

11-2001

Mediation and Conciliation as Alternative Means of Settling International Disputes

Sompong Sucharitkul

Golden Gate University School of Law, ssucharitkul@ggu.edu

Follow this and additional works at: <http://digitalcommons.law.ggu.edu/pubs>

 Part of the [International Law Commons](#)

Recommended Citation

In its original version, this essay was written in response to an invitation to celebrate a festive occasion honouring Ambassador Professor Geraldo do Nascimento e Silva of Brazil (Nov. 2001).

This Presentation is brought to you for free and open access by the Faculty Scholarship at GGU Law Digital Commons. It has been accepted for inclusion in Publications by an authorized administrator of GGU Law Digital Commons. For more information, please contact jfischer@ggu.edu.

MEDIATION AND CONCILIATION

AS ALTERNATIVE MEANS OF SETTLING INTERNATIONAL DISPUTES

by

SOMPONG SUCHARITKUL*

- * B.A. Hons., B.C.L., M.A., D.Phil., D.C.L. (Oxford); Docteur en Droit (Paris); LL.M. (Harvard); of the Middle Temple, Barrister-at-Law; Associate Dean and Distinguished Professor of International and Comparative Law at Golden Gate University School of Law (San Francisco); Former Member and Special Rapporteur of the International Law Commission; Member of the Institute of International Law (Geneva); Member of the Panels of Conciliators and Arbitrators of ICSID (World Bank); Member of the United Nations Compensation Commission (UNCC) and President of ASEAN - ID Arbitral Tribunal.

MEDIATION AND CONCILIATION AS ALTERNATIVE MEANS OF SETTLING INTERNATIONAL DISPUTES

Sompong SUCHARITKUL

I. GENERAL CONSIDERATIONS

An endeavour will be made in this article* to present two distinct methods of international dispute settlement, namely, mediation and conciliation. The presentation will be done from an international and comparative standpoint, inevitably retaining an Asian perspective in its global survey. Observations will be concentrated on these two procedures for the resolution of international conflicts. In this chapter, the terms 'dispute' and 'conflict' are used interchangeably. So also are the terms 'settlement' and 'resolution'.

1. SCOPE AND OBJECTIVE

The object and purpose of any method of dispute resolution could be achieved if a just settlement was reached peacefully and amicably, or if a mutually acceptable solution could be found to resolve the conflict. The method chosen by the parties to the dispute, whatever it is, is not an end in itself, but only a means to an end. Pacific settlement of the dispute or peaceful resolution of the conflict is the end result to be attained, which constitutes the object and purpose of our study of the two methods of dispute settlement.

* In its original version, this essay was written in response to an invitation to celebrate a festive occasion honouring Ambassador Professor Geraldo do Nascimento e Silva of Brazil.

Mediation and conciliation are listed in Article 33 of the Charter of the United Nations¹ as alternative means of international dispute settlement. While the list is not intended to be exhaustive, the methods enumerated appear to start from the most direct and the most informal procedure, namely negotiation all the way up to the most sophisticated and the last resort of conflict resolution, namely judicial settlement. In between the initial and the final steps of the ladder several other methods are specified: inquiry, mediation, conciliation, arbitration, resort to regional agencies and arrangements, or any other means of their own choice. Among the residual means of their own choice which have been frequently used but are not specifically mentioned in this list are good offices and fact-finding proceedings.

A fact-finding mission may serve to determine the existence of a fact which could be conclusive of the outcome and could put an end to the conflict, or it may form part of the procedures adopted in a particular method of dispute settlement, such as mediation and conciliation. Resort to regional agencies or arrangements may lead to a settlement or resolution of the conflict by mediation, good offices, conciliation or arbitration, or any other means specified in Article 33.

As the aim of every method of international dispute settlement is essentially to achieve the final resolution of an international conflict, negotiation between the parties is to be encouraged on a continuing or uninterrupted basis. Renegotiation may be considered resumption of a series of protracted negotiations which may be engaged at any time or any stage of the proceedings, whatever the method of dispute resolution adopted by the parties.

By way of illustration, the United States welcomed Nicaragua's decision to discontinue the proceedings it had instituted pending the final stage of assessment of compensation by the

¹ See Chapter VI, Article 33 of the Charter of the United Nations, signed at San Francisco on June 26, 1945; entered into force on October 24, 1945; 59 Stat. 1031, T.S. 993, 3 Bevens 1153; Pub. L. 89-206, as amended 22 USCA ss. 287-287t. Text supplied by the UN Secretariat.

International Court of Justice.²

Again without withdrawing the case from the International Court of Justice, the United States and Iran jointly requested the Court to postpone sine die public hearings during which the Parties were to present their oral arguments in a case concerning the Aerial Incident of July 3, 1988.³ Postponement of public hearings sine die by the Court without fixing a future date for the hearing or any subsequent proceedings entails the same legal consequences as discontinuance, withdrawal or removal of the case from the Court's list. This could be done any time by agreement of the parties. As such direct negotiation or continuing dialogue between the parties should always be encouraged by the mediator, conciliator, arbitrator, trial judge and other person responsible for the administration of a particular method of dispute settlement. The influence of such a continuing dialogue cannot be overrated.

