or domestic regulation. Further, the parties themselves may be able privately to construct their own dispute resolution mechanism by contract. In both scenarios the genesis of the process is consent—either of the relevant states or of the private actors.

This Article will examine the use of conciliation as a mechanism for the resolution of disputes arising out of trade, investment, and other business relationships in this broadly framed transnational system. Conciliation, using a third party to provide non-binding recommendations to the disputants in an attempt to resolve the problem, is found in every stratum of the transnational business system. The variants of conciliation that are created and the viability of conciliation as an effective mechanism for the resolution of international economic and business disputes will also be addressed. Part I presents an overview of dispute resolution methods. Part II provides a definition of “international conciliation.” Part III discusses the various uses of international conciliation as a method for the resolution of international conflicts; this Part highlights several relevant international agreements and organizations. Part IV argues in favor of conciliation as a means for achieving the settlement of international economic and business disputes. This Article concludes that the international community should make greater use of conciliation as a pathway to the settlement of economic and business disputes, rather than automatically taking the more complex arbitration route to dispute settlement.

I. AN OVERVIEW OF METHODS OF DISPUTE RESOLUTION IN THE TRANSNATIONAL SYSTEM AND THE PARTIES INVOLVED

The forms of dispute resolution that are utilized in the transnational system include negotiation, mediation, conciliation, arbitration, and judicial settlement. Although non-judicial methods of dispute resolution are also found in the domestic arena, a distinction can be made between the international system, on the one hand, and national legal systems on the other. On the international level these procedures are the familiar and preferred forms of dispute settlement. In the do-

mestic realm of many states, however, such mechanisms are categorized under the rubric "alternative dispute resolution" since they are considered to be a supplement, or even subordinate, to the official centralist structure of judicial settlement.³ In contrast, extrajudicial methods are the predominant modes of dispute determination in a variety of countries, including the Pacific Rim Asian nations, based on their cultural heritage.⁴

Dispute resolution on the international plane can be divided into the two categories of adjudicative and diplomatic forms of settlement. Adjudicative methods are those involving a neutral third party who resolves the issue by rendering a decision that is binding on the parties. In contrast, the diplomatic forms of dispute settlement, some of which involve a third party, result in outcomes that are always non-binding in effect. The fulfillment of any proposed solution depends upon the mutual agreement of the disputants on its implementation.

There are two adjudicative methods of dispute resolution: judicial settlement and arbitration. Judicial settlement can be defined in general terms as the provision of a legally-binding decision emanating from an impartial, formal, and permanent tribunal. Forms of judicial settlement on the international plane have been established pursuant to treaty and mainly limit access to states.⁵

When a dispute between entities engaged in trans-border activities occurs, the entities can attempt to resolve the dispute through adjudication in the domestic courts of a state. However, various disadvantages associated with the judicial settlement of international business disputes have led private enti-

3. This Article will not address the burgeoning field of alternative dispute resolution of domestic disputes in Western legal systems. There is a growing body of literature on the subject. See generally S. GOLDBERG, E. GREEN & F. SANDER, *DISPUTE RESOLUTION* (1985 & Supp. 1987); *A Colloquy: Alternative Dispute Resolution in International Trade and Business*, 40 ME. L. REV. 225, 258 (1988) (selective bibliography on alternative dispute resolution). But see Galanter, *Reading The Landscape of Disputes: What We Know And Don't Know (And Think We Know) About Our Allegedly Contentious And Litigious Society*, 31 UCLA L. REV. 4 (effectively stating that litigation is actually "alternative," since most disputes are resolved either before legal action taken or before trial).

4. See *infra* notes 177-212 and accompanying text (discussing various Pacific Rim legal systems and their use of conciliation).

5. J. MERRILLS, *INTERNATIONAL DISPUTE SETTLEMENT* 93 (1984); see *JUDICIAL SETTLEMENT OF INTERNATIONAL DISPUTES* (Mosler & Bernhardt eds. 1974).

ties to favour alternative means of dispute resolution where feasible, with arbitration being the preferred option.⁶

Arbitration is also an adjudicative mode of dispute resolution since it results in the issue of a binding decision by a neutral third party, the arbitrator or arbitral tribunal. However, it differs from judicial settlement because the disputants can structure the features of the arbitral process themselves rather than facing a preset framework.⁷ Arbitration is a mode of dispute resolution that is used throughout the transnational system by states, international organizations, and private actors.

Diplomatic or political means of dispute settlement are frequently utilized in the international system. Despite the deceptive nature of the title, they are used to solve disputes affecting the legal position of the parties.⁸ The attributes common to all the diplomatic methods are that the determination of the conflict will usually require a compromise between the parties and the final settlement is of a non-binding character.⁹ Diplomatic modes of settlement can be divided into two branches: those that involve only the disputants themselves and those that engage a third party to facilitate a resolution of the conflict. Negotiations and consultations are the main categories of diplomatic settlement that are conducted by the disputants alone. They are implemented at the outset of the resolution process due to their ease of initiation and conduct, informality, and privacy.¹⁰ The next level of diplomatic dispute settlement involves the intervention of a third party in the process on the behest of or with the consent of the disputants. The various methods of third party implication can be differentiated on the basis of the degree of involvement and initiative of the intervenor. Good offices, inquiry, mediation, and conciliation are the major alternatives.

In inter-state conflict, the "good offices" of a person in a position of authority and prestige is occasionally resorted to.

6. See generally D.F. Vagts, *Dispute-Resolution Mechanisms in International Business*, 203 REC. COURS 9 (1987).

7. J. MERRILLS, *supra* note 5, at 70.

8. Bowett, *Contemporary Developments in Legal Techniques in the Settlement of Disputes*, 180 REC. COURS 169, 177 (1983).

9. *Id.*

10. J. MERRILLS, *supra* note 5, at 6-7; Lachs, *International Law, Mediation and Negotiation*, in MULTILATERAL NEGOTIATION AND MEDIATION: INSTRUMENTS AND METHODS 183 (A.S. Lall ed. 1985).

The third party performing this function merely facilitates communications between the states or attempts to persuade them to restart negotiations.¹¹ An inquiry may be the appropriate avenue for resolution of a conflict that stems from uncertainty or disagreement over the relevant facts. A commission of inquiry can be constituted to ascertain objectively the facts in dispute.¹² It is anticipated that the report of the independent inquiry will lead to a settlement between the parties. In a broader sense, inquiry into the facts is an integral part of all varieties of third party dispute resolution.¹³

Mediation is another method of third party dispute settlement used throughout the transnational system. A mediator plays a more substantial role in the process, empowered not only to construe and transmit communications between the disputants but also to forward informal proposals for settlement.¹⁴ There is a marked similarity between mediation and conciliation.

II. *INTERNATIONAL CONCILIATION DEFINED*

International conciliation, the diplomatic mode of dispute settlement in which the third party conciliator or conciliation commission has the most pronounced effect on the process, has been defined by the author Cot as:

[I]ntervention in the settlement of an international dispute by a body having no political authority of its own, but enjoying the confidence of the parties to the dispute and entrusted with the task of investigating every aspect of the dispute and of proposing a solution which is not binding on the parties.¹⁵

11. J. MERRILLS, *supra* note 5, at 20.

12. N. BAR-YAACOV, *THE HANDLING OF INTERNATIONAL DISPUTES BY MEANS OF INQUIRY* (1974).

13. *Id.* at 2-3.

14. J. MERRILLS, *supra* note 5, at 20; V. UMBRIGHT, *MULTILATERAL MEDIATION: PRACTICAL EXPERIENCES AND LESSONS* 24 (1989). *But see* Bilder, *International Third Party Dispute Settlement*, 17 *DEN. U.J. INT'L L. & POL'Y* 471, 481 (1989).

15. J. COT, *INTERNATIONAL CONCILIATION* 9 (1968) (trans. Myers 1972). In contrast, conciliation in some domestic systems has a less formal structure—the conciliator promotes interaction between the parties but does not pose a solution. *See* Dress, *International Commercial Mediation and Conciliation*, 10 *LOY. L.A. INT'L & COMP. L.J.* 569, 574 (1988). However, the ombudsman institution and the mini-trial, a new form of alternate dispute resolution, are conciliatory in nature.

Although the definition was made in the context of international conciliation between states, it may be applied equally to international conciliations involving non-state entities. Mr. Cot identifies the core aspects of the conciliation process as follows: (1) the conciliator (or conciliation commission) must have the confidence of the disputants in order to be able to perform her function; (2) the function of the conciliator is to examine the entire dispute, including clarification of the facts and a survey of both the applicable law and the non-judicial elements; (3) the recommendations of the conciliator need not be based purely on the application of law. The relevant legal principles may be supplementary grounds or may be absent altogether; and (4) the resolution proposed by the conciliator is not binding on the disputants, who can refuse to implement the recommendations.¹⁶

Conciliation has been used to resolve disputes on questions of law, the relevant facts, or a combination of both. It can be utilized in the settlement of disputes that involve "non-arbitrable" or "non-justiciable" issues and is generally not hindered by jurisdictional challenges.¹⁷ Conciliation is used, even when there are relevant sources of law that can be applied, because the disputants may wish to soften the impact of the legal principles concerned by implementing a conciliatory approach that focuses on reaching an equitable solution. Conciliators are given flexibility in the pursuit of a just result and, although certain laws and sources of obligation cannot be disregarded, extant conciliation rules reflect this relative freedom.¹⁸

Although conciliation has been used in some domestic societies for hundreds of years, on the international level it appeared in the early part of this century, evolving out of both

16. J. COT, *supra* note 15, at 9-10.

17. I. DORE, *ARBITRATION AND CONCILIATION UNDER THE UNCITRAL RULES: A TEXTUAL ANALYSIS* 7-8 (1986); see *Report of the Secretary-General: Commentary on the Revised Draft UNCITRAL Conciliation Rules*, U.N. Doc. A/CN.9/180 [hereinafter U.N. Doc. A/CN.9/180].

18. See U.N. Doc. A/CN.9/180, *supra* note 17; see also UNCITRAL Conciliation Rules, Report of 13th Session, 35 U.N. GAOR Supp. (No. 17) at 12, U.N. Doc. A/34/17 (1980), art. 7(2), G.A. Res. 35/52, 35 U.N. GAOR Supp. (No. 48) at 260, U.N. Doc. A/35/48 (1980) [hereinafter UNCITRAL Conciliation Rules]; International Chamber of Commerce, *Rules of Conciliation and Arbitration*, art. 5, ICC Pub. No. 447 (1988), reprinted in 28 I.L.M. 231, 235 (1989) [hereinafter ICC Conciliation Rules].

the inquiry and mediation processes.¹⁹ Further, in the early years of its use, conciliation was implemented together with inquiry as a two-step procedure where, initially, the facts involved in the dispute were ascertained, followed by a reconciliation phase.²⁰ As the practice of conciliation was refined, the two concepts merged so that it can be derived from the general definition of conciliation that, in an examination of the entire dispute, an elucidation of the facts by the conciliator is an integral element of the process.²¹

As noted, the concept of conciliation stemmed from and resembles mediation, with both methods using a third party to facilitate a non-binding result through the medium of communication with the disputants. Indeed, the two terms are occasionally used interchangeably. In the transnational system, a distinction between the two can be made in the degree of formality and level of initiative imposed on the third party. A mediation is more informal and the mediator, when making proposals, is expected to construct them based purely on the information provided by the parties. Comparatively, a conciliation is more formal in structure and procedure, yet retains a non-adversarial environment. The central objective of the conciliator is to facilitate an amicable settlement of the conflict by communicating with the parties, typically through structured conciliation proceedings, and by submitting written proposals for a resolution of the dispute. When conciliation is resorted to in name, however, the actual process that is utilized may be sometimes more akin to mediation than to conciliation as defined above.²² In reality, as the use of the conciliation process throughout the transnational system is surveyed, it is evident that variations on the theme of conciliation flourish.

Resort to conciliation can be accomplished in two ways.

19. See, e.g., Hertmann, *Conciliation as a New Method of Dispute Settlement*, in *NEW TRENDS IN THE DEVELOPMENT OF INTERNATIONAL COMMERCIAL ARBITRATION AND THE ROLE OF ARBITRAL AND OTHER INSTITUTIONS* 145 (P. Sanders ed. 1983) (e.g. China and Japan); Marasinghe, *The Use of Conciliation For Dispute Settlement—The Sri Lanka Experience*, 29 *INT'L & COMP. L.Q.* 389 (1980); N. BAR-YAACOV, *supra* note 12, at 198 (discussing principle in international terms).

20. N. BAR-YAACOV, *supra* note 12, at 198-211.

21. *Id.* at 241-46.

22. *Report of the Secretary-General: Conciliation of International Trade Disputes*, U.N. Doc. A/CN.9/167; see *supra* note 15 and accompanying text (discussing differing nature of conciliation on domestic level).

The parties can insert a conciliation clause into a treaty or contract; thus, any future conciliation would address disputes arising out of that particular relationship. Alternatively, the parties may consent to a discrete conciliation agreement which will usually address a specific dispute that has arisen.

The concept of party autonomy governs the constitution of each conciliation. By their agreement, the parties can determine the entire personality of the conciliation process: the number and identity of the conciliators, the extent of conciliator duties, and all aspects of the procedure. For conciliations involving international business disputes, the parties can avoid the uncertainties involved in designing their own rules by agreeing that the process will be governed by institutional rules—such as the International Chamber of Commerce Conciliation Rules²³ or the United Nations Commission on International Trade Law (UNCITRAL) Conciliation Rules.²⁴

In essence, the conciliation process commences with the appointment of the conciliator (or commission). The conciliator will decide upon the format of the conciliation process, acting in accordance with any rules that the parties have agreed upon. Investigation into the facts and the law will be undertaken by the conciliator, and both written and oral submissions from the parties' agents will usually be presented. The conciliator may attempt to facilitate an amicable settlement during the process and, in any event, will be clarifying the parties' positions and eliciting indications of their inclination to reach a settlement. Ultimately, the conciliator will record his recommendations in a report that will be provided to the disputants.²⁵ A common practice, due to the non-binding nature of the proposals, is to give the report to the disputants for a period of time within which they must decide whether they can accept the recommendations or not.²⁶ If the disputants agree to accept the recommendations, the conciliator will draft a document, often referred to as the *procès-verbal*, which indicates that the conciliation has been successful and outlines the terms of the agreement.²⁷ Alternatively, if either party rejects the

23. ICC Conciliation Rules, *supra* note 18.

24. UNCITRAL Conciliation Rules, *supra* note 18.

25. J. COT, *supra* note 15, at 59.

26. J. MERRILLS, *supra* note 5, at 64.

27. *Id.*

recommendations, the document will record the fact that the parties could not accept the proposals, with the conciliation dissolving at this point. If institutional rules are used, they may refine or embellish the basic structure of the conciliation process.

In contrast to judicial settlement, the entire procedure and written record of the conciliation remains confidential unless the parties agree otherwise. Invariably, it will be agreed that all proposals and other statements made during the conciliation cannot be used in any subsequent phase of the dispute settlement process, but occasionally this can be departed from upon the consent of the parties.²⁸

The cardinal feature of conciliation is the non-binding character of the conciliator's recommendations. The actual recommendations are not binding on the disputants because they are ultimately free to accept or reject the recommendations. However, if a settlement agreement is made between the parties based on these proposals, this agreement in and of itself is binding.²⁹

Realistically, it is likely that disputants will determine that conciliation is not a viable mode of dispute settlement when they consider that their positions are so polarized and antagonistic that any concession is impossible. Also, if the parties wish to have their legal rights conclusively determined, then arbitration or judicial settlement would be the more appropriate alternatives. The engagement of the parties in the entire process is possible only if they are willing to move from their initial positions towards a mutually acceptable solution, thereby increasing the likelihood that the conciliator's recommendations will be implemented. Regular dialogue between the conciliator and the parties will generate even greater confidence in both the third party and the process.

The generous freedom of action residing with the disputants is also reflected in the initiation and conduct of the conciliation process. Typically, resort to conciliation is structured

28. J. COT, *supra* note 15, at 161-62; ICC Conciliation Rules, *supra* note 18, art. 11; UNCITRAL Conciliation Rules, *supra* note 18, art. 20.

29. U.N. Doc. A/CN.9/180, *supra* note 17, ¶ 6; UNCITRAL Conciliation Rules, *supra* note 18, art. 13(3); ICC Conciliation Rules, *supra* note 18, art. 7(a). The parties may include an arbitration clause in the settlement agreement in the event of a dispute over its enforcement.

as an optional procedure. Either disputant is generally able to refuse to conciliate or can withdraw from the process even if a conciliation clause or agreement exists.³⁰ Thus, it is clear that the continued willingness of the disputants to participate in the conciliation procedure is essential for its ultimate completion. Due to its character, conciliation is not always the sole vehicle used to resolve a particular dispute. The proceedings may break down or the conciliator's recommendations may be rejected. Consequently, another phase for settlement of the conflict is usually agreed upon, such as arbitration, to follow if the conciliation attempt fails.

