Chapter 9

Elements of Conciliation in Dispute Settlement Procedures Relating to International Economic Law

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I  Introduction

As explained by Christian Tomuschat, ‘conciliation has less well-defined contours’ than arbitration. Indeed, conciliation or similar forms of dispute settlement involving third parties, but still being fundamentally based on a mutual consent of the disputing parties, may take various forms and are often not very clearly defined.

Nevertheless, there seems to be quite a broad field of application for conciliation and similar dispute settlement techniques in international economic law or – as the organizers of this conference have very aptly suggested – quite a broad base of dispute settlement techniques in which “elements” of conciliation can be traced.

These range from the traditional inter-state WTO dispute settlement, to alternatives to mixed arbitration in the field of investor-state dispute settlement (ISDS) and to conciliatory elements in settling financial and monetary disputes.


2 Pursuant to the Institut de Droit International conciliation is ‘a method for the settlement of international disputes of any nature according to which a commission set up by the parties, either on a permanent basis or on an ad hoc basis to deal with a dispute, proceeds to the impartial examination of the dispute and attempts to define the terms of a settlement susceptible of being accepted by them, or of affording the parties, with a view to its settlement, such aid as they may have requested’ (Art. 1 Institut de Droit International, ‘Resolution on International Conciliation’ 49(ii) (1961) Annuaire de l’Institut de Droit International 385). However, legal scholars do not always agree on what the precise differences between ‘conciliation’ and ‘mediation’ may be, indeed, both terms are occasionally used interchangeably, see Linda Reif, ‘Conciliation as a Mechanism for the Resolution of International Economic and Business Disputes’, 14 (1990) Fordham International Law Journal 584; see also infra note 28. For the purpose of this article, both terms are used interchangeably.
The following contribution will provide an overview of the use of conciliation in international economic law as well its potential for more frequent recourse to such an alternative to judicial or arbitral dispute settlement.

II The Actual Use of Conciliation in International Economic Law

Some elements of conciliation can actually be traced in the practice of settling disputes of a financial and/or monetary character between states and between states and international organizations. The ad hoc solutions sought in fora like the Paris Club, or the London Club, when it comes to restructuring sovereign debt vis-à-vis official and private creditors, or similar attempts through bondholder committees sometimes integrate conciliation elements. However, usually the emphasis is on direct negotiations between creditors and debtors, rather than on conciliation through third parties. Thus, in the following overview the focus will be on WTO dispute settlement and on conciliation elements in ISDS.

1) WTO Dispute Settlement

In WTO dispute settlement, conciliation takes a rather prominent position as a form of alternative dispute settlement, alternative to the prescribed two-tiered quasi-arbitral dispute settlement between WTO members which is provided for in the Dispute Settlement Understanding (DSU). Article 5 DSU explicitly provides for conciliation together with good offices and mediation