The need to maintain direct negotiation between the parties on a continuing basis is justified. It provides a key to the successful conclusion of any method of dispute resolution. Continuing dialogue between the parties will ensure settlement, satisfaction and compliance with the verdict or recommendation of the independent third party whose decision has been sought by the parties to the dispute with the view to resolving the outstanding conflict between them.

2. THREE DIMENSIONAL DEFINITION OF INTERNATIONAL DISPUTES

Thus far I have given illustrations of international conflicts in the traditional sense of the term. A dispute is international because it is between two or more nations or States. International disputes are primarily inter-governmental. This is by no means the only dimension or level of international disputes.

In actual fact, what is more popularly known today in this country as a distinct category

² See Communiqué No. 91/28 of September 27, 1991. The President of the Court on September 26, 1991, made an order recording the discontinuance of the proceedings and directing the removal of the case of Military and Para-military Activities in and against Nicaragua from the Court's list.

³ See Communiqué No. 94/18 of August 11, 1994.

of international disputes belong to another dimension, the private-sector or non-governmental dimension of transnational disputes. This non-governmental dimension covers mainly commercial disputes and other civil liabilities involving a foreign element which require the application of a selected set of conflict rules in the domain of private international law. In this commercial non-governmental dimension, the exact replica of the various methods of dispute settlement available for inter-governmental conflicts are also to be found for the purpose of resolving transnational civil and commercial conflicts. It involves consideration of the choice of law and the choice of forum as well as the method of dispute settlement which could be at the option of the parties or by the Court's ruling in accordance with the international conflict rules of the State of the Forum or of the site of arbitration, conciliation or mediation. In turn, the harmonization and assimilation or unification of the rules of private international law can only be achieved as have been partially achieved by States through the codification process undertaken by the norm-formulating agencies, such as UNCITRAL, UNIDROIT and the Hague Conferences. For execution of a foreign judgment or award, the mandatory rules of the State of the Forum including its notion of the 'ordre public' appear to enjoy unquestioned supremacy.

The link between the two dimensions or levels of international disputes, i.e., governmental on the one hand and non-governmental on the other, has been further compounded by the formation of a third dimension which represents a fusion or a hybrid mixture of the two dimensions. The third dimension consists of disputes between a State or an agency or instrumentality of a State and a national or corporation of another State.

A perfect example of the third dimension of international disputes is furnished by conciliation and arbitration as well as the additional facility available at the International Centre for the Settlement of Investment Disputes (ICSID) under the Washington Convention of 1965.⁴ ICSID facilities are specifically designed for the settlement of investment disputes between States and nationals of other States. This dimension of international disputes are qualified ratione

⁴ U.N.T.S. 159, 4 ILM 532 (1965), done at Washington on March 18, 1965, entered into force on October 14, 1966. One hundred States are now Parties to the Convention.

personae⁵ by reason of the status of the parties to the dispute, one being a State and the other a national of another State. This specific dimension only covers one kind of disputes, namely investment disputes, and as such is subject to a limitation ratione materiae⁶ by reason of its subject-matter.

In the remote past before the advent of ICSID, disputes relating to foreign investments, such as expropriation or personal injuries suffered by aliens were left to the private parties concerned initially to seek redress from the territorial authority. After having exhausted the local remedies, the injured individuals or juridical entities would then be permitted to seek the espousal or sponsorship from their respective government for the prosecution of their claims. The injuries suffered by the individual victims could then be said to pass on to the State as if by way of subrogation. It is the State that now claimed as an injured party through the internationally wrongful act committed against its nationals or entities by failing to provide adequate protection of the investments made by them or else to provide a substitute performance by paying appropriate compensation under international law. Such failure could amount to a denial of justice when local remedies had been exhausted without redress. The injured State was not obliged to reimburse its nationals for whose injuries the State had received compensation as the wrong was considered to have been committed against the State and not its nationals.

On the other hand, the parties to the dispute could agree to create a mixed claim commission with or without the payment of a lump sum which could be set aside for the satisfaction of the claims made by nationals of the injured State. Countless such bilateral or mixed claims commissions have been set up between neighboring States such as the United States and Canada, or the United States and Mexico. Several multilateral claims commissions have also been established to consider questions of reparations for war-time loss and damage to properties. The United Nations recently set up an International Claims Commission for victims

⁵ Article 1 (2): The purpose of the Centre shall be to provide facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States.

⁶ Ibid. Article 1 (2).

of the war between Iraq and Kuwait. These claims commissions afford instructive instances of alternative dispute resolution designed to yield salutary results if not to guarantee complete satisfaction of each and every claim submitted by individual victims or their relatives including reparations for environmental damage.⁷

3. PLURALITY OF METHODS OF DISPUTE SETTLEMENT AT THE OPTION OF THE PARTIES

Parties to an international dispute are absolutely free to resort to any means of dispute settlement of their choice in any of the three dimensions considered. This freedom of choice is unqualified so long as there is reciprocal agreement. Once the choice is made by both parties, it is not open to one party to revoke the option or unilaterally to withdraw from the agreed method of conflict resolution. The sanctity of an undertaking to submit a dispute to a pre-determined method of dispute resolution depends on the compulsory character of the obligation incumbent upon the parties to use that particular method of dispute settlement. In actual practice, parties often make their choice in advance, and this choice is binding on them once a dispute has arisen, unless they both agree to resort to a different option. Thus, it is not infrequent that States, international organizations, other entities and individuals have concluded agreements whereby each party undertakes to submit future disputes to compulsory arbitration, conciliation or mediation. Such an undertaking is generally binding on the parties.