III. THE USE OF CONCILIATION AS A MECHANISM FOR THE RESOLUTION OF INTERNATIONAL ECONOMIC AND BUSINESS DISPUTES

The transnational system abounds with variations on conciliation as a method for the settlement of disputes arising out of international economic and business relationships. In the inter-state economic sphere, conciliation has been adopted for use in resolving disputes between contracting parties within an international organization or multilateral treaty framework. Conciliation has also been inserted in bilateral agreements, in particular those relating to trade or investment by one party in the territory of the other. On the national level, conciliation has been incorporated into domestic statutes regulating international commercial dispute settlement. Finally, in the private sector, parties entering into international business contracts can draft conciliation clauses into their agreements, utilizing institutional conciliation rules if desired. Whether the framework is a multilateral or bilateral treaty, domestic statute or private ordering, conciliation usually serves as a preliminary or intermediate step in a layered dispute resolution structure.

In the international economic sphere, conciliation is either structured according to its traditional format, as discussed above, or particular aspects of the concept are used. Moreover, conciliation is infrequently activated when a dispute does arise, its availability notwithstanding.³¹ With some exceptions

30. I. DORE, *supra* note 17, at 6; see J. COT, *supra* note 15, at 102-03. The ICC and UNCITRAL Conciliation Rules reflect this freedom.

31. This situation is paralleled in the general inter-state system. See J. COT, *supra*

found in the realm of international trade, disputants appear to prefer adjudicative, binding methods of dispute resolution. However, there is some contemporary support for greater use of conciliation and other non-binding forms of settlement.³² This Article does not attempt to provide an exhaustive survey of the use of conciliation; rather, it will track the conciliation paradigm across the spectrum of transnational law to illustrate the diversity of its application.

A. *Conciliation as a Method for the Settlement of Disputes Arising Out of Participation in an International Organization or a Multilateral or Bilateral Treaty Regulating International Economic Relations*

1. The General Agreement on Tariffs and Trade (GATT), the Tokyo Round Codes, and the Uruguay Round of Multilateral Trade Negotiations

The General Agreement on Tariffs and Trade (the "GATT" or the "Agreement"),³³ as supplemented by the trea-

note 15, at 63-88; J. MERRILLS, *supra* note 5, at 53-59; Mangoldt, *Arbitration and Conciliation*, in *JUDICIAL SETTLEMENT OF INTERNATIONAL DISPUTES* 417, 432-87 (Max Planck Institute 1974). In contrast to the inter-war years, in the post-World War II period there has been a lack of interest in the procedure on a bilateral basis, the Jan Mayen conciliation being a notable exception. See Report and Recommendations to the Governments of Iceland and Norway of the Conciliation Commission on the Continental Shelf Area Between Iceland and Jan Mayen Island, *reprinted in* 20 I.L.M. 797 (1981); Agreement on the Continental Shelf (Iceland-Norway), October 22, 1981, *reprinted in* 21 I.L.M. 1222 (1982). Although there has been some interest in the use of conciliation as a means for the settlement of conflict arising out of a multilateral treaty relationship, it is not being implemented. See, e.g., Optional Protocol to the Vienna Convention on Diplomatic Relations Concerning the Compulsory Settlement of Disputes, Apr. 24, 1964, art. 3, 23 U.S.T. 3374, T.I.A.S. No. 7502, 500 U.N.T.S. 241; Vienna Convention on the Law of Treaties, May 22, 1969, art. 66 and Annex, U.N. Doc. A/CONF. 39/27, 8 I.L.M. 679, 1155 U.N.T.S. 331; U.N. Convention on the Law of the Sea, Montego Bay, Dec. 10, 1982, arts. 284, 297-98, 21 I.L.M. 1261 (1983).

32. Bilder, *supra* note 14, at 498; Jarvin, *The Role of Conciliation, Contract Modification and Expert Appraisal in Settling International Commercial Disputes*, 4 INT'L TAX & BUS. LAW. 238, 240 (1986); see U.N. Doc. A/CN.9/180, *supra* note 17; *infra* note 124 and accompanying text.

33. General Agreement on Tariffs and Trade (GATT), *opened for signature*, Oct. 30, 1947, 61 Stat. pts. 5 & 6, T.I.A.S. No. 1700, 55 U.N.T.S. 187. See generally J. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* (1989) [hereinafter J. JACKSON, *WORLD TRADING SYSTEM*]; *THE NEW GATT ROUND OF MULTILATERAL TRADE NEGOTIATIONS: LEGAL AND ECONOMIC PROBLEMS* (E.-U. Petersmann & M. Hilf eds. 1988) [hereinafter *NEW GATT ROUND*]; O. LONG, *LAW AND ITS LIMITATIONS IN THE GATT MULTILATERAL TRADE SYSTEM*

ties known as the Tokyo Round Codes,³⁴ constitutes the international legal framework of the multilateral trade system. Directed at the liberalization of international trade, the GATT contains a dispute settlement mechanism that has evolved considerably. Articles XXII and XXIII of the GATT are the central provisions, elaborated upon in the 1979 Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance (the "1979 Understanding"),³⁵ and the 1982 Ministerial Declaration on Dispute Settlement (the "1982 Ministerial Declaration"),³⁶ and refined in the Uruguay Round 1989 Provisional Decision on Improvements to the GATT Dispute Settlement Rules and Procedures.³⁷

Article XXII provides for consultations with respect to any matter affecting the operation of the Agreement. The article XXIII procedure can be activated by a contracting party when it considers that any benefit accruing to it directly or indirectly under the Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded. Again, pursuant to article XXIII:1, the disputants must enter into consultations. Only if the matter cannot be resolved at this stage can the parties refer the matter to the contracting

(1987); K. DAM, *THE GATT: LAW AND INTERNATIONAL ECONOMIC ORGANIZATION* (1970); J. JACKSON, *WORLD TRADE AND THE LAW OF GATT* (1969); U.S. International Trade Commission, *Review of the Effectiveness of Trade Dispute Settlement Under the GATT and the Tokyo Round Agreements*, USITC Publication 1793 (1985) [hereinafter ITC Review].

34. See Protocol Amending the Agreement on Government Procurement, 34S B.I.S.D. 12 (1988) [hereinafter Government Procurement Code]; Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade, 26S B.I.S.D. 56 (1980) [hereinafter Subsidies Code]; Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, 26S B.I.S.D. 171 (1980) [hereinafter Antidumping Code]; Agreement on Government Procurement, 26S B.I.S.D. 33 (1980); Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade, 26S B.I.S.D. 116 (1980) [hereinafter Customs Valuation Code]; Agreement on Technical Barriers to Trade, 26S B.I.S.D. 8 (1980) [hereinafter Standards Code]; Agreement on Import Licensing Procedures, 26S B.I.S.D. 154 (1980); Agreement on Trade in Civil Aircraft, 26S B.I.S.D. 162 (1980); International Dairy Arrangement, 26S B.I.S.D. 91 (1980); Arrangement Regarding Bovine Meat, 26S B.I.S.D. 84 (1980).

35. Adopted on Nov. 28, 1979, 26S B.I.S.D. 210 (1980) [hereinafter 1979 Understanding].

36. GATT, 29S B.I.S.D. 13 (1982) [hereinafter 1982 Ministerial Declaration].

37. MTN.TNC/11 at 24-31 (Apr. 21, 1989), *reprinted in* 1 no. 4 W.T.M. 5 (1989) [hereinafter Uruguay Round Provisional Decision]. It will be applied on a trial basis from May 1, 1989 to the end of the Uruguay Round. *Id.* at 24.

parties under article XXIII:2.³⁸

Article XXIII:2 provides that the contracting parties shall promptly investigate any matter referred to them and shall make appropriate recommendations to the relevant contracting parties or give a ruling on the matter. A structured dispute settlement process has developed through GATT practice. A hybrid of conciliation and good offices is an optional procedure for use at an early stage in the process. Paragraph 8 of the 1979 Understanding states that "[i]f a dispute is not resolved through consultations the contracting parties concerned may request an appropriate body or individual to use their good offices with a view to the conciliation of the outstanding differences between the parties."³⁹ The 1982 Ministerial Declaration elaborated on the conciliatory aspect of paragraph 8 of the 1979 Understanding by adding elements of the classic conciliation procedure.⁴⁰

The Uruguay Round Provisional Decision (the "Provisional Decision") considerably expands the use of good offices, conciliation, and mediation by disputing parties, providing detailed rules for their use.⁴¹ The Provisional Decision stipulates

38. "Contracting Parties" connotes the GATT parties acting jointly pursuant to their GATT decision-making powers, whereas "contracting party/parties" refers to GATT parties acting individually. The Contracting Parties have delegated most of their powers to the Council of Representatives.

39. See *supra* note 35 and accompanying text (discussing 1979 Understanding).

40. See 1982 Ministerial Declaration, *supra* note 36, at 14. The GATT Director-General or nominee shall conduct the conciliation and the proceedings shall be confidential and without prejudice to other article XXIII proceedings. See GATT, 14S B.I.S.D. 18 (1966) (decision of Apr. 5, 1966) (discussing conciliation procedures for disputes between contracting parties from developed and lesser-developed countries).

41. Uruguay Round Provisional Decision, *supra* note 37, at 26. The decision, in relevant part, states that:

1. Good offices, conciliation and mediation are procedures that are undertaken voluntarily if the parties to the dispute so agree. They may be requested at any time by any party to a dispute. They may begin at any time and be terminated at any time. Once terminated, the complaining party can then proceed with a request for the establishment of a panel or a working party under Article XXIII:2
2. If the parties to a dispute agree, procedures for good offices, conciliation or mediation may continue while the panel or working party process proceeds.
3. The Director-General may, acting in an *ex officio* capacity, offer his good offices, conciliation or mediation with a view to assisting contracting parties to settle a dispute.

that with party agreement these processes can be started "at any time" and can, if the parties further agree, continue while the panel (or working party) phase proceeds.⁴²

If the dispute continues despite consultations and any specific resort to conciliation, the parties may request the establishment of a panel

to examine, in the light of the relevant GATT provisions, the matter referred to the CONTRACTING PARTIES . . . and to make such findings as will assist the CONTRACTING PARTIES in making the recommendations or in giving the rulings provided for in Article XXIII:2.⁴³

The constitution and powers of the panel are similar to those of a conciliatory body: the panel cannot be composed of persons who are nationals of the disputing parties and the members must act in their personal capacities. Panels have been given the authority to formulate draft recommendations addressed to the disputing parties.⁴⁴ Even at the point when the final panel report is completed, a further attempt is made to conciliate a settlement through the private submission of the report to the parties.⁴⁵ The panel report has no legal status until it is adopted by the contracting parties, acting through the GATT Council of Representatives (the "Council") which operates by consensus.⁴⁶ Further, the disputing parties will be represented on the Council and are permitted to participate in the adoption process, which permits a disputant to block the adoption of the report if it desires to do so.⁴⁷ An analysis of

Id.

42. *Id.* ¶¶ 1 & 2.

43. *Id.* at 27, ¶ 1. Although a working party alternative is available, it will not be discussed further as the panel procedure has become the favoured mechanism.

44. 1979 Understanding, *supra* note 35, ¶¶ 11 & 17, annex, ¶¶ 6(iii) & (viii). There has been debate in the literature on the nature of the panel process. See, e.g., Hilf, *Settlement of Disputes in International Economic Organizations: Comparative Analysis and Proposals for Strengthening the GATT Dispute Settlement Procedures*, in NEW GATT ROUND, *supra* note 33, at 304-05 ("GATT panel procedures may be best compared to procedures of conciliation"). But see Petersmann, *Strengthening the GATT Dispute Settlement System: On The Use of Arbitration in GATT*, in NEW GATT ROUND, *supra* note 33, at 335; McGovern, *Dispute Settlement in the GATT—Adjudication or Negotiation?*, in THE EUROPEAN COMMUNITY AND GATT 73 (M. Hilf, F. Jacobs & E.-U. Petersmann eds. 1986).

45. 1979 Understanding, *supra* note 35, ¶ 18.

46. 1982 Ministerial Declaration, *supra* note 36, at ¶¶ (vii) & (x); Uruguay Round Provisional Decision, *supra* note 37, at 30.

47. 1982 Ministerial Declaration, *supra* note 36, art. (x), at 15-16; Uruguay Round Provisional Decision, *supra* note 37, at 30.

the history of GATT dispute resolution has found that, although many disputes are settled through diplomatic means before the panel stage, more than half of the complaints lodged in forty years of GATT activity resulted in the submission of a panel report.⁴⁸ Most of the panel reports put before the Council have been adopted; however, delay has been a particular problem.⁴⁹

The GATT dispute settlement mechanism incorporates variants of conciliation throughout the process.⁵⁰ Conciliation may be used in its more classic sense, albeit informally, at the early stages of the dispute resolution stream. With the formulation of the specific conciliation provisions in the Provisional Decision, the inclination to attempt conciliation at this phase will be promoted and heighten the potential for early settlement of the conflict. The panel-Council procedure can be described as being similar to conciliation in some aspects, although the conciliatory elements are attenuated. The panel will usually make recommendations to solve the dispute which will only be adopted by the Council if there is a consensus in favour thereof. Even if the report is adopted, pursuant to article XXIII:2 the final outcome may be technically only recommendatory in nature if a ruling is not given.⁵¹

48. GATT, 46 *Focus* 2 (1987). A GATT survey covering 1948-1986 found that of the approximately one hundred complaints lodged under article XXIII:2, fifty-two led to the submission of a panel report whereas the remainder were settled prior to this stage. Of the fifty-two reports, fifty were adopted or led to mutually satisfactory solutions together with a withdrawal of the complaint. In only two disputes were the reports unsuccessful in attaining dispute resolution. *Id.*

49. *Id.*; see Davey, *Dispute Settlement in GATT*, 11 *FORDHAM INT'L L.J.* 51, 83-85 (1987).

50. See O. LONG, *supra* note 33, at 73, 76, 86-88; Graham, *A Review of Considerations Relating to Dispute Resolution Mechanisms and Trade in Services*, in *THE INTERNATIONAL BUSINESS AND TRADE LAW PROGRAMME OF THE ONTARIO CENTRE FOR INTERNATIONAL BUSINESS*, WORKING PAPER No. 3, 7, 12-13 (1988-89).

51. Cf. Jackson, *Dispute Settlement Techniques Between Nations Concerning Economic Relations—With Emphasis on GATT*, in *RESOLVING TRANSNATIONAL DISPUTES THROUGH INTERNATIONAL ARBITRATION* 39, 50 n.29 (T. Carbonneau ed. 1984). Professor Jackson stated that

[n]either Article XXIII of GATT . . . nor the Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance . . . explicitly requires a party to a dispute to abide by the results of a panel report, even when the panel report is adopted by the GATT Contracting Parties. Article XXV of GATT . . . does authorize the Contracting Parties to take "joint action" as required under the GATT, or otherwise "with a view to facilitating the operation and furthering the objectives of [the GATT]." It could be

However, various elements of the GATT panel procedure diverge from the conciliation model when compared to Mr. Cot's identified characteristics of the conciliation process. A GATT panel also exhibits certain features of an adjudicative body. Although a panel does have the confidence of the disputants, the procedure followed differs in some aspects from the classic conciliation process. The panel does examine the entire dispute, but this exercise extends only to the facts and the applicable law and does not include the non-judicial elements. Furthermore, the reports of the panel are virtually always based on GATT treaty law and earlier panel reports which have interpreted GATT provisions. Moreover, although the report is technically non-binding, the contracting parties concerned rarely reject panel findings. Ultimately, article XXIII:2 departs from the consensual approach. The article permits Contracting Parties indirectly to enforce the recommendation by authorizing the prejudiced party to suspend the application of GATT concessions made to the other party. This sanction has only been authorized once, however, which is indicative of both the perceived detrimental consequences of trade retaliation and the effect of the layered dispute resolution system, which contains a number of opportunities for settlement of the conflict.⁵²

The conciliatory approach to settling disputes has been continued in the treaties concluded at the end of the GATT Tokyo Round of multilateral trade negotiations (the "Tokyo Round Codes"), which elaborate on specific aspects of the GATT obligations.⁵³ Many of these agreements create dispute resolution frameworks that are independent of the article XXIII process. In particular, the Subsidies Code and the Antidumping Code (the "Codes") contain mechanisms that incorporate a conciliatory stage as part of the settlement process. Typically, if consultations between the disputing parties are

argued that this language is broad enough to embrace the concept that panel reports adopted by the GATT Contracting Parties should be deemed binding on the parties to the dispute.

Id.; see Jackson, *Strengthening The International Legal Framework of the GATT-MTN System: Reform Proposals for the New GATT Round*, in *NEW GATT ROUND*, *supra* note 33, at 14.