In an advisory opinion rendered by the International Court of Justice on April 26, 1988,⁸ regarding a controversy between the United Nations and the United States Government concerning the Office of the Permanent Observer's Mission of the PLO in New York, the Court considered the applicability of the obligation to arbitrate under Section 21 of the U.N.

⁷ See U.N. Document S/22599, May 2, 1991, concerning the creation of a U.N. Compensation Fund to be administered by the Governing Council, composed of representatives of the fifteen members of the Security Council in Geneva. The Governing Council has served as the Appointing Authority to nominate members of the Commission to administer the Fund and to adjudicate the claims. See paragraphs 16, 17 and 18 of UNSC Resolution 687 (1991).

⁸ Advisory Opinion, 1988 I.C.J. Rep. 12.

Headquarters Agreement of June 26, 1947⁹ and found that obligation to be valid and binding on the United States as a party to it.

An obligation previously undertaken by a State and an international organization to submit their disputes to compulsory arbitration was recognized by the Court as an unequivocal obligation to arbitrate. By the same token, the acceptance of the Optional Clause, Article 36 (2) of the Statute of the International Court of Justice, creates for that State an irrevocable obligation to submit future disputes to the compulsory jurisdiction of the Court. What was otherwise originally optional has become compulsory by virtue of a voluntary declaration accepting the compulsory jurisdiction of the Court.

In a non-international forum, such as a court of law in California, certain disputes regarding family relations may be subject to mandatory mediation at the instance of the Court itself, or as otherwise required by the procedural rules of the forum, before the matter is considered by the court.

Nevertheless, neither mandatory mediation, nor compulsory conciliation, carries with it an obligation on the part of the parties to the dispute to accept or to abide by the award or recommendation or report of the conciliation commission or of the mediator chosen by them. A glance at the practice of States appears to suggest that the parties are still free to accept or reject the opinion, decision or recommendation they have themselves specifically requested from the conciliators or mediators. If found unacceptable or if not found mutually agreeable by the parties, the entire proceedings may end up in total non-compliance. But the parties may pursue other avenues or resort to other methods of dispute settlement in search for a more mutually acceptable solution. On the other hand, in a domestic or municipal court, a recommendation of the mediator may weigh heavily against rejection at the risk of losing further time and expenses without necessarily assuring a more acceptable solution.

In the inter-governmental dimension, a marked absence of measures of constraint or enforcement measures against States or lack of effective sanctions in most systems of international dispute settlement appears to have contributed to the successive use of different

⁹ Done at Lake Success, June 26, 1947, entered into force November 21, 1947, 11 U.N.T.S. 11; 61 Stat. 3416, 12 Bevans 956.

methods of dispute settlement by the States in order eventually to encounter or arrive at a solution that ideally suits the dispositions of both parties. This quest for a viable solution may seem endless as seen in the light of State practice.

4. TWO CELEBRATED ILLUSTRATIONS

For present purposes, suffice it to give but two of the most highly instructive case studies to illustrate the usefulness of the plurality of available methods of international conflict resolution. These methods are by no means mutually exclusive, although not concurrently or simultaneously pursued, they may be successively utilized by the parties to the same dispute.

a. The Argentine-Chilean Border Conflict

Without going into the substance of the controversy between Chile and Argentina concerning the Beagle Channel, it is noted that both parties considered it to be a dispute over the interpretation of the Chilean-Argentine Boundary Treaty of July 23, 1881.¹⁰ This controversy had been the subject of lengthy negotiations and a sustained exchange of diplomatic correspondence between the two Governments. In the Protocol signed in 1915, the U.K. Government was designated as Arbitrator in accordance with the General Treaty of Arbitration of 1902.¹¹ In a Declaration issued by Queen Elizabeth II, ratifying the unanimous decision of the Court of Arbitration composed of five Members chosen from the International Court of Justice, namely Sir Gerald Fitzmaurice (U.K.), Mr. Hardy C. Dillard (U.S.A), Mr. André Gros (France), Mr. Charles Oneyama (Nigeria) and Mr. Sture Petren (Sweden) appointed by the U.K. Government in the capacity as sole arbitrator, the decision was considered to constitute the AWARD in accordance with the Treaty and was as such communicated to the Parties in London

¹⁰ See the AWARD/LAUDO 1977, Beagle Channel Arbitration.

¹¹ See *ibid.* p. 422: Tratado General de Arbitraje de 1902.

on May 2, 1977. In the meantime Argentina denounced the General Treaty of 1902 in accordance with Article XV, the Treaty nonetheless remained in force between them until the conclusion of the proceedings. On January 25, 1978, the Arbitration Award of 1977 was rejected by the Argentine Government.¹²

Neither the decision of the Court of Arbitration endorsed by the Queen of England, nor the AWARD by the Queen as sovereign head of the U.K. Government, sole arbitrator, was ever accepted by Argentina. In fact another controversy was brewing over the Falkland Islands, aliter las Malvinas, between the Argentine Republic and the U.K.

Chile and Argentina continued their search for a more mutually acceptable solution, having thus unsuccessfully resorted to both arbitration and adjudication by the five Members of the Court of Arbitration. On December 26, 1978, Cardinal A. Samore, representing the Holy See, began a series of interviews in Buenos Aires and Santiago. The two Parties signed an Agreement on January 8, 1979, in Montevideo accepting the mediation of the Holy See.¹³ Thus, a different method of dispute settlement was adopted by the Parties seeking the good offices of the Pope as intermediary to mediate the dispute between the two Catholic States. This time a settlement was reached by 1984 and the solution suggested by His Holyness the Pope¹⁴ was accepted and implemented by the Parties.¹⁵

b. The U.S.-Iran Hostages and Assets Disputes

The second 'cause célèbre' relates to the dispute between the United States and Iran concerning U.S. diplomatic and consular staff in Iran.¹⁶ The United States Government, as

¹² See 17 I.L.M. 738 (1978), and a note by Chile repudiating the Argentine rejection note, 17 I.L.M. 750 (1978).

¹³ See 24 I.L.M. 1 (1985).

¹⁴ See *ibid.*, 24 I.L.M. pp. 7-10 (1985), Papal Proposal of December 12, 1980.

¹⁵ See 24 I.L.M. pp. 11-16 (1985).

¹⁶ For the decision of the Court, see 1980 I.C.J. Rep. 3.

an injured party, tried every conceivable method of dispute settlement. The Security Council of the United Nations was seized of the urgent matter as the continuance of the dispute was likely to endanger international peace and security. A watered down resolution was passed while a more strongly worded one encountered opposition. Recourse to the International Court of Justice resulted in a clear and decisive judgment ordering immediate release of the hostages and the return of the premises to the U.S. diplomatic and consular missions in Iran. But this judicial decision was to no avail. Thus frustrated and exasperated, the U.S. Government was desperate enough to attempt a rescue party and in the ultimate resort had to use unilateral counter-measures by a presidential decree freezing all Iranian assets in the United States. It was not until 1981 that a negotiated settlement was reached in the Algiers Accords, thanks to the good offices provided by the Iranian chosen intermediary, the Algerian Government with the expert help of an adept and experienced negotiator to serve as go-between intermediary to transmit the translated communications from the United States to Iran and vice versa.

The negotiated settlement embodied in the Algiers Accords of January 16, 1981 was merely a means to an end. It marked the beginning of a series of dispute resolution of all dimensions between Iran and the United States. The solution was found in the release of the American hostages, the establishment of a unique arbitral institution which has disposed of several thousands of claims and cross claims, and the transfer of a lump sum of one billion U.S. dollars into the escrow of the account of the Iran-U.S. Claims Tribunal at The Hague. The administration of dispute settlement by the Tribunal with the funds at its disposal deserves a more detailed and in depth treatment.¹⁷

At least one can count four or five successive methods of international conflict resolution invoked by the United States as the aggrieved Party in the dispute with Iran over the treatment of U.S. diplomatic and consular staff in that country in the trying months of 1979-1981.

The Iran-U.S. Claims Tribunal constitutes yet another shining example of the third dimension of international conflicts covering disputes between nationals and corporations of one

¹⁷ For a collection of essays on the negotiations between the U.S. and Iran and for the settlement of the hostage crisis and the related crucial and financial issues, see *American Hostages in Iran*, W. Christopher, ed. 1985.

Party and Government agencies or departments of another Party.

II. MEDIATION AS AN ALTERNATIVE MEANS OF RESOLVING INTERNATIONAL CONFLICTS

References to mediation as a highly successful method of international dispute settlement have loomed large in the preceding survey of general considerations, especially in the citation of the two leading cases: The Beagle Channel and the U.S. Diplomatic and Consular Staff in Iran.

Mediation is but a second or third step up the ladder in the scale of international conflict resolution. At this point it is useful to observe that within a particular method of dispute settlement there may be far greater variations than the differences that may or may not be appreciable between one method of conflict resolution and the next step up or down the ladder of dispute settlement.

One type of mediation could be as diverse from another type of mediation as, or even more so than, the case of good offices or conciliation which could flourish on the border line with mediation. While in general conciliation is closer to arbitration than mediation, good offices sometimes assume all the characteristics of mediation. The difference between good offices and mediation is only a matter of degree and not of substance. Several instances of good offices have been identified as mediation.

Treaties and international conventions tend to include good offices in the same grouping with mediation. Thus the Pact of Bogota 1948¹⁸ which is an American Treaty on Pacific Settlement deals with Procedures of Good Offices and Mediation together under Chapter II. It might be convenient to say with some measure of precision that good offices stop where mediation begins, if the degree of participation by the middle man or the go-between is taken into consideration. There are as such border line cases where the two procedures are hardly

¹⁸ 30 UNTS 55, the 1948 American Treaty on Pacific Settlement.

distinguishable.¹⁹

The terms 'good offices' and 'mediation' have been in diplomatic and judicial usage for several hundred years. Chief Justice Marshall referred to them in *The Schooner Exchange v. M'Faddon* (1812)²⁰ Pradier-Fodéré in the late XIX century gave an accurate appraisal of the role of good offices and mediation as alternative means of settling international disputes.²¹ In each case, the third State or Party used its good offices or played the role of a mediator to induce the contending Parties to reach an amiable settlement. The mediator plays the part of a 'compositeur à l'amiable' and exercises his moral influence to tone down the excessive pretensions of the opposing Parties to a more moderate positions conducive to reciprocal concessions leading to an amiable arrangement.²²

While good offices are limited to initiating direct negotiations between the parties concerned without active participation, a mediator generally takes a more active part in the discussion and is often expected to suggest some solutions to the problem. A line of distinction, if any, is very thinly drawn between the two procedures which are frequently confused.²³ The two cases cited below as examples of good offices could well be regarded as a modest form of mediation.