52. GATT, 1S B.I.S.D. 32 (1953); K. DAM, *supra* note 33, at 364. *But see* Davey, *supra* note 49, at 99-100 (stating that retaliation has occurred without authorization and *de hors* formal GATT dispute settlement system).

53. *See supra* note 34 and accompanying text (discussing various trade codes).

unproductive, the Codes provide for conciliation of the dispute conducted by the Committee constituted under the particular agreement, followed, if necessary and requested by a party, by panel proceedings. Generally, the panel will issue its report to the GATT Code Committee (the "Committee") which, in turn, will produce the findings, recommendations, or rulings that it thinks necessary to determine the dispute.⁵⁴ Again, some aspects of conciliation are apparent in the panel-Committee procedure which is followed by a putative, institutional enforcement mechanism as the final step.

The attitudes of contracting parties to the GATT system can be classified as being either "legalistic"/"rule-oriented" or "nonlegalistic"/"power-oriented". In the second camp, some contracting parties prefer the flexible, diplomatic approach to the enforcement of GATT obligations as the most appropriate means for the maintenance of international trade equilibrium, whereas the legalists call for greater application of the rule of law.⁵⁵ Despite the increased reliance in GATT on legalistic approaches, Professor Castel concludes that diplomatic characteristics in general and the conciliatory aspect in particular are still predominant in the dispute settlement framework:

Today, in spite of the progressive codification of the basic procedures for the settlement of disputes by third party adjudication, consultations and conciliation leading to an amicable settlement through diplomatic negotiations are still preferred by the contracting parties. Thus, the major characteristic of the GATT system of settlement of disputes is the conciliatory character of the procedures. The objective is to redress the contractual balance of rights and obligations between the disputants in particular and among the

54. Subsidies Code, *supra* note 34, arts. 13, 17 & 18; see Antidumping Code, *supra* note 34, arts. 14 & 15. The Customs Valuation Code, the Standards Code, and the Government Procurement Code, do not specifically authorize the use of conciliation. Instead, if consultations are ineffective, they instruct the Code Committee "to investigate the matter, with a view to facilitating a mutually satisfactory solution," a mediatory approach. The Codes provide for further recourse to panel or technical expert group/panel proceedings.

55. See Phan van Phi, *A European View of the GATT*, 14 I.B.L. 150, 151 (1986). The EC is the main advocate of the diplomatic approach. *But see* J. JACKSON, *WORLD TRADING SYSTEM*, *supra* note 33, at 109-15 (advocating reliance on and strengthening of legalist aspects of GATT settlement regime); *see also* Davey, *supra* note 49, at 53; ITC Review, *supra* note 33.

contracting parties in general.⁵⁶

In this vein, the GATT adaptation of conciliation is a continuing manifestation of the nonlegalist attitude—the attempt to obtain the amicable resolution of disputes between contracting parties, thereby maintaining the viability of the treaty relationship—a pragmatic response to the limitations of the strict application of law in the international trade system.

2. Free Trade Agreements

Article XXIV of the GATT permits the creation of free trade agreements (“FTAs”) in which members eliminate tariffs and certain other trade barriers on goods crossing the intra-FTA borders while retaining their independent legal regimes for goods moving to and from other states. Numerous free trade agreements have been created by GATT contracting parties, and an examination of selected agreements demonstrates that their dispute resolution provisions usually include variations of conciliation. Diverging from the norm, however, FTA conciliatory bodies are not completely neutral, as they usually include representatives from the FTA member states.

The European Free Trade Association (the “EFTA”)⁵⁷ relies on the conciliatory approach for the settlement of disputes arising out of its operation, as found in articles 31 and 33 of the EFTA Convention. Article 31(1) permits any member state to refer a dispute to the EFTA Council which, on majority vote, will examine the matter. The Council may refer the dispute to an examining committee. Moreover, the Council is required to consider the report of the committee to determine whether any benefit conferred by the EFTA Convention or any EFTA objective is or may be frustrated.⁵⁸ Based on this review, the EFTA Council “may, by majority vote, make to any

56. Castel, *The Uruguay Round and the Improvements to the GATT Dispute Settlement Rules and Procedures*, 38 I.C.L.Q. 834, 838-39 (1989); see O. LONG, *supra* note 33, at 73, 76; J. JACKSON, *WORLD TRADING SYSTEM*, *supra* note 33, at 98 (detailing increased emphasis on legalistic attitude in continuing amendments to dispute settlement procedure).

57. Currently, the countries that are Contracting Parties are: Austria, Finland, Iceland, Norway, Sweden, and Switzerland. Convention Establishing the European Free Trade Association, Jan. 4, 1960, 370 U.N.T.S. 3 [hereinafter EFTA Convention]. See generally J. LAMBRINIDIS, *THE STRUCTURE, FUNCTION, AND LAW OF A FREE TRADE AREA* (1965).

58. EFTA Convention, *supra* note 57, art. 31(3).

Member State such recommendations as it considers appropriate."⁵⁹ The EFTA Convention procedure roughly parallels the GATT at the final stage, since the EFTA Council can authorize any member state to suspend the application of obligations under the EFTA Convention against the state that does not comply with a recommendation *if* the EFTA Council, by majority decision, finds that a Convention obligation has not been fulfilled.⁶⁰ So, similar to GATT article XXIII, the EFTA Council recommendation, although definitionally non-binding, can be ultimately enforced by means of the threat of a sanctioning decision if there has been a breach of the EFTA Convention.⁶¹

There are also free trade agreements in place between individual EFTA states and the European Economic Community (the "EC" or the "Community"), each of which establish a Joint Committee responsible for the administration and proper implementation of the agreement.⁶² Each agreement contains the same dispute resolution structure wherein the Joint Committee, composed of representatives of both the Community and the particular EFTA state, is empowered to make recommendations or take decisions in the settlement of the disputes

59. *Id.*

60. *Id.* art. 31(4).

61. See J. LAMBRINIDIS, *supra* note 57, at 219-20. Mr. Lambrinidis draws a distinction between the GATT and the EFTA Convention at this stage, stating that

GATT provides for similar measures, that is suspension of concessions (Article XXIII) even in the absence of a breach of treaty. In EFTA, the line between the two cases is clearly drawn. In cases where a breach of treaty has not been established, the most that the Council can do is to issue Recommendations.

Id.

62. Agreement Between the European Economic Community and the Republic of Austria, July 22, 1972, reprinted in ENCYCLOPEDIA OF EUROPEAN COMMUNITY LAW vol. B II, B12369, arts. 27, 29 & 30 (K.R. Simmonds ed. looseleaf 1973) [hereinafter ENCYCLOPEDIA II]; Agreement Between the European Economic Community and the Kingdom of Sweden, July 22, 1972, ENCYCLOPEDIA II, *supra*, at B12401, arts. 27, 29 & 30; Agreement Between the European Economic Community and the Swiss Confederation, July 22, 1972, ENCYCLOPEDIA II, *supra*, at B12430, arts. 27, 29 & 30; Agreement Between the European Economic Community and the Republic of Iceland, July 22, 1972, reprinted in ENCYCLOPEDIA OF EUROPEAN COMMUNITY LAW Vol. B III, B12462, arts. 28, 30 & 31 (K.R. Simmonds ed. looseleaf 1973) [hereinafter ENCYCLOPEDIA III]; Agreement Between the European Economic Community and the Kingdom of Norway, May 14, 1973, ENCYCLOPEDIA III, *supra*, at B12474, arts. 27, 29 & 30; Agreement Between the European Economic Community and the Republic of Finland, Oct. 5, 1973, ENCYCLOPEDIA III, *supra*, at B12474, arts. 27, 29 & 30.

specified in the particular treaty.⁶³

The 1984 U.S.-Israel Free Trade Agreement⁶⁴ is an example of state reliance on purely non-binding forms of dispute resolution, primarily conciliation in this instance, for conflicts arising out of the treaty relationship. Article 19 contains the dispute resolution process: the first phase involves consultations between the parties and, if unsuccessful, the second stage permits either party to refer the matter to a Joint Committee that is instructed to endeavour to resolve the dispute.⁶⁵ If the conflict is not resolved by this method within the stated time period, article 19(1)(d) allows either party to refer the matter to a conciliation panel composed of three members. The conciliation procedure follows the classical model, with the panel attempting to solve the dispute through party agreement during the process and, if unsuccessful, presenting to the parties a report that is non-binding and contains, *inter alia*, findings of fact and a proposal on the settlement of the dispute.⁶⁶ The informal, diplomatic nature of the process is illustrated by the fact that the report is not passed back to the Joint Committee for further action. Instead, individual action is envisaged because, after the conciliation panel has presented its report to the parties, article 19(2) permits the affected party to take any appropriate measure. The conciliatory process can therefore be followed by authorized unilateral action taken to realize the panel proposals—an outcome that departs from the consensual nature of conciliation.

It is apparent that the dispute resolution structures in the free trade agreements are founded on the attitude that the political/diplomatic forms of settlement are often more appropriate than the adjudicative approach for maintaining interna-

63. *Id.*

64. United States-Israel Free Trade Agreement, reprinted in 24 I.L.M. 653 (1985) [hereinafter U.S.-Israel F.T.A.]. See generally James, *The Agreement on Establishment of a Free Trade Area Between the Government of the United States of America and the Government of Israel: Background and Analysis*, in THE LEGAL FRAMEWORK FOR CANADA-UNITED STATES TRADE 121 (M. Irish & E. Carasco eds. 1987). But see The Australia-New Zealand Closer Economic Relations-Trade Agreement, Mar. 28, 1983, art. 22, 1983 N.Z.T.S. No. 1, reprinted in 22 I.L.M. 945 (1983) [hereinafter Australia-New Zealand Agreement] (providing only inter-governmental consultations to facilitate dispute resolution).

65. U.S.-Israel F.T.A., *supra* note 64, arts. 17, 19(1)(b) & (c) (Joint Committee composed of representatives of parties).

66. *Id.* art. 19(1)(e).

tional free trade relationships, notwithstanding that the interests of the contracting parties are likely to be more similar than is the case with the global membership of the GATT system. Thus, although these agreements exhibit both the diplomatic and the adjudicative approaches to dispute resolution, the diplomatic chord dominates.

More recently, the Canada-United States Free-Trade Agreement (the "Canada-U.S. FTA")⁶⁷ exhibits a dispute resolution framework that incorporates legalistic aspects to a greater and more sophisticated degree compared to the earlier FTA models. The Canada-U.S. FTA framework has also been considered to be more legalistic in structure than its GATT relation.⁶⁸ However, analyses of chapters 18 and 19, the principal dispute settlement mechanisms in the Canada-U.S. FTA, recognize that the diplomatic modes of conflict resolution still play a leading role.⁶⁹

Chapter 19 of the Canada-U.S. FTA is the exception, structured as a fully adjudicative model.⁷⁰ It contains a procedure for binational panel review of the final antidumping and countervailing duty determinations of both states, replacing domestic judicial review.⁷¹ The panel decision is binding on the parties and cannot be subjected to judicial appeal in the domestic courts of either party.⁷²

Chapter 18, on the other hand, is the general dispute set-

67. The United States-Canada Free Trade Agreement, *entered into force*, Jan. 2, 1988, *reprinted in* 27 I.L.M. 281 (1988) [hereinafter Canada-U.S. FTA].

68. *See, e.g.*, Horlick, Oliver and Steger, *Dispute Resolution Mechanisms*, in *THE CANADA-UNITED STATES FREE TRADE AGREEMENT: THE GLOBAL IMPACT* 65, 73-75 (J. Schott & M. Smith eds. 1988); Davey, *Dispute Settlement Under the Canada-U.S. Free Trade Agreement*, in *TRADE-OFFS ON FREE TRADE: THE CANADA-U.S. FREE TRADE AGREEMENT* 173 (M. Gold & D. Leyton-Brown eds. 1988). However, the GATT Uruguay Round Provisional Decision has made some interim changes to the article XXIII procedure that are legalistic in character, such as putting time limits on the process and creating a binding arbitration procedure as an alternative to the panel. GATT Uruguay Round Provisional Decision, *supra* note 37.

69. *See* McDorman, *The Dispute Settlement Regime of the Free Trade Agreement*, 2 R.I.B.L. 303 (1988); Ferguson, *Dispute Settlement Under the Canada-United States Free Trade Agreement*, 47 U. OF T. FAC. OF LAW REV. 317 (1989).

70. McDorman, *supra* note 69, at 323.

71. Canada-U.S. FTA, *supra* note 67, arts. 1904(1) & (3).

72. *Id.* arts. 1904(9) & (11). Article 1904(13) and Annex 1904.13 do provide for an extraordinary challenge procedure to contest the panel decision on grounds of, *inter alia*, panel member conflict of interest and exceeding jurisdiction. *Id.* art. 1904(13) & annex 1904.13.

tlement mechanism for the Canada-U.S. FTA. It is very similar to the GATT article XXIII procedure, as it is also a multiphase system that relies both on diplomatic and adjudicative forms of conflict resolution with the nonlegalistic elements taking the predominant position. Further, the conciliation model, although it is not expressly referred to in Chapter 18, is actually utilized in the resolution machinery.⁷³

The Chapter 18 procedure is composed of escalating phases, starting with a notification requirement,⁷⁴ moving to a consultations stage,⁷⁵ and proceeding to a convening of the Canada-United States Trade Commission (the "Canada-U.S. Commission") at the request of either party if consultations are ineffective.⁷⁶ The Canada-U.S. Commission was created, *inter alia*, to assist in the resolution of disputes arising out of the Canada-U.S. FTA.⁷⁷ Composed of representatives of both parties, its principal members are the Canadian and U.S. cabinet-level ministers with the responsibility for international trade, and all its decisions are taken by consensus.⁷⁸ In effect, the Canada-U.S. Commission acts as a political mechanism for the settlement of Chapter 18 disputes. Article 1805(1) instructs the Canada-U.S. Commission to attempt to resolve disputes promptly. In an effort to reach a mutually satisfactory resolution, the Canada-U.S. Commission is empowered, pursuant to article 1805(2), to call on technical advisors or on the assistance of a mediator acceptable to both parties.

If the Canada-U.S. Commission is unable to achieve resolution of the dispute within thirty days after its referral under article 1805, then article 1806 instructs the Canada-U.S. Commission on the referral of disputes to binding arbitration. Disputes arising out of emergency actions taken under Chapter 11 of the Canada-U.S. FTA *shall* be referred to mandatory binding arbitration, and any other Chapter 18 dispute *may* be referred to binding arbitration by the Canada-U.S. Commission.⁷⁹ The alternative route for dispute settlement, if article 1806 arbitra-

73. See Ferguson, *supra* note 69, at 347.

74. Canada-U.S. FTA, *supra* note 67, art. 1803.

75. *Id.* art. 1804.

76. *Id.* art. 1805(1).

77. *Id.* arts. 1802(1), 1806 & 1807.

78. *Id.* arts. 1802(2) & (5).

79. *Id.* art. 1806(1)(a) & (b).

tion is not implemented, is the establishment upon the request of either party of a panel of experts to consider the matter.⁸⁰ The panel issues an initial and final report containing: findings of fact, a determination whether the measure at issue is inconsistent with FTA obligations or causes nullification and impairment, and recommendations, if any, for resolving the dispute.⁸¹ Article 1807(8) specifies that the Canada-U.S. Commission, upon receipt of the final panel report, shall agree on the resolution of the dispute "which normally shall conform with the recommendation of the panel."⁸² If the Canada-U.S. Commission cannot reach agreement within the stated time, article 1807(9) permits retaliation by the party who feels that its fundamental rights or benefits are or would be impaired by the maintenance of the measure.

This panel-Commission procedure is clearly conciliatory in tone and is closely reminiscent of the GATT article XXIII panel process. The Canada-U.S. FTA panel of experts, despite its U.S. and Canadian membership, is expected to act as an impartial third party, providing recommendations in an effort to resolve the conflict. The recommendations of the panel can only be accepted with the consent of the disputants. Here, disputant agreement is attempted through the medium of the Canada-U.S. Commission and, if unsuccessful, the ultimate remedy is authorized unilateral action. However, as with the GATT panel, the FTA panel of experts diverges from the classic conciliation body towards the adjudicative model. A panel of experts is unlikely to examine non-judicial aspects of the conflict, instead confining itself to the relevant facts and law. In addition, based on GATT and Canada-U.S. FTA panel experience, any recommendations of the FTA panel will be based on the applicable legal principles, although there is still room for creative recommendations within the confines of the governing treaty law. Returning to the conciliation paradigm, the FTA sends the dispute to the Canada-U.S. Commission for

80. *Id.* art. 1807(2). Each panel is composed of five members, at least two of whom shall be Canadian citizens and at least two of whom shall be U.S. citizens. However, the panelists are to be chosen strictly on the basis of, *inter alia*, objectivity and sound judgment and shall not be affiliated with or take instructions from either party. *Id.* art. 1807(1).