Thus, in the THAILAND-CAMBODIA dispute 1960, the Secretary-General of the United

¹⁹ See Rapport Descamps, *Conférence de la Paix de 1899*, p. 102. "Les bons offices peuvent être distingués à certains égards de la médiation. Pratiquement, ces moyens d'action se différencient moins par leur nature que par leur pénétration plus ou moins grande dans la sphère de rapprochements amiables. Souvent d'ailleurs l'un succède à l'autre et la Puissance tierce qui a noué des négociations entre des Etats en conflit est tout indiqué pour participer à ces négociations et parfois pour les conduire. Les actes diplomatiques n'insistent pas sur cette distinction."

²⁰ (1812) 7 Cranch 116, at pp. 136-137.

²¹ See *Traité de droit international public européen et américain*, (1885-1906) No. 2588.

²² See also in this sense, Fauchille, *Traité de droit international public*, Paris (1921-1925), No. 932.

²³ See Sompong SUCHARITKUL: *Good Offices as a Peaceful Means of Settling Regional Differences*, in *International Arbitration Liber Amicorum for Martin Domke*, The Hague, 1967, pp.338-347.

Nations, Mr. Dag Hammarskjöld and Ambassador Engen (Norway) were present throughout the negotiations between the Thai and the Cambodian delegations at the U.N. Headquarters in New York. In actual practice, both compositeurs à l'amiable did take part in the negotiations and even chaired the discussions between the two sides. Their quiet and discreet participation exercised considerable moral influence on the Parties and eventually led to the conclusion of four New York Agreements.²⁴

Again the MALAYSIA-INDONESIA question (1963-1966) could also be considered another cause célèbre for the good offices or mediation services provided by Thailand in the person of her able Foreign Minister Dr. Thanat Khoman, to put an end to the policy of 'Confrontasi' initiated by President Sukarno against Malaysia.²⁵

Mediation is defined in Article XI of the Pact of Bogota 1948 as "submission of the controversy to an outsider by mutual agreement between the parties concerned". The role of the mediator, not unlike that of good offices defined in Article IX, is to assist the parties in the settlement of the controversies in the simplest and most direct manner, avoiding formalities and seeking an acceptable solution.²⁶

The Hague Convention No. I of October 28, 1907 contains provisions placing good offices and mediation in comparable positions. Article 2 stipulates: "En cas de dissentiment grave ou de conflit, avant d'en appeler aux armes, les Puissances contractantes conviennent d'avoir recours, en tant que les circonstances le permettront, aux bons offices ou à la médiation d'une ou de plusieurs Puissances amies." This role could not be assumed by one of the parties to the dispute. But an offer of good offices or mediation is not to be construed by the parties as an unfriendly or less friendly act.

What appears to be significant in inter-governmental mediation is the fact that the third party enjoys the position of respect and is highly regarded by both parties to the dispute as their venerable friends. In effect, it is both institutional as well as personal, in that the mediator

²⁴ For an account of the procedures, see *ibid.*, at pp.341-343.

²⁵ For a more detailed account of this notable case, see *ibid.*, at pp.343-346.

²⁶ Article XII of the Pact of Bogota also provides that "no report shall be made by the mediator and, so far as he is concerned, the proceedings shall be wholly confidential."

must be an entity or a person of respectable integrity, of high moral character and capable of exercising appreciable moral influence on both sides. The procedures utilized in mediation are simple and informal, often unrecorded or at any rate reported in the briefest minutes of the meetings in summary form and not to be published, while oral proceedings or negotiations are held in camera or 'à huis clos' with the presence and participation of the mediator who conducts the meetings or otherwise assists the parties and facilitates the conclusion of an amiable settlement. What counts is the solution or resolution of the conflict.

The role of the mediator is sometimes described as that of a chief negotiator as in the case of Count Bernadotte of Sweden who served as Chief U.N. Truce Negotiator in the area to bring about armistice agreements between Israel and the Arab States in 1949. The significance of the role of the mediator cannot be fully appreciated without an understanding of the risk involved. As it happened, Count Bernadotte was killed in the service of the United Nations. History appears to be repeating itself in the cycle that followed in the case of another distinguished Swedish experienced negotiator mediator who perished in the line of official U.N. duties. Both valiant men dedicated their life as an international civil servant in ceaseless pursuit of the ways and means of resolving international conflicts.

Mediation is relatively still in the pre-dawn stage of legal development in the third dimension of transnational disputes between States and nationals of other States. It is not precluded under the ICSID machinery of dispute settlement. The achievement of Ambassador Bedjaoui of Algeria in the Iran-U.S. negotiated settlement may be said to have directly helped resolve thousands of international disputes in this twilight zone of the third dimension.