81. *Id.* arts. 1807(5) & (6).

82. *Id.* art. 1807(8).

agreement on its resolution, which normally shall, but impliedly does not have to, conform with the recommendations of the panel. It remains for future analysis whether the Canada-U.S. Commission's article 1807(8) agreements will consistently conform with the recommendations of each panel, thereby adopting an adjudicative approach to the process, or whether the agreements will occasionally differ from the panel recommendations, indicative of an approach that is more in harmony with the conciliation model. In effect, the panel of experts procedure in the Canada-U.S. FTA is a variant form of conciliation that is attenuated due to its position in a relatively complex conflict settlement structure.

The political influence in the panel of experts-Commission route has been illustrated in the first Chapter 18 dispute, *In The Matter of Canada's Landing Requirement For Pacific Coast Salmon and Herring*.⁸³ The Canada-U.S. Commission was unable to agree upon a resolution of the dispute within the time-line specified in article 1807(9) due to differing interpretations of the panel report submitted to it.⁸⁴ The parties agreed to extend the time for negotiation, and a compromise solution was reached in February 1990, the details of which only slightly depart from the panel's recommendations.⁸⁵ The resolution of the dispute demonstrates, at least in this particular case, that

83. *In The Matter of Canada's Landing Requirement For Pacific Coast Salmon and Herring*, Panel Final Report, October 16, 1989, CDA-89-1807-01; see *Lobsters From Canada*, Panel Final Report, May 25, 1990, USA-89-1807-01 [hereinafter Second Panel Report]. The second panel addressed the Canadian complaint that the amendment to the U.S. Magnuson Fishery Conservation and Management Act, prohibiting the sale or transport into or in the United States of undersized lobster, violated U.S. obligations under art. 407 of the Canada-U.S. FTA. Second Panel Report, *supra*, at 18, ¶ 4.1.1.1. The view of the panel as represented by the majority was that GATT article XI (treated as incorporated in the Canada-U.S. FTA article 407) was inapplicable. Second Panel Report, *supra*, at 40-71. Instead, the panel was of the opinion that the U.S. measures were covered by GATT article III. The panel declined to examine the consistency of the U.S. measure with article III on the grounds that their terms of reference did not permit such a consideration. Second Panel Report, *supra*, at 70-71, ¶ 7.22.2. The panel did not make any recommendations.

84. *The Free Trade Observer*, in FREE TRADE LAW REPORTER (CCH) 30 (Dec. 1989).

85. Government of Canada, *News Release No. 038*, February 22, 1990 (copy on file at the *Fordham International Law Journal* office). The agreement is slightly different from the panel recommendations on the percentage of the catch that should be directly exported without landing in Canada in order to satisfy the conservation of exhaustible natural resources justification for the landing restriction. The panel had suggested that ten to twenty percent should be directly exported, whereas the parties have agreed, with effect for four years, on twenty to twenty-five percent.

the conciliatory approach of the panel of experts-Commission procedure works, albeit not in the manner anticipated by the precise language of the Canada-U.S. FTA. However, the parties, in providing the Canada-U.S. Commission with the opportunity to disregard any recommendations made by a panel in accordance with the conciliation paradigm, have established a structure that will not guarantee certainty of results or dispute resolution within a specified period. In a particular situation there may be compromise, deadlock or disagreement, and any of these possibilities may also be encouraged by both the nature of the dispute and the content of the recommendations posed by the panel.

The emphasis on conciliation in the GATT and free trade agreements, treaties wherein states have strictly circumscribed the limitations on their sovereignty in the economic sphere, can be contrasted with the dispute settlement system employed by the European Community. As a supranational organization designed to build a common market and moving towards economic union, it has a multiplicity of sources of Community law.⁸⁶ The legalistic approach is ascendant in this treaty relationship wherein the member states have consented to be bound by Community law, including the power given to the Court of Justice of the European Communities (the "European Court of Justice") to ensure that the law is observed in the interpretation and application of EC law.⁸⁷

3. The Use of Conciliation in Other Trade-Related Treaties

Conciliation as a means for the avoidance or resolution of conflict arising out of a treaty relationship can be found in a variety of other trade-related agreements. These include the Organization for Economic Co-operation and Development (the "OECD")⁸⁸ and the United Nations Conference on Trade and Development ("UNCTAD"), where conciliation is used as a dispute avoidance technique.⁸⁹

86. See generally D. LASOK & J. BRIDGE, *LAW AND INSTITUTIONS OF THE EUROPEAN COMMUNITIES* (4th ed. 1987).

87. *Id.* at 135.

88. OECD, Revised Council Recommendation Concerning Co-operation Between Member Countries on Restrictive Business Practices Affecting International Trade, adopted on May 21, 1986, 25 I.L.M. 1629 (1986).

89. In the U.N. Conference on Trade and Development ("UNCTAD"), concilia-

4. International Organizations Governing Finance and Development

The international organizations in the international finance and development field make use of a variety of mechanisms for the settlement of internal disputes. Most of these organizations—the International Monetary Fund, the International Bank For Reconstruction and Development (the “World Bank”), the International Development Association, and the International Finance Corporation—do not use conciliation, relying instead on methods ranging from collaboration and consultation to arbitration.⁹⁰ Two of the World Bank group of international organizations, however, do include conciliation as a mechanism for the settlement of internal disputes: the Multilateral Investment Guarantee Agency (the “MIGA”)⁹¹ and the International Centre for Settlement of Investment Disputes (the “ICSID” or the “Centre”).⁹² In these organizations, conciliation takes its traditional form as a discrete alternative for the settlement of disputes arising out of a treaty relationship.

The MIGA was established to provide political risk guarantees for investors of state members who wish to invest in the developing state members. The creation of a dispute settle-

tion is incorporated as a preliminary step before voting occurs to avoid conflicting positions. G.A. Res. 1995 (XIX), Dec. 30, 1964, G.A. Res. 1995, 19 U.N. GAOR Supp. (No. 15), art. 25, U.N. Doc. A/5815. Article 25 provides for a “process of conciliation to take place before voting and to provide an adequate basis for the adoption of recommendations with regard to proposals of a specific nature for action substantially affecting the economic or financial interests of particular countries.” *Id.* art. 25.

90. Articles of Agreement of the International Monetary Fund, Dec. 27, 1945, as amended, 29 U.S.T. 2204; Articles of Agreement of the International Bank For Reconstruction and Development, 2 U.N.T.S. 134, [1944] Can. T.S. No. 37, at 47; International Finance Corporation, May 25, 1955, 264 U.N.T.S. 118; International Development Association, 439 U.N.T.S. 249. *But see* several conciliations dealing with international finance issues, Imperial Japanese Government 4% Loan of 1910 Issued in France - Methods of Resumption of Service, 29 I.L.R. 4 (1955); City of Tokyo 5% Loan of 1912 - Plan For Resumption of Payments and Interest on the French *Tranche* of the Loan, 29 I.L.R. 11 (1960).

91. Convention Establishing the Multilateral Investment Guarantee Agency, Oct. 11, 1985, reprinted in 24 I.L.M. 1598 (1985) [hereinafter MIGA Convention]; see I. SHIHATA, *MIGA AND FOREIGN INVESTMENT* (1988).

92. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 575 U.N.T.S. 159, 17 U.S.T. 1270 [hereinafter ICSID Convention].

ment structure to maintain harmonious relations between developed and developing state members was deemed essential. Beyond the provisions dealing with specific categories of disputes,⁹³ article 57 of the Convention Establishing the Multilateral Investment Guarantee Agency (the "MIGA Convention") covers disputes between MIGA and its members and envisages the use of a number of diplomatic methods of resolution, including conciliation.⁹⁴ Claims made by MIGA, acting as subrogee of an investor, against a state member are to be settled, pursuant to article 57(b), in accordance with either: (i) the Annex II procedure, or (ii) an alternative agreement. Pursuant to article 57(a), any dispute between MIGA and a current or past member, other than those processed elsewhere, shall be settled in accordance with the Annex II procedure.

Annex II contains a two or three phase process for the resolution of article 57 disputes, using negotiation, then conciliation and/or arbitration. Although negotiations must be conducted in the first instance, conciliation is an optional procedure prior to arbitration.⁹⁵ The Annex II procedure utilizes a sole conciliator, provides for her appointment, and permits the conciliator to determine the rules governing the conciliation procedure unless otherwise agreed upon by the parties or specified in the Annex.⁹⁶ The conciliator's report, submitted to the parties, must record the results of the conciliator's efforts and set out the controversial issues and the conciliator's proposals for settlement. The disputants are obligated to cooperate in good faith with the conciliator, and to "give their most serious consideration to his recommendations."⁹⁷ Due to the recency of the entry into force of MIGA, it is still too early to tell whether or not the conciliatory aspects of the

93. MIGA Convention, *supra* note 91, art. 44 (action initiated against MIGA in the courts of member states for disputes other than those processed under arts. 57 & 58); *id.* art. 52 (suspension/expulsion of a member for nonfulfillment of treaty obligations); *id.* art. 56 (questions on the interpretation/application of the treaty); *id.* art. 58 (arbitration of disputes arising out of a contract of guarantee or reinsurance).

94. *Id.* art. 57.

95. *Id.* annex II, arts. 2 & 3.

96. *Id.* annex II, art. 3(b) & (c). Article 3(c) states that the conciliator shall be "guided" by the Conciliation Rules of the ICSID Convention. However, the conciliator is under no duty to utilize the ICSID Rules. I. SHIHATA, *supra* note 91, at 266.

97. MIGA Convention, *supra* note 91, art. 3(d). Article 3(f) obligates each party to express in writing its views on the report to the other within sixty days of receipt of the report. *Id.* art. 3(f).

MIGA dispute resolution system will be used on a regular basis. A comparison with the ICSID, which provides arbitration and conciliation facilities, indicates that the conciliation alternative is underutilized—the clear preference of parties involved in investment disputes is to move directly to arbitration.

In contrast to other international organizations, where dispute settlement plays a supplementary role in the treaty relationship, the objective of ICSID is the settlement of investment disputes by conciliation and/or arbitration.⁹⁸ The jurisdiction of the Centre extends

to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that state) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre.⁹⁹

Conciliation is treated as an optional form of ICSID dispute resolution and, if used, can be structured as either an alternative or preliminary to arbitration. The Centre provides a roster of conciliators/arbitrators and has established Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (“Institution Rules”), Rules of Procedure for Conciliation Proceedings (“ICSID Conciliation Rules”), and an Additional Facility to handle certain disputes that are otherwise outside ICSID jurisdiction.¹⁰⁰

The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (the “ICSID Convention”) addresses the request for conciliation, the constitution of the conciliation commission, and the subsequent proceedings. The commission can consist of a sole conciliator or any uneven number of conciliators appointed by party agreement.¹⁰¹ The conciliation is to be conducted in accord-

98. ICSID Convention, *supra* note 92. There is a considerable body of literature on the ICSID Convention and the ICSID. See generally *Bibliography*, 1 ICSID REV.-F.I.L.J. 454 (1986); ICSID, ICSID BASIC DOCUMENTS (ICSID/15 1985).

99. ICSID Convention, *supra* note 92, art. 25(1).

100. ICSID, BASIC DOCUMENTS, *supra* note 98.

101. ICSID Convention, *supra* note 92, art. 29(2)(a). Article 29(b) states that, where the parties have not agreed on number and method of appointment, the Commission will be composed of three members, each party selecting one member, and the third selected by party agreement. *Id.* art 29(b). Article 30 is the fallback provi-

ance with the provisions of the ICSID Convention and Conciliation Rules; any question of procedure that is not covered by either shall be decided by the commission.¹⁰² The duties of the commission and disputants are specified¹⁰³ and the common proviso—the prohibition on the invocation of or reliance on any opinions or statements expressed or published during the conciliation at any other proceeding, unless the parties agree otherwise—is included.¹⁰⁴ The ICSID Conciliation Rules provide more detailed rules of procedure on the establishment of the commission, the conciliation process, and termination of the proceedings.

There have been only two conciliations initiated at the Centre to date. The first conciliation case was settled prior to the institution of the commission.¹⁰⁵ The second, *Tesoro Petroleum Corporation v. Trinidad and Tobago*,¹⁰⁶ was successfully completed in 1985. In comparison to the meager use of concilia-

sion. *Id.* art 30. Although ICSID maintains a Panel of Arbitrators, article 31 allows conciliators to be appointed from outside the Panel. *Id.* art 31.

102. *Id.* art. 33. In addition, article 32 states that the Commission shall be the judge of its own competence. *Id.* art. 32(1).

103. *Id.* art. 34(1). Article 34(1) provides that:

[i]t shall be the duty of the Commission to clarify the issues in dispute between the parties and endeavour to bring about agreement between them upon mutually acceptable terms. To that end, the Commission may at any stage of the proceedings and from time to time recommend terms of settlement to the parties. The parties shall cooperate in good faith with the Commission in order to enable the Commission to carry out its functions, and shall give their most serious consideration to its recommendations.

Id. art 34(1).

104. *Id.* art. 35.

105. *La SEDITEX Engineering Beratungsgesellschaft für die Textilindustrie m.b.H. v. Government of the Democratic Republic of Madagascar* (ICSID Case No. CONC/82/1). The case was terminated before the conciliation commission had been constituted. ICSID, ICSID CASES 1972-1987.

106. ICSID Case No. CONC/83/1; see Nurick & Schnably, *The First ICSID Conciliation: Tesoro Petroleum Corporation v. Trinidad and Tobago*, 1 ICSID REV.-F.I.L.J. 340. The *Tesoro* conciliation arose out of an equity joint venture between Tesoro Corp. and the government of Trinidad and Tobago. Each party took fifty-percent ownership of the shares in the joint venture ("Trinidad-Tesoro"). Relations between the joint venturers deteriorated, with disputes over taxation and the blocking of dividend declarations, so that Tesoro decided to sell its shares in Trinidad-Tesoro. In the agreement, Tesoro was under an obligation to make a first offer to the government; the ICSID conciliation/arbitration clause was invoked by Tesoro. The parties agreed on a sole conciliator, Lord Wilberforce, whose proposals formed the basis of a settlement agreement reached between the parties in late 1985, detailing the payment of dividends to the shareholders. *Id.*

tion stands the relatively greater number of arbitrations that have been conducted under ICSID auspices.¹⁰⁷ Although it is not possible to determine exactly why there has been scant use of the ICSID conciliation facility, the reasons posed range from omission of a conciliation clause in the parties' initial agreement to the perceived disadvantages of conciliation generally, *i.e.*, its non-binding nature makes it a waste of time and money.¹⁰⁸ Further, the nature of the ICSID investment disputes may also contribute to this reluctance.

In conclusion, based on the ICSID experience, it appears that when conciliation is not the mandatory method for the settlement of disputes covered by an international organization or treaty mechanism but instead is an optional alternative, contracting parties prefer the adjudicative mechanism of arbitration.

5. Bilateral Investment Treaties

The international investment world has also been attracted to conciliation as a possibility for bilateral dispute settlement. States have entered into a variety of bilateral treaties to protect the foreign investments of their nationals. These agreements have evolved over time, starting with friendship, commerce and navigation treaties and moving on to investment insurance agreements. More recently, bilateral investment treaties ("BITs") have been launched as the contemporary prototype.

The BIT envisages a cross-flow of foreign investment and creates a broad regime for investment promotion and protection, imposing reciprocal rights and obligations on the contracting parties.¹⁰⁹ Although individual BITs vary, they generally contain provisions on treatment of the foreign investment, including the most-favored-nation and national treatment

107. As of the 1988-89 year, nine ICSID arbitrations had produced awards and eleven had been settled or discontinued. ICSID, 1989 ANNUAL REPORT 4 (1989). As of the Summer of 1989, there were nine arbitration cases before the Centre. ICSID, 6 NEWS FROM ICSID 2 (1989).

108. Nurick & Schnably, *supra* note 106, at 340, 349.

109. See generally U.N. CENTRE ON TRANSNATIONAL CORPORATIONS, BILATERAL INVESTMENT TREATIES (1988) [hereinafter U.N. CENTRE]; ICSID, INVESTMENT LAWS OF THE WORLD: INVESTMENT TREATIES (1987 - looseleaf); Pappas, *Bibliography - References on Bilateral Investment Treaties*, 4 ICSID REV.-F.I.L.J. 189 (1989).

principles, currency transfer rights, compensation in the event of expropriation or other losses, and investment promotion clauses. ICSID statistics indicate that by the end of 1988, a total of 309 BITs had been concluded.¹¹⁰ Comprehensive dispute resolution provisions are inserted in these treaties to address two forms of disputes that might arise: (i) disputes between the contracting parties over the application of the treaty, and (ii) conflict between a contracting party (host state) and an investor of the other party concerning an investment in the host state.¹¹¹

Although arbitration is the ultimate resolution method agreed upon in both cases, conciliation is typically found only in the procedure for the settlement of disputes between an investor and the host state. It is likely that conciliation is contemplated in the latter case, since it is a settlement mechanism that can help preserve an amicable relationship between the investor and the host state, thereby facilitating the continuation of the foreign investment. In an investment dispute between the host state and the investor of the other state, conciliation may be inserted as an early, optional phase in the process. Interface between the BIT and the multilateral ICSID Convention can occur here because the ICSID conciliation and arbitration facilities were specifically created to address these types of investment disputes and are often accepted for the institutional procedure.¹¹² Disputes between the two states are sent directly to arbitration if the disputes cannot be settled through diplomatic channels.¹¹³

110. Pappas, *supra* note 109, at 194.

111. The early BITs did not include the second type of dispute. However, the establishment of ICSID in 1965 led to the express coverage of the host state-investor dispute, with the current BIT approach being to cover the situation even if the states involved are not party to the ICSID Convention. U.N. CENTRE, *supra* note 109, at 96. However, some states, particularly those in Latin America, still take the position that host state-investor disputes must be decided under the domestic laws of the host.

112. For an ICSID reference, the contracting parties must also be party to the ICSID Convention or the ICSID Additional Facility must be applicable. See generally Broches, *Bilateral Investment Protection Treaties and Arbitration of Investment Disputes*, in *THE ART OF ARBITRATION* (J. Schultz & A. Van Den Berg eds. 1982).

113. U.N. CENTRE, *supra* note 109, at 89-91; see Federal Republic of Germany - St. Lucia Agreement, *id.* annex II, art. 10; Netherlands Revised Model Agreement, *id.* annex IV, art. 13; United States Prototype Treaty, *id.* annex V, art. VII; Asian-African Legal Consultative Committee Revised Model Agreement, *id.* annex VI, models A & B, art. 11.

Some model BITs that have been adopted by various countries contain clauses including conciliation as a method for the settlement of investment disputes between the host state and the investor. The Netherlands Revised Model Agreement,¹¹⁴ the United States Prototype Treaty,¹¹⁵ and the Asian-African Legal Consultative Committee Revised Draft of Model Agreements for Promotion and Protection of Investments (the "AALCC Model Agreements")¹¹⁶ all contain such a provision.

For example, the AALCC Model Agreements do not totally rely on the ICSID mechanism. Pursuant to article 10 of each model agreement, three stages of dispute settlement are created: negotiations, conciliation and arbitration. Consent of the parties to conciliation or arbitration in accordance with the BIT is given in article 10(i). If negotiations break down, article 10(ii) states that either party can initiate conciliation or arbitration proceedings if the local remedies requirements have been satisfied. If conciliation proceedings are implemented, unless the parties have agreed to use the ICSID Convention facilities, it is specified that conciliation shall take place under the UNCITRAL Conciliation Rules.¹¹⁷ If conciliation fails, article 10(iv) and (v) requires that the dispute be referred to arbitration on the behest of either party.

In contrast, article VI of the U.S. Prototype Treaty is relatively sophisticated and focuses on the ICSID facilities. The first phase, in article VI(2), involves consultation and negotiation, which may include the use of non-binding third party procedures. Presumably, this could cover the use of good offices, mediation, and conciliation as well as the ICSID Additional Facility.¹¹⁸ Article VI(3)(a) provides that the investor may choose

114. U.N. CENTRE, *supra* note 109, annex IV, art. 9.

115. *Id.* annex V, arts. VI(2) & (3) (1984 Model); see Vandeveld, *The Bilateral Investment Treaty Program of the United States*, 21 CORNELL INT'L L.J. 200, 256-75 (1988); see, e.g., Treaty Between the United States of America and the Kingdom of Morocco concerning the Encouragement and Reciprocal Protection of Investments, July 22, 1985, arts. VI(2) & (3), reprinted in 1 ICSID REV.-F.I.L.J. 219; Treaty Between the United States of America and the Republic of Turkey concerning the Reciprocal Encouragement and Protection of Investments, Dec. 3, 1985, arts. VI(2) & (3), reprinted in *id.* at 415.

116. Models A & B, art. 10, U.N. CENTRE, *supra* note 109, at annex VI.

117. *Id.* art. 10(iii); see UNCITRAL Conciliation Rules, *supra* note 18; *infra* notes 147-150 and accompanying text.

118. An earlier 1983 draft specifically refers to the ICSID Additional Facility, while the 1984 draft does not. Vandeveld, *supra* note 115, at 262 n.403.

to consent to the submission of the dispute to ICSID, or the ICSID Additional Facility, for settlement by conciliation or arbitration, provided that certain criteria are satisfied.¹¹⁹ Article VI(3)(b) contains the consent of both state parties to the submission of an investment dispute to ICSID conciliation or arbitration. Once the investor has consented to the use of ICSID, either the host state or the investor can institute proceedings, and if the parties disagree over whether conciliation or arbitration is the more appropriate procedure to be utilized, the opinion of the investor shall prevail.¹²⁰ Although the U.S. Prototype Treaty does not expressly state that ICSID conciliation, if unsuccessful, can be followed by arbitration, it is always open to the parties to agree on such a sequence.

In contrast, some BITs do not expressly include conciliation in the event of an investment dispute, directing the host state and the investor to arbitration if they cannot settle their dispute amicably.¹²¹ In particular instances, this may be due to the fact that neither contracting party had signed the ICSID Convention when the BIT was negotiated. For example, neither the first BIT entered into by Canada with the Soviet Union nor other recent BITs involving the Soviet Union include conciliation.¹²² However, this does not preclude the use

119. U.N. CENTRE, *supra* note 109, U.S. Prototype Treaty, annex V, art. VI(3)(a). Article VI(3)(a) provides that the investor cannot submit the dispute to ICSID until six months after the date on which the dispute arose have elapsed, the investor must not have submitted the dispute for resolution in accordance with any applicable previously agreed dispute settlement procedures, and the investor has not brought the dispute before the courts or the administrative tribunals of the host state. *Id.*

120. *Id.*

121. *See, e.g.*, U.N. CENTRE, *supra* note 109, annex II, art. 10; ICSID, *supra* note 109, Federal Republic of Germany-St. Lucia Treaty Concerning The Encouragement and Reciprocal Protection of Investments, March 16, 1985, art. 10 (investment disputes shall be submitted for arbitration under the ICSID Convention).

122. At time of writing neither Canada nor the U.S.S.R. are ICSID contracting parties. Canada - U.S.S.R. Agreement for the Promotion and Reciprocal Protection of Investments, Nov. 20, 1989, Treaty Section, Department of External Affairs, Canada, art. IX (copy on file at the *Fordham International Law Journal* office); France - U.S.S.R. Agreement for the Promotion and Reciprocal Protection of Investments, July 4, 1989, art. 7, *reprinted in* 29 I.L.M. 317 (1990); Federal Republic of Germany - U.S.S.R. Treaty on Promotion and Reciprocal Protection of Investments, June 13, 1989, art. 10 *reprinted in* 29 I.L.M. 351; U.S.S.R. - U.K. Agreement for the Promotion and Reciprocal Protection of Investments, Apr. 6, 1989, art. 8, *reprinted in* 29 I.L.M. 366 (1989).

of conciliation, because the disputants are always free to agree on its use during their settlement negotiations.

In conclusion, it is apparent that a number of states involved in the negotiation of BITs anticipate that maintenance of the investment relationship between the host state and the investor warrants a layered dispute resolution structure that includes non-binding methods such as conciliation. Due to the recency of BIT negotiation, however, it is too early to determine whether the conciliation alternative will be implemented to any material degree if and when investment disputes erupt.

B. *Conciliation as a Mechanism for the Settlement of International Business Disputes*

In the resolution of disputes arising out of an international business relationship, parties have tended to avoid judicial settlement. Instead, international commercial arbitration is the route preferred by many. There are a variety of advantages to the use of arbitration, including the ability of the parties to structure the arbitration, the binding nature of the award, and its enforceability in many jurisdictions.¹²³ Conciliation is another alternative that has generated greater interest in the West in recent years—and has been a common form of domestic dispute resolution in the East for centuries.¹²⁴ The several sets of flexible institutional rules that have been established to facilitate conciliation proceedings are illustrative of the movement. In addition, recent national legislation recognizes the viability of conciliation as a solution to international business disputes, and many regional arbitration centres also offer conciliation support.

123. See generally A. REDFERN & M. HUNTER, *LAW AND PRACTICE OF INTERNATIONAL ARBITRATION* (1986); U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 38, 21 U.S.T. 2517 [hereinafter U.N. Convention on Recognition and Awards].

124. See, e.g., Dress, *supra* note 15; Jarvin, *supra* note 32; Herrmann, *supra* note 19; Jakubowski, *Reflections on the Philosophy of International Commercial Arbitration and Conciliation*, in *THE ART OF ARBITRATION* 175 (J. Schultz & A. van den Berg eds. 1982); Hoellering, *Alternative Dispute Resolution and International Trade*, 14 N.Y.U. REV. L. & SOC. CH. 785 (1986); Perlman & Nelson, *New Approaches to the Resolution of International Commercial Disputes*, 17 INT'L LAW. 215 (1983).

1. The International Chamber of Commerce Conciliation Rules

One of the major activities of the International Chamber of Commerce (the "ICC") is assistance in the settlement of international business disputes. Arbitration under the auspices of the ICC is accepted worldwide. In addition, ICC conciliation is also made available to facilitate the amicable settlement of disputes, although it is extremely underused compared to the numbers of ICC arbitrations. The most recent amendments to the ICC Rules of Conciliation and Arbitration entered into force on January 1, 1988.¹²⁵ In particular, the ICC Conciliation Rules were extensively revised both to promote the initiation of conciliation and to refine the process.

Reference to the ICC Conciliation Rules in the event of a contractual dispute between parties should be established by the inclusion of a clause to that effect in the contract. The ICC proceeds on the basis that resort to conciliation is optional unless the parties have otherwise agreed.¹²⁶ There is some inflexibility involved because the ICC Conciliation Rules, unlike the UNCITRAL Conciliation Rules,¹²⁷ do not contain a general provision that permits the disputants to agree to vary or delete any of the ICC Conciliation Rules when the process is implemented.

The two most striking amendments to the ICC Conciliation Rules are the rationalization of the procedure to initiate conciliation, and the number of conciliators used. The previous rules provided for a conciliation committee of three members appointed in a cumbersome manner involving the Administrative Commission for Conciliation, whereas in the new ICC Conciliation Rules, article 1 specifies that if conciliation is used, it is to be conducted by a sole conciliator appointed by

125. ICC Conciliation Rules, *supra* note 18.

126. ICC Conciliation Rules, *supra* note 18. The ICC recommends the following clause:

All disputes arising in connection with the present contract shall be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.

Id. at 234.

127. UNCITRAL Conciliation Rules, *supra* note 18, art. 1(2) (providing that "parties may agree to exclude or vary any of these Rules at any time").

the ICC.¹²⁸ The consent and appointment process has also been simplified. Pursuant to article 2, the party requesting conciliation must apply to the Secretariat of the Court of the ICC, who informs the other disputant of the request. That party has fifteen days to inform the Secretariat whether or not it agrees to participate in the conciliation process; a negative reply or silence is deemed to be a rejection of the conciliation request, whereas an affirmative response establishes the agreement to conciliate and authorizes the Secretary-General of the Court to appoint a conciliator as soon as possible.¹²⁹

The current ICC Conciliation Rules have expanded upon some aspects of the conciliation procedure and simplified others; the changes should facilitate the smooth operation of an ICC conciliation. The conciliator is given the broad power in article 5 to "conduct the conciliation process as he thinks fit, guided by the principles of impartiality, equity and justice."¹³⁰ With the agreement of the parties, the conciliator fixes the place for conciliation, may request the submission of additional information at any time, and the parties may be assisted by counsel of their own choice.¹³¹ Other than this, the ICC Conciliation Rules do not establish procedural requirements that the conciliator must follow. Clearly, the essence of conciliation and the article 5 obligation will be circumvented if the conciliator does not at least permit the parties to present their positions, and if the conciliator does not present her recommendations to the disputants. Respect for the confidential nature of the conciliation process is imposed on all persons involved in the process.¹³² If the parties sign a settlement agreement upon completion of a conciliation, the ICC Conciliation Rules stipulate that the agreement is binding on the parties, and that it must remain confidential unless and to the extent that its application or execution requires disclosure.¹³³

Two crucial conciliation provisions are maintained and expanded upon in the ICC Conciliation Rules. First, article 10

128. ICC Conciliation Rules, *supra* note 18, art. 1; W. CRAIG, W. PARK, & J. PAULSSON, *INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION* 682 (2d ed. 1990).

129. ICC Conciliation Rules, *supra* note 18, arts. 3-4.

130. *Id.* art. 5.

131. *Id.*

132. *Id.* art. 6.

133. *Id.* art. 7(a).

states that, unless the parties agree otherwise, the conciliator shall not act in any judicial or arbitral proceedings relating to the dispute which has been the subject of the conciliation, whether as an arbitrator, representative, or counsel of a party. Additionally, the conciliator shall not be called as a witness in any further proceedings.¹³⁴ The rationale underlying this prohibition is that the conciliator obtains a comprehensive knowledge of the disputants' cases, including their strengths and weaknesses, so that the willingness of the parties to confide in the conciliator might be compromised if they feared that their disclosures might be used by the conciliator against their interests in a subsequent proceeding.¹³⁵

Second, article 11 provides that the parties agree not to introduce in any judicial or arbitral proceeding, as evidence or in any matter whatsoever,

- (a) any views expressed or suggestions made by any party with regard to the possible settlement of the dispute;
- (b) any proposals put forward by the conciliator;
- (c) the fact that a party had indicated that it was ready to accept some proposal for a settlement put forward by the conciliator.¹³⁶

This clause is considerably more elaborate than the former rules.¹³⁷ The provision is included in conciliation rules with the same objective: to provide an atmosphere of security to encourage the disputants to conciliate and make full disclosure of their positions without fear of prejudicing any further arbitral or judicial proceedings.¹³⁸

Statistics on the use of the ICC arbitration and conciliation facilities illustrate that conciliation is infrequently used by disputants, especially when compared to the use of ICC arbitration. In the initial years, from 1923-1929, conciliation was quite popular, especially when compared to the number of arbitrations. In May 1929, of the 337 requests registered by the ICC Court, 120 had been brought to conclusion as follows: eighty by amicable settlement, twenty-one by conciliation, and

134. *Id.* art. 10.

135. Herrmann, *supra* note 19, at 161.

136. ICC Conciliation Rules, *supra* note 18, art. 11.

137. *Id.*

138. Herrmann, *supra* note 19, at 162.

nineteen by arbitral award.¹³⁹ At that time, there were more successful conciliations than arbitrations. Such activity in the international commercial arena paralleled the attraction to conciliation in the inter-state system.¹⁴⁰ However, the data for 1983-1987 shows a marked decline in resort to conciliation, and the reverse relationship between arbitration and conciliation. During this later period, there were forty-two requests for conciliation, nine of which were withdrawn, nine turned into arbitrations, ten were still pending, and fourteen were successfully conciliated.¹⁴¹ In contrast, the same five-year period saw 1,545 requests for arbitration, although 832 were withdrawn before proceedings started or before final award and ninety-seven resulted in awards by consent.¹⁴² The low level of ICC conciliation activation, in both absolute and relative numbers, is illustrative of the modern transnational system in which arbitration is the dominant extra-judicial settlement mechanism. It is unlikely that the major revisions to the ICC Conciliation Rules will result in a marked acceleration in the use of ICC conciliation in the absence of an alteration in the attitudes of the parties to an international business relationship. A greater receptivity to the concept of conciliation as a viable alternative for dispute resolution is required.

2. The UNCITRAL Conciliation Rules

The main objective of the UNCITRAL is to further the progressive harmonization and unification of the law of international trade by, *inter alia*, drafting treaties, model laws, and uniform laws.¹⁴³ Although the initial focus of UNCITRAL in the dispute resolution field was on arbitration, it soon turned its attention to conciliation, producing the UNCITRAL Conciliation Rules, which were adopted by the U.N. General Assem-

139. Gaudet, *Overcoming Regional Differences*, in *ARBITRATION IN SETTLEMENT OF INTERNATIONAL COMMERCIAL DISPUTES INVOLVING THE FAR EAST AND ARBITRATION IN COMBINED TRANSPORTATION* 301, 303 (P. Sanders ed. 1989).

140. See J. MERRILLS, *supra* note 5.

141. Gaudet, *supra* note 139, at 303.

142. *Id.* at 304. In 1989, only five requests for conciliation were received whereas 304 requests for arbitration were made. W. CRAIG, W. PARK & J. PAULSSON, *supra* note 128, at 681.