In the private-sector dimension, however, mediation is viewed as an entirely different form of conflict resolution. Domestically, in some jurisdictions, notably in the United States, mediation is sometimes mandatory before the matter goes to the Court for judicial determination. As in the Ninth Circuit of the Federal Court of Appeal, a number of mediators have been appointed by the Court to deal full time with appeals, out of which it is reported that ninety per cent are settled by mediation. Court appointed mediators might or might not command the respect of the parties, but experience has proved that their efforts have been very productive and more than highly successful in reaching final settlement. So successful indeed that the institution of mediation is being introduced in the curriculum of enlightened American

law schools. Indeed repeated attempts have been made to export the techniques to other legal systems on the Asian side of the Pacific Rim with some measure of initial success, as is indicated by the experience of the Philippines.

A reminder is in order at this point. Mediation is one of the oldest forms of dispute settlement, well known in the practice of most Asian States. It is automatic or mandatory and without formality or ceremony. For instance, in the Thai village community where family ties are very important and the intimacy of family relations is strengthened by religious principles, the bond of marriage is totally voluntary and the consensual principle applies to the contract of marriage as well as to its agreed dissolution. Because like marriage, divorce is also consensual, it is not unnatural that any administrative officer responsible for the registration of marriage and of divorce is vested with the authority to suspend the petition for divorce by first endeavouring to mediate the differences between the disenchanted spouses. Even judicial proceedings or adjudication in the earlier stage of legal development tend to function in a manner very much reminiscent of mediation and conciliation, thereby promoting the chance of amiable settlement to be reached by the parties themselves with the assistance or insistence by the Court of law or the competent family court.

The use of mediation as a means of settling local differences was widespread in Asia long before the birth of Jesus Christ. One only has to revisit the classical epic poem RAMAYANA, or RAMAKIARTI in the Thai version, which is popularly known throughout South-East Asia and the Indian Subcontinent. Since olden days, several episodes have been performed as classical drama, called Khon. In one of the very last episodes towards the end of the seemingly endless odysseys of RAMA and SITA, the hero RAMA, unable to overcome his lingering suspicion about the chastity of his queen, SITA, was reluctant to reunite with her after a protracted period of absence since her abduction by the ten-headed Giant King TOSAKAN. At a gathering of all the angels, ISUARN the Sovereign Lord of all angel kings conferred with Prince INDRA, and decided to send for SITA from the undersea world to appear before him at Krailas, the summit of the Earth, for a consultation and inquiry. Seeing that SITA was still upset and disappointed by RAMA's groundless suspicion, ISUARN exercised his moral influence as a mediator or compositeur à l'amiable, reminding RAMA of his excessive mental cruelty to SITA. On the other hand, talking to SITA, ISUARN placed the blame on the devil

who plotted for her death. After further exchanges, SITA and RAMA were reconciled and ISUARN arranged a festive celebration for their reunion upon their return to the homeland in Ayudhya, and the couple lived happily ever after thanks to ISUARN's mediation.

Mediation is more likely to succeed in any dimension when both parties have agreed to resort to it as a means of settling their dispute, especially if and when an appropriate person of stature could be found to perform the task.

Mediation could be suspect if it is forced upon the parties. Thai legal circles are generally mindful of the legend of the two fishermen, TA IN and TA NA, fighting over the fish they caught. The dispute centered upon the question as to which half of the fish should go to TA IN and which other half to TA NA. TA YU, an innocent bystander, offered his service as a mediator who arbitrarily gave the head of the fish to TA IN and the tail to TA NA, keeping for himself the main body of the entire fish.

This story also reminds us of the mediation Japan offered to conduct in a territorial dispute between Thailand and France, which resulted in the TOKYO Convention of May 9, 1941,²⁷ six months before the outbreak of hostilities in the Pacific War on December 8, 1941. While a portion of the territories claimed by Thailand was retroceded to Thailand, the portions retained by French Indochina were soon to be occupied by Japanese forces for nearly four years before Japan's unconditional surrender in 1945.

While mediation has led to several well-known successes in inter-governmental and transnational disputes, the fate of the mediator needs to be carefully re-examined in light of the high casualty rate.

III. CONCILIATION AS ANOTHER MEANS OF SETTLING INTERNATIONAL DISPUTES

In our study of conciliation as another alternative means of settling international disputes, it is convenient to return for another brief revisit to the RAMAYANA epic. In one of its richly

²⁷ See Treaty Series published by the Ministry of Foreign Affairs of Thailand, Vol. V: 1937-1941, Convention de la Paix entre la France et la Thaïlande and Protocols, pp. 173-191.

literary episodes, there was a scene which depicted the procedures for conciliation, arbitration and judicial settlement of a complicated dispute in actual operation. In this episode, MALIVARAJ, the maternal grandfather of the ten-headed Giant King TOSAKAN, who resided on the mountain top called Yod Far, enjoyed the reputation of righteousness, being a person of high moral quality, justice and impartiality. He was also credited with an unusual quality of UBEKKHA or equanimity which reinforced his skill in dispensing justice. He was further endowed with a special gift, the power of curse and blessing. Whatever he wished and said, invariably came true, good or bad alike.

Wearied and worn out from several battles with RAMA, TOSAKAN was still unable to repel the invading forces of the monkey army led by RAMA, persisting in his attempts to capture Langka, the capital city of the Kingdom of the Giants, and to retrieve his beloved wife, SITA, who had been kidnapped by TOSAKAN and kept as hostage under house arrest in that capital city. TOSAKAN, hoping to make use of the gift of curse of his grandfather MALIVARAJ to destroy RAMA, petitioned MALIVARAJ as a friend of both parties to conciliate the dispute with RAMA over custody of a beautiful woman, SITA, whom TOSAKAN was keeping as lawful prize for having found unescorted the femme sole in the deep deer forest, basing his claim to SITA's hands on the principle 'finder's keeper'.

MALIVARAJ heard the accusation against RAMA's unwarranted use of force. But first the sole conciliator would like to hear the other side of the story, including SITA's testimony, being herself the subject of the dispute, and to confront RAMA with the accusation. RAMA was a grandson of his bosom friend. SITA was invited to appear by a process not dissimilar from a habeas corpus. Seeing SITA for the first time, MALIVARAJ was astonished by her disarming beauty and thought to himself that had he not been endowed with equanimity he would have been emotionally aroused by the presence of SITA. He immediately understood TOSAKAN's problem. SITA confirmed the truth about her status as RAMA's lawfully wedded wife and her abduction by TOSAKAN. RAMA further corroborated the evidence adduced by SITA, stating that he was lured by a golden hind and went ahunting, thereby allowing time for TOSAKAN to kidnap his wife in his absence. Upon hearing testimonies that contradicted TOSAKAN's allegation, MALIVARAJ was angered by his grandson's perjury and malicious prosecution, and decided that SITA should be returned to RAMA. Like any recommendation

of a conciliator, the parties could reject. Here too, TOSAKAN did not embrace the decision. Thereupon, MALIVARAJ put a curse on TOSAKAN to the effect that he would be defeated every day by the swords and arrows of RAMA. The curse came true in every detail.

This episode clearly demonstrates the use of conciliation as an older method of international conflict resolution in an almost inter-galactic dispute between the human king and the giant king, fact-finding proceedings were utilized to ascertain the truth of the allegation. The fundamental rules of procedure were strictly followed. Both sides were given ample and equal opportunities to state their case and to be heard, and the decision was given after due deliberation. Non-compliance entailed serious consequences adversely affecting the wrongdoer for violation of the principle of good faith.

The Asian legal world is thus equally familiar with conciliation proceedings as it is with mediation and good offices. In any event, the procedures have been used and are still in use in the internal legal system of the South-East Asian region. The story provides a fitting example for the resolution of inter-governmental conflicts as well as domestic and international differences in other dimensions.

Conciliation is also known in the region as an alternative means for the settlement of inter-governmental disputes between neighboring States. For instance, the ASEAN community has agreed to set up a High Council to take cognizance of the existence of disputes or situations likely to disturb regional peace and harmony and to recommend to the parties appropriate means of settlement, such as good offices, mediation, inquiry or conciliation. The High Council could offer its good offices or upon agreement of the parties in dispute constitute itself into a committee of mediation, inquiry or conciliation. The High Council may also recommend appropriate provisional measures to prevent deterioration of the dispute or situation. The conciliation procedures are intended to provide compulsory settlement of legal and political disputes with binding effect within the framework of ASEAN.²⁸

²⁸ See Articles 14 and 15 of the Treaty of Amity and Cooperation in South-East Asia, Bali, February 24, 1976, ASEAN Documents Series, 1967-1985, pp. 26-29; also see C. Quisumbing, "Problems and Prospects of ASEAN Law: Towards a Legal Framework for Regional Dispute Settlement", ASEAN Identity Development and Culture, Honolulu, East-West Center, Cultural Learning Institute, 1981, p.300. We may soon see this procedure at work in regard to

On the other hand, Thailand herself had an unfortunate experience earlier with the five-member Franco-Siamese Conciliation Commission set up under Article III of the Washington Accord of 1946²⁹ and in accordance with Article XXI of the Franco-Siamese Treaty of December 7, 1937.³⁰ More recently, however, conciliation has been increasingly designated as one of the alternative means of resolving international conflicts in a multilateral or global context, such as dispute regarding the application of jus cogens in the Vienna Convention on the Law of Treaties between States and International Organizations of 1986³¹ and the latest system of dispute settlement devised by the World Trade Organization (WTO) and established in January 1995.³²

The global machinery for dispute settlement under the new WTO envisages the office of the Director-General as provider of good offices, conciliation and mediation at the preliminary stage of the consultations. These procedures are undertaken voluntarily if the parties so agree. There is also provision for the establishment of a panel by the Dispute Settlement Body (DSB). The panel which is conciliatory in nature submits its report to the parties for interim interview. The DSB adopts the panel's report which is subject to appellate review. The DSB then adopts the Appellate Report and monitors the implementation of Panel and Appellate Body recommendations. The parties continue to negotiate compensation pending full implementation. The DSB may authorize retaliation or suspension of concessions pending full implementation thirty days after expiry of a reasonable period of time.