143. G.A. Res. 2205, 21 U.N. GAOR, Annexes 3, U.N. Doc. A/6369 and Add. 1 & 2 (1966).

bly in 1980.¹⁴⁴ Although one view in UNCITRAL was that conciliation was of doubtful value, the stronger viewpoint supported the drafting of UNCITRAL Conciliation Rules. This viewpoint was due both to the perceived trend in many countries to settle disputes by conciliation, and the viability of conciliation as an alternative to arbitration.¹⁴⁵

The UNCITRAL Conciliation Rules technically have a broader application than the ICSID (legal disputes arising out of an investment between the investor and host state) or ICC Conciliation Rules (business disputes of an international character). The UNCITRAL Conciliation Rules are not necessarily limited to business disputes or to an international relationship, although the U.N. General Assembly resolution adopting the UNCITRAL Conciliation Rules recommended that they be used to settle disputes arising out of international commercial relations.¹⁴⁶ Again, due to the relative youth of the UNCITRAL Conciliation Rules, it is not yet possible to gauge the degree to which they have or will be utilized in the drafting of contractual dispute resolution clauses.

The UNCITRAL Conciliation Rules are more detailed than the closest alternative, the ICC Conciliation Rules. Yet the concept underlying the UNCITRAL Conciliation Rules is that there must be simplicity and flexibility of application to permit the parties to modify the rules and terminate the proceedings at any point.¹⁴⁷ In this vein, article 1(2) of the UNCITRAL Conciliation Rules permits the parties to agree to vary or exclude any of the rules at any time. As noted, this freedom is not granted when the ICC Conciliation rules are used. Conciliation proceedings can be initiated if there is acceptance by one party of an invitation to conciliate made by the other pursuant to article 2. The UNCITRAL Conciliation Rules provide

144. See *supra* note 18 and accompanying text. See generally I. DORE, *supra* note 17, at 8-9; Herrmann, *supra* note 19; Herrmann, *Commentary on the UNCITRAL Conciliation Rules*, VI Y.B. COMM'L ARB. 170 (1981).

145. Report of UNCITRAL on the Work of its Twelfth Session, 34 U.N. GAOR Supp. (No. 17), U.N. Doc. A/34/17 (1979) [hereinafter UNCITRAL Report].

146. UNCITRAL Conciliation Rules, *supra* note 18. Pursuant to article 1(1), the UNCITRAL Conciliation Rules apply to the "conciliation of disputes arising out of or relating to a contractual or other legal relationship where the parties seeking an amicable settlement of their dispute have agreed that the UNCITRAL Conciliation Rules apply". *Id.* art 1(1).

147. UNCITRAL Report, *supra* note 145, at ¶ 86.

for one conciliator, unless the parties agree that there shall be two or three. In the latter situation, the conciliators "ought, as a general rule, to act jointly."¹⁴⁸

The UNCITRAL Conciliation Rules covering the conciliation procedure are considerably more specific than the ICC Conciliation Rules. They provide for initial submission of party statements on the dispute and the points at issue to the conciliator and to each other, the right of the disputants to be represented or assisted by persons of their choice, and a series of directions to the conciliator on her role.¹⁴⁹ Pursuant to article 7(1), the conciliator is instructed to assist the parties in their attempt to obtain amicable dispute settlement, and must act independently and impartially in fulfilling this duty. Article 7(2) further requires that

[t]he conciliator will be guided by principles of fairness, equity and justice, giving consideration to, among other things, the rights and obligations of the parties, the usages of the trade concerned and the circumstances surrounding the dispute, including any previous business practices of the parties.¹⁵⁰

Beyond this, the conciliator has the freedom to conduct the proceedings in such a manner as thought appropriate, although the circumstances of the case and the express wishes of the parties must be taken into account.¹⁵¹ In contrast to the ICC Conciliation Rules, which provide the conciliating entity with a general but vague power, the UNCITRAL Conciliation Rules specify that the conciliator may, at any stage of the proceedings, make informal proposals for dispute resolution and may meet or communicate with the parties, either separately or together.¹⁵²

Furthermore, in contrast to the ICC Conciliation Rules

148. UNCITRAL Conciliation Rules, *supra* note 18, art. 3. Article 4 of the UNCITRAL Conciliation Rules provides a detailed process for the appointment of the conciliator(s), moving from party agreement to third person or institutional assistance. *Id.* art. 4.

149. *Id.* arts 5-7.

150. *Id.* art. 7(2).

151. *Id.* art. 7(3).

152. *Id.* arts. 7(4) & 9(1). Article 10 provides that if the conciliator receives factual information on the dispute from a party, she is to disclose the substance of that information to the other party unless the first disputant provides the material on the condition of confidentiality. *Id.* art 10.

which are silent on the matter, the UNCITRAL Conciliation Rules address actions of the disputants. The parties are directed to cooperate with the conciliator in good faith, and each can play an affirmative role in the resolution process by submitting to the conciliator, on their own initiative or at her invitation, suggestions for the settlement of the dispute.¹⁵³ In article 16, the parties are expressly enjoined from initiating any arbitral or judicial proceedings in respect of the dispute during the conciliation process unless such proceedings are, in the opinion of the party taking the action, necessary to preserve its rights.

Pursuant to article 13, after the conciliator has found it possible to submit terms of a possible settlement to the disputants, the parties participate in the process by providing their observations, which are to be taken into account by the conciliator in any reformulation. If the parties reach agreement on dispute resolution, they are directed to draw up and sign a binding settlement agreement, unless they request the conciliator to do so or to assist them. The usual confidentiality requirement is imposed on the parties and the conciliator through article 14, which covers both the proceedings and any settlement agreement, except that the agreement can be disclosed for enforcement purposes.

Identical to the ICC Conciliation Rules, the UNCITRAL Conciliation Rules include the two important provisions on the role of the conciliator and the admissibility of evidence in other proceedings. First, article 19 of the UNCITRAL Conciliation Rules stipulates that all parties undertake that the conciliator will not act as an arbitrator, representative, or counsel of a party, or be called as a witness, in any arbitral or judicial proceedings on the same dispute. As with article 10 of the ICC Conciliation Rules, this provision can be altered by party agreement; in the UNCITRAL Conciliation Rules, however, this possibility is permitted indirectly by operation of article 1(2). Second, in article 20 of the UNCITRAL Conciliation Rules, the parties undertake not to rely on or introduce as evidence in arbitral or judicial proceedings all views, suggestions, or admissions of the parties, proposals made by the conciliator, or the other party's willingness to accept a settlement pro-

153. *Id.* arts. 11-12.

posal made by the conciliator. On this topic, however, the ICC Conciliation Rules in article 11 do not allow the parties to vary the rule by agreement. In contrast, the UNCITRAL Conciliation Rules permit all the rules to be varied by the disputants, including the prohibition on introduction of evidence.

In conclusion, both the ICC and UNCITRAL Conciliation Rules cover all types of international business disputes. However, beyond the aims common to both sets of rules—the amicable conciliation of disputes and the grant of considerable freedom of action to the disputants and the conciliator—they do take different approaches. The ICC Conciliation Rules are less detailed but, accordingly, do not overtly restrict the activities of the conciliator beyond the minimum required to ensure fair process. The UNCITRAL Conciliation Rules, on the other hand, contain more elaborate details on the procedure, but permit the parties to modify or exclude any or all of the rules by agreement. In a choice between the two, the deciding factors may be reduced to familiarity and convenience: the ICC Conciliation Rules are supported by a reputable institution, whereas an UNCITRAL conciliation must be conducted by the disputants and the conciliator without assistance, unless an institution providing conciliation services has adopted the UNCITRAL Conciliation Rules. In common, however, both the ICC and UNCITRAL Conciliation Rules are subject to underutilization relative to international commercial arbitration rules.

3. Conciliation Rules Adopted by Other Institutions

A wide variety of domestic arbitration associations/centres and chambers of commerce have adopted conciliation rules for use by parties desirous of resorting to the procedure. The establishments that offer the conciliation option are located throughout the world.¹⁵⁴ Recently, for example, the British Columbia International Arbitration Centre was established, and rules were created for international commercial arbitration and conciliation proceedings to be held in the centre.¹⁵⁵ However, these centres generate most of their business from the

154. See, e.g., *HANDBOOK OF INSTITUTIONAL ARBITRATION IN INTERNATIONAL TRADE* (E. Cohn, M. Domke & F. Eisemann eds. 1977).

155. Reprinted in *UNCITRAL ARBITRATION MODEL IN CANADA* 201 (Paterson & Thompson eds. 1987).

conduct of arbitrations, and comparatively few conciliations are conducted. Taking a different approach, not involving the creation of additional conciliation rules, regional centres for arbitration established in Kuala Lumpur and Cairo include among their functions the facilitation of conciliation under the UNCITRAL Conciliation Rules.¹⁵⁶

4. Domestic Arbitration Laws Supportive of Conciliation

Apart from those Eastern Pacific Rim states which have historically favoured conciliation, legislative endorsement of conciliation is appearing in the West in the form of laws governing the conduct of international commercial arbitration that include supportive provisions for conciliation as a preliminary or additional resolution method. In particular, the statutory activity is occurring in those Western jurisdictions with a Pacific Rim orientation.

Although the drafters of the 1985 UNCITRAL Model Law on International Commercial Arbitration (the "UNCITRAL Model Law") did discuss the inclusion of references to conciliation as another mechanism for settling disputes, the final draft of the Model Law did not contain any provisions on conciliation.¹⁵⁷ Nonetheless, most of the Canadian provinces and territories—the first jurisdictions to create domestic international commercial arbitration laws based on the UNCITRAL Model Law—have unilaterally inserted references to conciliation and mediation in their legislation.¹⁵⁸ The statutes do not

156. These centres were established under the auspices of the Asian-African Legal Consultative Committee. Lin, *The Kuala Lumpur Regional Arbitration Centre*, 3 ICSID REV.- F.I.L.J. 118, 120 (1988).

157. See generally H. HOLTZMANN & J. NEUHAUS, *A GUIDE TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION: LEGISLATIVE HISTORY AND COMMENTARY* 1118, 1142-45 (1989).

158. The International Commercial Arbitration Act of Alberta, ALTA. REV. STAT. (1986), ch. I-6.6, § 5; The International Commercial Arbitration Act of British Columbia, B.C. REV. STAT. (1986), ch. 14, § 30(1); The International Commercial Arbitration Act of Manitoba, MAN. REV. STAT. (1986-87), ch. 32, § 5; The International Commercial Arbitration Act of New Brunswick, N.B. REV. STAT. (1986), ch. I-12.2, § 5; The International Commercial Arbitration Act of Newfoundland, NFLD. REV. STAT. (1986), ch. 45, § 6; The International Commercial Arbitration Act of Nova Scotia: N.S. REV. STAT. (1986), ch. 12, § 6; The International Commercial Arbitration Act of Ontario, ONT. REV. STAT. (1988), ch. 30, § 3; The Commercial Arbitration Act of Prince Edward Island, P.E.I. REV. STAT. (1986), ch. 14, § 5; The International Commercial Arbitration Act of Saskatchewan, SASK. STAT. (1988-89), ch. I-10.2, § 4; The International Commercial Arbitration Act of Yukon, YUK. ORD. (1987), ch. 14, § 3.

structure conciliation as a mechanism to be used prior to arbitration, envisaging it, instead, as a superadditional method since they permit the arbitral tribunal, if the disputants agree, to utilize conciliation or other procedures *during the arbitration*. For example, the British Columbia International Commercial Arbitration Act, section 30(1) states that

[i]t is not incompatible with an arbitration agreement for an arbitral tribunal to encourage settlement of the dispute and, with the agreement of the parties, the arbitral tribunal may use mediation, conciliation or other procedures at any time during the arbitral proceedings to encourage settlement.¹⁵⁹

Drafted in a slightly different fashion, the other Canadian provincial laws referring to conciliation, as illustrated by section 5 of the Alberta International Commercial Arbitration Act, state that

[f]or the purpose of encouraging settlement of a dispute, an arbitral tribunal may, with the agreement of the parties, employ mediation, conciliation or other procedures at any time during the arbitration proceedings and, with the agreement of the parties, the members of the arbitral tribunal are not disqualified from resuming their roles as arbitrators by reason of the mediation, conciliation or other procedure.¹⁶⁰

The reasons supporting the inclusion of the British Columbia provision have been stated as being the promotion of an amicable settlement by any method acceptable to the disputants, and the recognition that some people have traditionally preferred conciliation or mediation over arbitration.¹⁶¹ It is implicit in the British Columbia provision that the arbitrator can resume his duties if the conciliation attempt fails; consent of the parties to this event is not specifically required. In contrast, the Alberta legislation (and that of the other relevant Ca-

The North West Territories, Quebec, and Canadian federal statutes do not refer matters to conciliation or mediation.

159. International Commercial Arbitration Act of British Columbia, B.C. REV. STAT. (1986), ch. 14, § 30(1).

160. International Commercial Arbitration Act of Alberta, ALTA. REV. STAT. (1986), ch. I-6.6, § 5.

161. See Paterson, *International Commercial Arbitration Act: An Overview*, in UNCTRAL ARBITRATION MODEL IN CANADA, *supra* note 155, at 113, 122. See *infra* text accompanying notes 176 - 203 for discussion of conciliation preference in Pacific Rim states.

nadian provinces) makes the express agreement of the parties a prerequisite to recommencement of the arbitration.

Hong Kong, influenced by both Eastern and Western concepts of dispute settlement, has also expressly recognized conciliation. The Hong Kong Arbitration Ordinance (the "Ordinance" or the "Hong Kong Ordinance") addresses conciliation as a procedure used prior to arbitration. In addition, the Ordinance has been amended recently to allow an arbitrator to act as a conciliator during the arbitration itself.¹⁶² With respect to conciliation as a preliminary mechanism, the Ordinance states that no objection can be made to the appointment of the conciliator as the arbitrator in the same dispute, pursuant to the parties' agreement, in the event that the conciliation effort fails.¹⁶³

The new provision, on the power of the arbitrator to act as a conciliator, permits such dual activity if all parties consent in writing and for so long as no party withdraws his consent in writing.¹⁶⁴ The Ordinance also ensures that no objection shall be taken to the conduct of arbitration proceedings by an arbitrator solely on the ground that he had acted previously as a conciliator pursuant to the new section.¹⁶⁵ Thus, the legislation affirmatively ensures that the arbitration can resume. The amendments impose some statutory control over the conduct of the arbitrator/conciliator. The issues of communication with the parties and treatment of confidential information are

162. Hong Kong Arbitration Ordinance, Cap. 341, L.H.K. 1982, as amended by Arbitration (Amendment) (No. 2) Ordinance, 1989, §§ 2A-2B [hereinafter Hong Kong Arbitration Ordinance] (copy on file at the *Fordham International Law Journal* office); see The Law Reform Commission of Hong Kong, *Report on the Adoption of the UNCITRAL Model Law on International Commercial Arbitration*, Topic 17 (the Report forms a schedule to the Arbitration Ordinance and may be referred to by the courts in interpreting the legislation) (copy on file at the *Fordham International Law Journal* office); McInnis, *Alternative Dispute Resolution*, in *THE FUTURE OF HONG KONG* 391 (1989); Hunter, *Arbitration in Hong Kong*, in *ARBITRATION IN SETTLEMENT OF INTERNATIONAL COMMERCIAL DISPUTES INVOLVING THE FAR EAST AND ARBITRATION IN COMBINED TRANSPORTATION*, *supra* note 139, at 73; Tisdall, *The Hong Kong International Commercial Arbitration Centre*, in *PATERSON AND THOMPSON*, *supra* note 155, at 31; Thomas, *Arbitration in Hong Kong*, 14 *I.B.L.* 142 (1986).

163. Hong Kong Arbitration Ordinance, *supra* note 162, § 2A(2). The Hong Kong Law Reform Commission noted that prior to the introduction of this provision it was regarded as improper for a conciliator to become an arbitrator and an arbitration could be set aside on this basis. *Id.*

164. *Id.* § 2B(1).

165. *Id.* § 2B(4).

regulated. An arbitrator acting as a conciliator may communicate with the parties collectively or separately, and shall treat information obtained from a party as confidential unless that party otherwise agrees or the conciliation process terminates without resulting in a settlement agreement.¹⁶⁶ In the latter event, before the arbitration resumes, confidential information obtained by an arbitrator/conciliator during the conciliation must be disclosed to all other parties to the extent he considers material to the arbitration proceedings.¹⁶⁷

Strong commercial connections with the People's Republic of China, a country favouring conciliation, clearly influenced the establishment of the conciliation provisions in the Hong Kong Ordinance. The Hong Kong Law Reform Commission (the "Hong Kong Commission") recommended that the Ordinance be amended to permit the use of conciliation during the arbitral process, applicable to both domestic and international arbitrations.¹⁶⁸ The Hong Kong Commission underlined that the purpose for requiring that the arbitrator/conciliator disclose confidential, material information obtained during the failed conciliation, prior to resumption of the arbitration, is "to provide a statutory framework within which an arbitrator can conciliate without committing misconduct by breaching the rules of natural justice."¹⁶⁹ Although the Hong Kong Commission recognized that the disclosure requirement might repress the frankness of the disputants, it was of the opinion that this was a better alternative than compelling the arbitrator to attempt to ignore material information. In addition, it could see no procedural difficulty in such an approach.¹⁷⁰

As discussed below, the superadded conciliation procedure is in common use in the People's Republic of China. However, the procedure used in the Canadian and Hong Kong legislation raises the issue of the propriety of the arbitrator

166. *Id.* §§ 2B(2)(a)-(b).