While WTO machinery for international conflict resolution deals with trade and tariff and other commercial and financial disputes as between States, its recommendations have far-

disputes concerning the Spratly Islands.

²⁹ See Accord de Règlement Franco-Siamois, signed in Washington D.C. on November 17, 1946, Treaty Series published by the Ministry of Foreign Affairs of Thailand, Vol. VI, 1942-1957, pp. 59-71.

³⁰ Ibid., Vol.V, 1937-1941, pp. 83-103.

³¹ See in particular Articles 53 and 64 of the 1986 Convention, not yet entered into force.

³² 33 I.L.M. (1994) 112, Understanding on Rules and Procedures Governing the Settlement of Disputes.

reaching consequences affecting private corporations and individual traders in the transfrontier trade, thus blurring still further the border line between governmental and private sector dimensions, approaching the third dimension as exemplified by the ICSID experience.

For the third dimension, ICSID has to some extent assimilated the procedures for Arbitration and Conciliation while maintaining essential differences and features and keeping two separate panels of conciliators and of arbitrators. Qualifications of persons to serve on both panels are virtually the same. They are persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment.³³ It is further required that competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators. One person could serve on both panels for renewable periods of six years.³⁴ The experience of ICSID seems to support the conclusion that the Conciliation Procedure although less frequently used than Arbitration has proved highly successful in terms of satisfactory settlement of disputes of this dimension. In one case, the parties reached a settlement agreement before the constitution of the Conciliation Commission.³⁵ In another case, settlement was agreed by the Parties soon after the constitution of the Commission by the Sole Conciliator, Richard Wilberforce (U.K.) on January 6, 1984.³⁶

Like mediation, conciliation is also increasingly used by parties in all the three dimensions of international conflicts. Not unlike mediation, the record maintained by conciliation has been impressive in ensuring ultimate settlement of international disputes.

³³ See Article 14 of the Washington Convention 1965.

³⁴ *Ibid.*, Article 15 and also Article 16.

³⁵ Case No. ICSID CONC/82/1, *SEDITEX v. Madagascar*, 1982.

³⁶ Case No. ICSID CONC/83/1, *Tesoro Petroleum Corporation v. Trinidad and Tobago*.

IV. CONCLUSION

It is encouraging to witness the recent widespread of recourses to mediation and conciliation as alternative means of international dispute settlement. This phenomenal increase in the use of alternative dispute resolution is prevalent in all the three dimensions and at all levels of international conflicts, for inter-governmental conflicts, private and commercial disputes as well as controversies of a mixed category.

True it is that in a sophisticated legal system like that obtaining in the United States, especially on the West Coast, mediation, conciliation and arbitration have been introduced and promoted by the judiciary at the insistence of the Court of law. ADR has become a new acronym for Alternative Dispute Resolution, alternative they are indeed to judicial settlement of disputes.

In other more ancient legal systems, the Court of law or the judiciary still clings to its hard-won independence and autonomy, bordering on the sensitive issue touching the sovereign authority of the State itself. The judiciary tends to guard its independence jealously. Any encroachment on the domain of judicial settlement could be viewed as undermining judicial independence and autonomy. This should be understood in the light of the past experience of a number of Asian countries, notably China, Japan and Thailand, whose courts of law had for several decades been deprived of competence to adjudge most local disputes to which Westerners were parties under the so-called extraterritorial regime, otherwise known in Turkey as the Capitulation Regime, under which European nationals were deemed to be outside the territorial jurisdiction of an otherwise competent court of law in spite of their physical presence within the territorial confines of Asian States.

While mediation and conciliation are distinctly venerable methods of dispute resolution in Asia, their re-introduction into Asian judicial systems by American counterparts might be "carrying coal to New Castle". It should not be forgotten, however, that time progresses. One day before too long, the need may arise for New Castle to start importing coal. That time may have indeed come for Asian Pacific judicial systems to embrace the new found techniques developed by Californian and United States Courts as advanced methods of mediation and conciliation. The transplantation or transposition of American models on Asian soils may not

currently be fashionable, while the good gesture has been accompanied by the best of intentions. The motive is worthy of the most serious consideration, as judges require more time to be better able effectively to maintain judicial independence and discretion. Asian judges share the same sentiments as their American brethren. It is encouraging to observe the zeal and enthusiasm displayed by American colleagues to learn about Asian cultures as long ingrained in their judicial systems.

In a truly international forum, mediation and conciliation continue to be heavily used, because of their flexible and confidential procedures, and also partly because of the initial aversion felt by several Asian nations and nationals alike for the frightening prospect of any international adjudication, a feeling recently echoed by high officials in the Administration of this country especially following delivery by the International Court of Justice of its Judgment in the case concerning military and para-military activities in and against Nicaragua. But there has since been a fundamental change of circumstances and the case has been removed from the list of the Court. A change of attitude is now in order.

Whatever the final outcome of this debate, it is the settlement acceptable to the parties that we all strive to achieve for all international disputes, by whatever means attainable. Call it what you will, ADR or other similarly unpretentious nomenclature will do equally well. Successful efforts will be highly appreciated. Let us all help restore peace and harmony in our part of the world, and let us maintain security and tranquility with our sustained efforts.

Sompong SUCHARITKUL

San Francisco, November 2001