167. *Id.* § 2B(3).

168. *Id.* § 4.35.

169. *Id.*

170. *Id.* The Commission suggested that if the arbitrator were to send to each disputant a list of information she regarded as material and disclosable and the arbitrator considered the views of each party before acting, then the chances of error would be small.

playing a dual role. The approach of a conciliator is different from that of an arbitrator. A conciliator acts affirmatively in a manner designed to bring the parties to an amicable resolution, often posing compromissory recommendations, whereas the approach of an arbitrator is usually more detached and legalistic. The potential problems of the conciliator/arbitrator not maintaining confidentiality of or misusing information have to be addressed. Article 10 of the ICC Conciliation Rules and article 19 of the UNCITRAL Conciliation Rules recognize the problems associated with the conciliator becoming the arbitrator in subsequent proceedings, let alone mixing the two roles in the same process. Evidently, the Canadian and Hong Kong legislators have decided that party autonomy should govern: if the disputants consent to the conduct of conciliation during an arbitration it should be permitted and vice versa. The Hong Kong Ordinance, however, addresses the concerns raised and, accordingly, is the more sophisticated legal regime, since it imposes some control over the conduct of the arbitrator/conciliator during and after the conciliation process. Yet, any remaining concerns about an arbitrator playing a dual role should not prejudice the consideration of a conciliation being held *prior* to any arbitration.

California has also recognized the potential of conciliation as an international business dispute resolution mechanism. As the first U.S. state to pass legislation based on the UNCITRAL Model Law on International Commercial Arbitration, it has included conciliation as an optional, preliminary method for the settlement of disputes. The California International Arbitration and Conciliation Act (the "California Act")¹⁷¹ separates the conciliation initiative from any subsequent arbitral proceedings. Also, the California Act incorporates a variety of provisions governing the conduct of the conciliation. This approach can be contrasted with the Hong Kong Ordinance where it addresses conciliation as a preliminary method and which contains only a few provisions with respect to the proceedings.

171. CAL. CIV. PROC. CODE §§ 1297.11-432 [hereinafter Act]. See Wright, *California's International Commercial Arbitration Act New Procedures For the Arbitration and Conciliation of International Commercial Disputes*, 17 I.B.L. 45 (1989); Golbert & Kolkey, *California's Adoption of a Code For International Commercial Arbitration and Conciliation*, 10 LOY. L.A. INT'L & COMP. L.J. 583 (1988).

The California Act applies to international commercial conciliation held within the state based on the definitions applied by the UNCITRAL Model Law.¹⁷² The California Act expressly states that it is the policy of the State of California to encourage parties to an international commercial agreement or transaction to which the California Act applies to resolve any dispute arising out of the relationship by conciliation.¹⁷³ The legislation sets out the familiar provisions concerning the conduct of the conciliation and the duties of the parties involved, permitting the parties' agreement to include the use of particular conciliation rules.¹⁷⁴ As with the ICC and UNCITRAL Conciliation Rules, the California Act contains those elements that protect the integrity of the conciliation process.¹⁷⁵ The California Act goes several steps further and provides that the parties' agreement to conciliate shall be deemed to be their agreement to stay all arbitral/judicial proceedings, and that all applicable limitation periods shall be tolled or extended.¹⁷⁶

All of the legislation discussed enables a settlement agreement reached pursuant to conciliation to be recorded in the same form and with the same effect as an arbitral award, thereby adding state support to the enforceability of such an agreement. The Canadian provincial legislation enables a settlement, reached by a conciliation conducted during arbitration, to be recorded in the form and with the same effect as an

172. Act, *supra* note 171, §§ 1297.12, 1297.13 (defining international conciliation agreement), 1297.14 & 1297.16 (defining "commercial").

173. *Id.* § 1297.341.

174. *See, e.g., id.* §§ 1297.342 (conciliator(s) shall be guided by principles of objectivity, fairness and justice), 1297.343 (conciliator(s) may conduct proceedings in manner considered appropriate taking into account wishes of parties and circumstances of the case), 1297.23 (where Act refers to the agreement of parties, it shall include any conciliation rules referred to in that agreement), & 1297.391 (termination of conciliation).

175. In particular, evidence of anything stated or admitted during the conciliation is not admissible in evidence and disclosure thereof cannot be compelled in a civil action, although evidence can be admitted if all parties consent to the disclosure. *Id.* § 1297.371. The conciliator is prohibited from serving as an arbitrator or taking part in any arbitral or judicial proceedings in the same dispute unless all parties consent or the conciliation/arbitration rules adopted by the parties provide otherwise. *Id.* § 1297.393.

176. *Id.* § 1297.381 (stay agreement operates from commencement of conciliation proceedings) 1297.382 (limitation periods tolled upon formation of parties' agreement to participate in conciliation until tenth day following termination of process).

arbitral award on agreed terms, but only if requested by the parties and the arbitrator does not object.¹⁷⁷ The Hong Kong legislation applies to written settlement agreements reached by parties to an arbitration, thereby covering successful conciliation settlement agreements reached either before or during arbitration.¹⁷⁸ The Hong Kong Ordinance does not make enforceability contingent on the parties' consent. The Hong Kong Ordinance provides that where the parties to an arbitration agreement have been successful in entering into a settlement agreement, that agreement shall be treated as an award on an arbitration agreement and may, by leave of the court or a judge thereof, be enforced in the same manner as a judgment or order to the same effect and, where leave is given, judgment may be entered in terms of the agreement.¹⁷⁹ The California Act covers only conciliations conducted separate from and prior to an arbitration. Nonetheless, the California Act treats a written settlement agreement reached pursuant to conciliation as an arbitral award, gives it the same force and effect as a final award, and does not require the consent of the parties to this event.¹⁸⁰

The legislative movement in Hong Kong, California, and the Canadian provinces, jurisdictions willing to enforce a conciliation settlement agreement obtained either before or during arbitration, illustrates a growing Pacific Rim interest in providing state support for the enforcement of settlement agreements. The effect of these provisions—in elevating a contractual conciliation settlement agreement to the same level as an arbitral award which, pursuant to national laws, may be enforced in the courts of these states—is to create a groundbreaking mechanism for the enforcement of successful conciliations. The issue also arises whether the Convention on

177. See, e.g., International Commercial Arbitration Act of British Columbia, B.C. REV. STAT. (1986), ch. 14, §§ 30(2)-(4). With the other provincial laws, the relevant section on conciliation would interact with article 30 of the UNCITRAL Model Law, which is incorporated into the legislation by schedule. See, e.g., International Commercial Arbitration Act of Alberta, ALTA. REV. STAT. (1986), ch. I-6.6, § 5 & schedule 2 (if requested by the parties and not objected to by the arbitral tribunal, settlement can be recorded in the form of an arbitral award on agreed terms which has same status and effect as any other award on merits of case).

178. Hong Kong Arbitration Ordinance, *supra* note 162, § 2C.

179. *Id.*

180. Act, *supra* note 171, § 1297.401.

Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention") could apply to these settlement agreements, providing them with an additional international enforcement mechanism.¹⁸¹ It is submitted that the New York Convention would not apply to conciliation settlement agreements since they are not arbitral awards *per se*; instead, they are merely treated like awards and only by the state in which the conciliation occurred. Independently, however, the possibility of conciliation settlement enforceability has recently come under scrutiny.¹⁸² Although some arguments have been made against affirmative enforcement of conciliation settlement agreements—such as the claim that enforcement is contrary to the amicable nature of the process—there is general consensus on the need to study the issue further.¹⁸³ However, on this particular issue, state action appears to be overtaking academic discussion. In further support of this development, it can be stated that the parties to a conciliation are not obligated to reach a settlement agreement on the conciliator's proposals. They have the freedom to accept or reject the proposals. But if they do reach agreement, their settlement is a contractual legal obligation so that any national law or future treaty enforcing the agreement merely facilitates its preexisting binding character.

5. Traditional Usage of Conciliation in Japan and the People's Republic of China—The Effect on International Business Transactions

The cultural heritage of the Far East has profoundly affected domestic legal systems in the region. One particular manifestation is the preferred use of extrajudicial means of dispute settlement, including conciliation. Although a number of

181. U.N. Convention on Recognition and Awards, *supra* note 123.

182. Glossner, *Enforcement of Conciliation Awards*, in *NEW TRENDS IN THE DEVELOPMENT OF INTERNATIONAL COMMERCIAL ARBITRATION AND THE ROLE OF ARBITRAL AND OTHER INSTITUTIONS* 218 (P. Sanders ed. 1983) (attaching suggested draft convention for enforcement of conciliation awards that follows structure of U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards); Herrmann, *supra* note 19, at 163-65 (arguments for and against enforcement, settlement agreements should be enforceable only if they contain provision by which parties agree to enforcement).

183. Herrmann, *supra* note 19, at 165.

countries have been influenced,¹⁸⁴ only the legal systems of Japan and the People's Republic of China will be addressed to examine whether their legal traditions have affected international business transactions involving Chinese or Japanese parties.

a. *Japan*

Nonadjudicative methods of dispute resolution have been dominant in the Japanese domestic system for centuries. Conciliation has played a major role, although the structure of the conciliatory process has evolved over the years.¹⁸⁵ A conceptual foundation for the reliance on extrajudicial dispute settlement is the traditional Japanese desire for group harmony, which itself stems from the influence of Confucian ethics in Japan.¹⁸⁶ It has also been argued that a crucial historical factor that promoted extrajudicial dispute resolution was the discouragement of judicial settlement during the premodern feudal society and the imposition of alternative means, conciliation in particular.¹⁸⁷

Modern Japanese conciliation is statute-based; it is an optional mechanism for the settlement of civil disputes that can either be initiated by one of the disputants prior to litigation, or by the court on receipt of the action.¹⁸⁸ The mechanism is used as an alternative or a preliminary to litigation. Either a conciliation committee is struck, composed of a judge and two

184. See, e.g., McDorman, *The Teaching of the Law of Thailand*, 11 DAL. L. J. 915, 921-22 (1987-1988).

185. D. HENDERSON, *CONCILIATION AND JAPANESE LAW TOKUGAWA AND MODERN* (Vol. I-II 1965); Yamashita, *Conciliation*, in *DOING BUSINESS IN JAPAN* XIV 3-1 (Matthew Bender & Co. Inc. 1987). See generally Tanaka, *The Role of Law in Japanese Society: Comparisons With the West*, 19 U.B.C. L. REV. 375 (1985); Seki, *Effective Dispute Resolution in United States-Japan Commercial Transactions*, 6 NW. J. INT'L L. & BUS. 979 (1984); *THE JAPANESE LEGAL SYSTEM* (H. Tanaka ed. 1976); Kawashima, *Dispute Resolution in Contemporary Japan*, in *LAW IN JAPAN: THE LEGAL ORDER IN A CHANGING SOCIETY* 41 (A. von Mehren ed. 1963).

186. See *infra* note 196 and accompanying text (discussing Confucian philosophy).

187. See Haley, *The Myth of the Reluctant Litigant*, 4 J. JAP. STUDIES 359 (1978) (concluding that Japanese hesitancy to litigate is not so much due to cultural norms as it is to systemic implementation of attitude through government policy); HENDERSON, *supra* note 185, at 8, 171-81 (describing how conciliation in Tokugawa Japan was imposed on people to excessive degree by Shogunate in attempt to protect hierarchical society and due to immaturity of legal system).

188. Yamashita, *supra* note 185, at XIV 3-4 through XIV 3-9.

or more court-appointed commissioners, or the judge alone may act as conciliator if thought appropriate.¹⁸⁹ The process is mediatory in nature as the committee encourages the disputants to reach a compromise agreement themselves, but the conciliatory aspect is present since the committee may put forward its own suggestions.¹⁹⁰ However, in the contemporary Japanese domestic arena where conciliation still retains an important place in civil affairs generally, it does not appear to be the favoured method of commercial dispute settlement. Instead, the more informal compromise settlement by the parties through amicable discussions is the preferred route.¹⁹¹

Similarly, conciliation is rarely used as a mechanism for the settlement of disputes arising out of international business transactions involving a Japanese entity.¹⁹² Although conciliation services are available at two Japanese institutions that offer commercial arbitration services, the Japan Commercial Arbitration Association and the Japan Shipping Exchange, they are rarely used.¹⁹³ Instead, international commercial arbitration is the preferred form of dispute settlement.¹⁹⁴ The differential use of conciliation in domestic as opposed to international commercial matters has been attributed both to the un-

189. *Id.* The commissioners are appointed by the Supreme Court and must fulfill specific criteria for appointment. *Id.* at XIV 3-8.

190. See Henderson, *supra* note 185, at 185-86, 220-22 (illustrates conciliatory aspect); Yamashita, *supra* note 185, at XIV 3-10 (emphasizes mediatory nature of process). If agreement is reached, it is reduced to writing, filed with the court and has the same effect as a compromise during trial. *Id.* (Civil Conciliation Law, art. 16).

191. Nomura, *Some Aspects of The Use of Commercial Arbitration By Japanese Corporations*, 33 OSAKA U.L. REV. 47, 60-61 (1986). Domestic arbitration is also unpopular, in contrast to the regular use of arbitration in disputes arising out of international business transactions. *Id.* at 47; see Young, *Dispute Resolution in Japan: Patterns, Trends, and Developments*, in LEGAL ASPECTS OF DOING BUSINESS WITH JAPAN 1985 319, 342-43 (I. Shapiro ed. 1985) (in 1981, only two percent of conciliations in both Summary Court and District Court involved commercial disputes). Although still different from the Western view of the legal system, the Japanese attitude towards law and extrajudicial dispute settlement has changed as the Japanese have become more "law-conscious" in the post World War II years. THE JAPANESE LEGAL SYSTEM, *supra* note 185, at 384, 387. See generally Kawashima, *supra* note 185.

192. Nomura, *supra* note 191, at 55.

193. *Id.* at 60-61 (JCAA has commercial conciliation rules and board of conciliators, but only one or two conciliation cases are submitted to the JCAA per year); Taniguchi, *Commercial Arbitration in Japan*, in ARBITRATION IN SETTLEMENT OF INTERNATIONAL COMMERCIAL DISPUTES INVOLVING THE FAR EAST AND ARBITRATION IN COMBINED TRANSPORTATION, *supra* note 139, 29 at 38.

194. Taniguchi, *supra* note 193, at 31; Nomura, *supra* note 191, at 47.

familiarity of foreign parties with conciliation, and the inability to initiate conciliation unless both disputants agree to its use.¹⁹⁵ However, with respect to the latter rationale, party consent is also required for international commercial arbitration, and this aspect has certainly not affected its popularity. It is likely that Western entities' preference for international commercial arbitration has influenced Japanese parties in the use of arbitration. An alternative explanation is that Japanese parties have not found arbitration unacceptable in the settlement of international business disputes.

b. *The People's Republic of China*

The legal system of the People's Republic of China (the "PRC") has been profoundly influenced by two competing schools of thought—the Confucian philosophy and the legalist tradition.¹⁹⁶ Confucianism is based on the rule of reason, emphasizing hierarchical grouping, social harmony, and the maintenance of relationships through virtuous behaviour and compromise. Accordingly, extrajudicial means of conflict resolution, such as conciliation and mediation, are preferred, and resort to adjudicative methods is considered a rending of the social fabric. Also, the PRC communist political structure has, until affected by the developments of the past decade, emphasized central control and discouraged the development of an adjudicative legal system based on the protection of individual rights.¹⁹⁷ In contrast, the legalist school is based on the rule of law and has surfaced in the Chinese system periodically. It has appeared most recently in the last decade, as the PRC has attempted an economic modernization programme which has included the enactment of numerous statutes in the commercial and international business areas.

The dispute settlement system of the PRC still exhibits the Confucian tradition and consultations, mediation, and conciliation continue to play a major role in dispute settlement, with

195. Nomura, *supra* note 191, at 56.

196. E. LEE, *COMMERCIAL DISPUTES SETTLEMENT IN CHINA* 1-2 (1985); Lee & Lai, *The Chinese Conception of Law: Confucian, Legalist and Buddhist*, 29 *HASTINGS L.J.* 1307 (1978).

197. Ross, *The Changing Profile of Dispute Resolution in Rural China: The Case of Zouping County, Shandong*, 26 *STAN. J. INT'L L.* 15, 16-7 (1989).

litigation serving as the last resort.¹⁹⁸ The terms mediation and conciliation are often used interchangeably in the PRC context. In addition, the use of conciliation may not always involve the making of recommendations—the third party may either simply persuade the parties to reach a solution themselves, or may make proposals as a final step in the process.¹⁹⁹

In the PRC, there are three sectors where conciliation is utilized: the settlement of domestic matters by the populace through conciliation (or mediation) committees,²⁰⁰ conciliation by arbitral bodies, and conciliation by the courts. The latter two avenues impact upon the settlement of international business disputes. Chinese statutes regulating international business matters suggest that the disputants use conciliation or mediation before resort to adjudicative mechanisms, and the relevant contracts between foreign and PRC parties often sanction the use of a series of nonadjudicative means of resolution in the event a dispute arises.²⁰¹ International business dis-

198. E. LEE, *supra* note 196, at 9. On PRC dispute settlement in both the domestic and international contexts *see generally* Ross, *supra* note 197; Farina, "Talking Disputes Into Harmony" *China Approaches International Commercial Arbitration*, 4 AM. U. J. INT'L & POL. 137 (1989); Yongzhen, *Overview on Resolution of Economic Disputes Involving Foreign Interests in China: The Legal Basis and the Major Methods*, Beijing Review 35 (October 9-15, 1989); Smilde & Tung, *Conciliation of Commercial Disputes in the People's Republic of China*, 4 CAN.-AM. L.J. 43 (1988); Jianxin, *Mediation, Conciliation, Arbitration and Litigation in the People's Republic of China*, in LEGAL ASPECTS OF FOREIGN INVESTMENT IN THE PEOPLE'S REPUBLIC OF CHINA (Jianxin ed. 1988); Comment, "Far From the Tiger's Mouth": *Present Practice and Future Prospects For the Settlement of Foreign Commercial Disputes in the People's Republic of China*, 3 J.L. & COMM. 115 (1983).

199. Farina, *supra* note 198, at 151-52; Smilde & Tung, *supra* note 198, at 54; Chew-Lafitte, *The Resolution of Transnational Commercial Disputes in the People's Republic of China: A Guide For U.S. Practitioners*, 8 YALE J. W. PUB. ORDER 236, 268 (1982).

200. *See* Smilde & Tung, *supra* note 198, at 44-47; E. LEE, *supra* note 196, at 11-13.

201. Smilde & Tung, *supra* note 198, at 51-52; *see* Law of the People's Republic of China on Chinese-Foreign Equity Joint Ventures, July 8, 1979, art. 14 (disputes between venture parties which cannot be settled through consultations may be settled through mediation or arbitration), *reprinted in* THE LAWS OF THE PEOPLE'S REPUBLIC OF CHINA (1979-1982) 150, 153 (1987); Regulations for the Implementation of the Law of the People's Republic of China on Joint Ventures Using Chinese and Foreign Investment, Sept. 20, 1983, art. 109 (disputes between venture parties shall, if possible, be settled through friendly consultation or mediation), *reprinted in* 2 COLLECTIONS OF LAWS AND REGULATIONS OF THE PEOPLE'S REPUBLIC OF CHINA CONCERNING FOREIGN ECONOMIC AFFAIRS 62 (Department of Treaties and Law, Mofert 1985); Law of the People's Republic of China on Economic Contracts Involving Foreign Interest, Mar. 21, 1985, art. 37 (parties shall do everything possible to settle their dispute through consultation or mediation), *reprinted in* THE LAWS OF THE PEOPLE'S REPUBLIC OF CHINA (1983-1986) 162, 167 (1987); Law on Chinese-Foreign Contrac-

putes fall within the purview of the China Council for the Promotion of International Trade (the "CCPIT") and are dealt with by the China International Economic and Trade Arbitration Commission (the "CIETAC") or the China Maritime Arbitration Commission (the "CMAC"). Both the CIETAC and the CMAC regularly use mediation and conciliation, including the making of recommendations, as settlement methods.²⁰² Indeed, even if conciliation is unsuccessful and the parties move on to arbitration, the arbitrators often continue to act in a conciliatory mode.²⁰³ The Chinese courts are also authorized to conduct mediation or conciliation prior to, and even during, judicial resolution.²⁰⁴

The preference for nonadjudicative methods has also carried over into the development of the mechanism known as "joint conciliation," utilized to settle international business disputes occurring between PRC and foreign entities.²⁰⁵ The mechanism has been established in arrangements made between PRC and foreign trade organizations. Arrangements for the availability of joint conciliation were made in 1976 between representatives of the American Arbitration Association, the National Council for U.S. China Trade, and the FETAC,

tual Joint Ventures (1988), art. 26 (disputes between venture parties shall be settled through consultation or mediation; if unwilling to use these methods or their use is unsuccessful, dispute may be submitted to Chinese or any other arbitration agency for arbitration), *reprinted in LAW IN THE PEOPLE'S REPUBLIC OF CHINA* 771, 776 (R. Folsom & J. Minan eds. 1989).

202. Farina, *supra* note 198, at 152; Grenner, *The Evolution of Foreign Trade Arbitration in the People's Republic of China*, 21 N.Y.U. J. INT'L L. & POL. 293, 301-07 (1989); Yongzhen, *supra* note 198, at 40. The Foreign Economic and Trade Arbitration Commission (FETAC) and Maritime Arbitration Commission (MAC) were renamed in June 1988 as the CIETAC and CMAC respectively.

203. Chew-Lafitte, *supra* note 199, at 269; Zongzhen, *supra* note 198, at 39. Also, the conciliator is permitted to act as the arbitrator in the same dispute.

204. Civil Procedure Law of The People's Republic of China (For Trial Implementation), Oct. 1, 1982, arts. 6 (mediation should be stressed in trying civil cases) & 97-102 (authorize court to mediate if possible and "urge the parties to understand each other's positions and reach an agreement"), *reprinted in THE LAWS OF THE PEOPLE'S REPUBLIC OF CHINA* (1979-1982) 259, 261, 276 (1987).

205. Chew-Lafitte, *supra* note 199, at 268-69; Holtzmann, *A Case Study of Joint Conciliation in Trade With China*, in *NEW TRENDS IN THE DEVELOPMENT OF INTERNATIONAL COMMERCIAL ARBITRATION AND THE ROLE OF ARBITRAL AND OTHER INSTITUTIONS*, *supra* note 182, at 225; Surrey & Soble, *Recent Developments in Dispute Resolution in the People's Republic of China*, in *LEGAL ASPECTS OF DOING BUSINESS IN CHINA* 1983 373 (J. Cohen ed. 1983).

although a written agreement was never entered into.²⁰⁶ Others have also been confirmed with French and Italian trade bodies.²⁰⁷ The U.S. arrangement resulted in two joint conciliations in the late 1970s, one of which was fully and successfully completed.²⁰⁸

Ordinarily, a joint conciliation is conducted by the two relevant trade organizations who each appoint a conciliator. The conciliators correspond with the parties and themselves, and then meet to formulate the recommendations which are, if the conciliators can agree on the proposals, provided to the disputants.²⁰⁹ As usual, if the process fails, the parties can move on to arbitration.

Recently, however, the economic modernization plan and the increase in commercial transactions with the West in the post-1979 period, accompanied by statutory development, has produced a shift in the Chinese orientation. Although nonadjudicative resolution methods are still preferred for domestic disputes, the formal mechanisms of arbitration and litigation are being increasingly used in the PRC.²¹⁰ In the international business context, although the same statutory or cultural preference for the use of nonadjudicative methods also continues, there is a growing trend in the PRC towards the use of international commercial arbitration as a final step in the dispute settlement process.²¹¹ The effect, if any, that the re-

206. Holtzmann, *supra* note 205, at 226. FETAC was the predecessor of the CIETAC.

207. Protocol for Settlement of Disputes Arising From China-France Industrial Property Trade (1980) concluded between CCPIT and the Bureau of Industrial Property of France; CCPIT-Italian Association for Arbitration Cooperation Agreement (1981). Xunyi, *supra* note 198, at 349-50. West Germany has opened a Conciliation Centre in Beijing and the Beijing-Hamburg Conciliation Centre has opened in the Federal Republic, the two centres jointly formulating conciliation rules. Yongzhen, *supra* note 198, at 38.

208. One other was initiated but was settled before the conciliators were appointed. Holtzmann, *supra* note 205, at 227-37.

209. *Id.*; Surrey & Soble, *supra* note 205, at 381-82.

210. Ross, *supra* note 197, at 63. Formal mechanisms are being accessed to a greater degree due to their accessibility and cost-effectiveness, whereas informal mechanisms are being seen as less effective in the resolution of disputes arising out of increasingly complex economic relationships. *Id.*

211. Farina, *supra* note 198, at 138 (greater numbers of Sino-foreign contracts and P.R.C. trade laws provide for international commercial arbitration); Grenner, *supra* note 202, at 307 (from 1985-1987, number of Sino-foreign arbitrations conducted in P.R.C. increased markedly, whereas number of conciliations did not).

cent political disturbances in the PRC will have on this movement cannot be fully determined.

The fact that a nation has a long tradition of resort to conciliation as a mechanism for the settlement of domestic disputes does not mean that it will be automatically used in international business disputes involving that country's nationals. This behaviour is illustrated clearly in international business transactions involving Japanese entities. Although the Chinese do continue to rely to a greater extent on the conciliatory/mediatory approaches in their international business relationships, this attitude could alter if they continue to engage in complex commercial transactions with Western parties. Indeed, the dominant influence in the transnational business system appears to be that of the West with its law consciousness and its inclination towards the adjudicative forms of dispute settlement, arbitration in particular.²¹² Although a tendency towards greater acceptance of conciliation can be seen in the legislation of those Western nations with a Pacific Rim exposure, in contractual practice the Western influences appear to be stronger.

IV. *THE VIABILITY OF CONCILIATION AS A MECHANISM FOR THE SETTLEMENT OF INTERNATIONAL ECONOMIC AND BUSINESS DISPUTES*

There are a variety of advantages to the use of conciliation, often in the comparative sense relative to litigation or arbitration. Conciliation is less costly than the adjudicative methods, as it is a relatively informal and expeditious process. Also, if a small claim is involved, conciliation should be preferred since it will be more cost-effective than litigation.²¹³ Like arbitration, party autonomy is emphasized and the disputants usually have considerable freedom to design the conciliation process, including the choice of location and conciliators with expertise in the relevant subject-matter. If the dispute is of a type that warrants a wide-ranging or creative solution,

212. Weber, *International Arbitration Is Gaining Acceptance Among Pacific Rim Traders*, 7 *CAL. LAW.* 29, 31 (1987). The author argues that Asian parties are likely to increasingly prefer arbitration over conciliation as a result of more complex commercial relationships, a greater geographic diversity of companies involved, and the comparatively better enforcement mechanisms available for arbitral awards. See generally *id.*

213. Yamashita, *supra* note 185, at XIV 3-14.

then conciliation, with its ability to design such proposals, would be more appropriate than litigation with the restrictions involved in rendering judgments.²¹⁴ Further, the information and statements generated by the conciliation remain confidential unless the parties agree otherwise.

The informal conciliation environment is likely to be warmer than that of the adjudicative forum. The compromisory, "win-win" character of the conciliatory process is a major advantage since it facilitates the maintenance of a harmonious business relationship, whereas the use of an adjudicative form may rupture this connection. Thus, conciliation should be preferred in situations where the parties wish to preserve their extant contractual and commercial ties.²¹⁵ For example, conciliation would facilitate the maintenance of a long-term contract or joint venture relationship.²¹⁶ In addition, some entities from the Eastern Pacific Rim may continue to have a cultural preference for nonadjudicative settlement methods although, as discussed, this inclination is not uniformly strong.

However, a number of drawbacks to the use of conciliation can be posed. It has been argued that conciliation, because it results in non-binding recommendations, is likely to be a waste of time, effort, and money since the process may collapse entirely or the recommendations may not be accepted by the disputants. These are possible outcomes. Yet, conciliation can and does result in successful settlement agreements between the parties based on the conciliator's recommendations. Also, if a state or state agency is involved, it may submit to third-party dispute settlement only if the conciliation is non-binding conciliation in order to avoid subjection to the binding decision of an adjudicative tribunal.²¹⁷ Even if the conciliation fails, the resultant costs will not have been inordinate, and there will be some carry-over benefits that will enure to any subsequent adjudication, such as clarification of facts and issues and completed legal research.

The attainment of a settlement agreement may involve contractual issues if the disputants are of unequal bargaining

214. *Id.*

215. *Id.*; Herrmann, *supra* note 144, at 173.

216. Brazil, *Resolution of Trade Disputes in the Asian Pacific Region*, 10 ADEL. L. REV. 49, at 51.

217. Herrmann, *supra* note 144, at 173.

power. Potentially, one party could be coerced into an agreement to accept the conciliator's recommendations which is not wholly acceptable to it because of the superior economic strength of the other. In this event, the weaker party would have to rely on contractual relief through doctrines such as economic duress or unconscionability. Alternatively, a weaker disputant should consider its status when deciding whether to try conciliation, and hope to be able to reject unsatisfactory results, or to opt instead for an adjudicative method wherein economic disparities are not immediately disadvantageous.

The enforceability of the settlement agreement can also be problematic if one of the parties refuses to observe its terms. A form of statutory enforcement exists, but only in limited jurisdictions. The contractual nature of a settlement agreement necessitates the initiation of a legal action based in contract in an attempt to get the recalcitrant party to honour its obligations. The uncertainties involved may mute the appeal of conciliation. Yet there are also uncertainties involved in arbitration and litigation, including the major issue inherent in their adversarial construct—the real possibility of the “win-lose” outcome wherein one disputant may obtain no satisfaction at all. In contrast, a successful conciliation typically results in a resolution that is of some benefit to both parties.

The best role for conciliation is as an optional, initial step in a layered dispute resolution process. If conflict occurs, the parties can decide at that future point whether conciliation would be a viable mechanism. If it is successful and a settlement agreement is reached, the substantial costs of adjudication are avoided. If conciliation fails, the disputants can proceed to other agreed modes of settlement and can benefit to a certain degree from aspects of the conciliatory exercise. There are, however, several factors that the disputants will have to examine in the event of a dispute to determine the viability of conciliation in the particular circumstances. First, the negotiability of the parties' initial positions on the issue in dispute is a precondition for a workable conciliation. The process will fail quickly if the disputants' positions are so polarized and entrenched at the outset that there is no realistic possibility for the compromise required to realize settlement. Second, although conciliation can be used to solve legal disputes, it will be an inappropriate mechanism if either disputant wishes to

firmly establish the parameters of the applicable law, or if mandatory regulatory legislation is involved. Although agreements to arbitrate that involve statutory claims are being enforced by many courts,²¹⁸ public policy and nonarbitrability concerns still remain as potential barriers to the enforcement of any arbitral award. Similar arguments could also apply to counter the enforcement of conciliation settlement agreements.

CONCLUSION

In theory, conciliation can fulfil a valuable role in transnational economic dispute settlement as an early, informal process that, if successful, obviates the necessity of resort to adjudicative mechanisms. It offers an objective third party to resolve a dispute while maintaining flexibility of procedure and the ultimate freedom of the disputants to choose whether or not to accept the conciliator's recommendations. Conciliation is included in dispute resolution structures throughout the transnational system in either its classic or hybrid forms. Yet, in practice, conciliation is not frequently utilized, especially in comparison with arbitration. The one exception to this observation occurs in the use of conciliation techniques in international trade treaties, whether they be multilateral or bilateral. The GATT and most free trade agreements include aspects of conciliation in one form or another as an integral element of conflict resolution. As these systems are the required mechanisms for settling treaty disputes, the conciliatory techniques are regularly utilized.

In contrast, although conciliation is occasionally found in other treaty relationships and can be used to settle private disputes, it is rarely used in either of these sectors when international economic or business disputes are involved. This may be due in part to the youth of many provisions containing the conciliation option. However, the relatively greater use of arbitration in agreements where both mechanisms are available indicates that most disputants, whether they be states or private entities, take the adjudicative route if the issue cannot be

218. *See, e.g., Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (providing enforcement of international commercial arbitration clause and holding that antitrust claims are arbitrable).

solved through negotiations. It is likely that this behaviour is founded in the Western tradition of conflict determination through binding, adversarial methods. The greater participation of Eastern players in the contemporary transnational economic system has only slightly altered this orientation, usually in states bordering on the Pacific Rim. It is questionable whether this trend will continue or whether, instead, the newer players will increasingly conform to the adjudication pattern. Yet conciliation does serve a useful function within carefully defined limits, and should be seriously considered when dispute resolution structures are being drafted or accessed. Conciliation deserves to be implemented more often than it is at present as an initial step in a layered framework. It may expeditiously resolve an international business dispute eliminating the need for, but not the availability of, adjudicative settlement mechanisms.