PC.DEL/616/14/Rev.1*)
30 October 2014

ENGLISH only

Mr. President, distinguished delegates,

It is a great pleasure and honour for me to be given the opportunity of providing you with a short introduction to the Court of Conciliation and Arbitration within the OSCE. This Court exists formally as an institution under international law. It was brought about by the Stockholm Convention of 15 December 1992 which came into force on 5 December 1994. To date, it has been ratified by 33 States of the OSCE membership of 57 States. Accordingly, the circle of States parties is even larger than the group having joined the European integration process under the treaties of Rome. Nonetheless, the OSCE Court is the least known of all European courts. No wonder: since its coming into existence, the Court has not received a single case. Born in the midst of the euphoria surrounding the developments of the years following the fall of the wall in Berlin, it was conceived as a mechanism under which the Europeans would be able to settle their problems in a spirit of mutual understanding without having to bother the institutions operating at world level. In other words, the Court symbolizes the hope that in the future, in that 'New Europe' that was ushered in by the Paris Charter adopted by the CSCE in 1990, all disputes would be settled amicably under the rule of law.

The ratification process, as just hinted, went ahead fairly smoothly during the first decade after the signing of the Convention. Many States declared at the same time that they generally accepted the jurisdiction of the Court. But the last instrument of ratification was deposited in 2003 by Luxembourg. Since that time, silence has spread. The Court has not fallen into total oblivion but it has simply remained unused, today known only to legal experts. What does that mean? Have disputes in Europe simply disappeared, or do governments believe that recourse to the Court would not be a sensible remedy? It is certainly not easy to find the right answer. But because of the somewhat ephemeral existence of the Court, it may be warranted to give a summary account of its structure and modalities of operation.

Not everyone may be aware of the double nature of the Court. Contrary to its name, which suggests that it is a judicial institution, it assembles under its roof both an arbitral body and a mechanism of conciliation. Conciliation, as you all know, is a flexible procedure which does not produce a binding decision but is confined to providing suggestions and re-

*) redistribution due to change of distribution status, text remains unchanged

commendations. Arbitration, on the other hand, terminates with a binding award. Only if the parties to a dispute have consented to arbitral settlement can a proceeding be put into motion.

Like under the system provided for under the Statute of the International Court of Justice, such consent may be given in general ex ante or in view of a specific case (Article 26). The Court thus offers to the parties a choice between two essentially different modalities of settlement. Whoever prefers flexibility, may turn to conciliation; whoever, on the other hand, is in favour of clear-cut outcomes, would normally opt for arbitration.

It is well-known that the choice of a dispute settlement procedure is a highly political act. In assessing the pros and cons of a specific mechanism, confidence plays a considerable role. Does the OSCE Court, although to date it has never become operational, deserve being trusted? Instead of responding by a blunt 'Yes', I confine myself to describing the appointment of the members of a Conciliation Commission or an Arbitral Tribunal. In each instance, the litigant parties play a decisive role. They are not confronted with a bench whose composition they can change only to a limited extent by requesting the addition of an ad hoc member of their own nationality.

The basic feature of the Court is that each State party appoints from the very outset for either segment of the Court's field of jurisdiction one main expert and one alternate member, i.e. one conciliator with an alternate, and one arbitrator also with one alternate member, together four persons. This consolidated list constitutes the intellectual backbone of the Court. The establishment of expert bodies for either conciliation or arbitration relies to a determinative extent on the list.

As far as conciliation is concerned, each side appoints for a case at hand one conciliator from the list. There is no requirement that the national conciliator from the consolidated list must be chosen although that may seem to be an almost natural inclination for any government. The Bureau of the Court shall then appoint three further conciliators who shall constitute the 'neutral' element of the Conciliation Commission. All this will be done in consultation with the parties. In the case of arbitration, the arbitration members appointed by the States parties concerned, figuring on the consolidated list, will become *ex officio* members of the Arbitration

Tribunal, and the Bureau of the Court will then again appoint additional arbitrators in such a manner that their number will exceed at least by one the number of *ex officio* members. Here, too, the parties will be consulted. The parties should never be confronted with unexpected surprises as far as the composition of an Arbitration Tribunal is concerned.

The members of the Bureau are not necessarily included as conciliators or arbitrators, but they may be chosen if so wished by the parties. Thus, the parties have a great deal of influence in the selection process, a fact which certainly may increase confidence in any of those bodies. A perusal of the permanent list demonstrates that the States Parties have invariably appointed well-known and highly qualified lawyers to act on their behalf.

The field of competence of the Court is not limited to matters previously dealt with by OSCE recommendations or measures. Only with regard to conciliation does the Convention indicate that a settlement should be sought 'in accordance with international law and … OSCE commitments' (Article 24) whereas the function of an Arbitral Tribunal is described as deciding any disputes 'in accordance with international law', i.e. not on the basis of the numerous programmatic rules established by the OSCE. Thus, an Arbitral Tribunal is instructed to act in the same manner as the International Court of Justice for which international law is the only determinative parameter.

Conciliation proceeds under the auspices of secrecy. No open hearings are provided for, and the details of the procedure lie largely in the hands of the parties. Moreover, conciliation has no rigidly defined outcome. It is incumbent on a Conciliation Commission to assist the parties to the dispute in finding a settlement. The final result of such endeavours is of course open. In the best of cases, a Conciliation Commission may succeed in leading the parties to a 'mutually acceptable settlement' which then is supposed to be implemented voluntarily.

From the very outset, it was generally felt that the OSCE Court would not be seized with disputes of a vital character that were susceptible of jeopardizing the existence or territorial integrity of a State. In fact, there are disputes of an intermediate relevance but which may nonetheless, if they are simmering on for years, seriously impair the relations between two States. Sometimes, governments may feel that it is wise to avoid any controversial issues,

fearing that silence is the best recipe. Many times, however, such caution may prove detrimental in the final analysis. In any event, for the people concerned it will generally be more beneficial to know the long-term perspective, being able to plan ahead in the knowledge that a personal investment will not be ruined by sudden unexpected political decisions.

As already said, it would probably exceed the capacities of the Court if it was confronted with major, peace-threatening situations. But there may be incidents of smaller proportions, border disputes for instance, that involve a risk of degenerating into actual fighting. Let me just give some examples. One of the main deficiencies in Europe is the general lack of appropriate international procedures for the settlement of environmental tensions in certain border regions. Ruritania may intend to build a nuclear power station close to the border with a neighbouring country, without listening to critical voices from the other side of the boundary. Or else decisions to build airports or large motorways close to the national frontier may arouse uneasiness or anger in the population that has to shoulder all the negative effects but does not benefit from the project. The distribution of the waters of an international river has often arisen as a major bone of contention. This is not the place and the time to establish a balance sheet of all possible differences of opinion that could be ironed out through the efforts of an international body that looks into the situation with an impartial, unbiased eye.

It should be underlined that the Court carries with it many advantages. Not being overburdened, it will certainly be able to act swiftly once a case has been brought to its cognizance. The financial advantages which it offers should also be taken into account. The Court is financed by the States Members of the Stockholm Convention. They shoulder the administrative and operational costs of the Court, in the same way as the members of the United Nations share the expenditure caused by the activity of the International Court of Justice. Only the agents and counsel have to be financed by the litigant parties themselves. In this sense, pursuing a proceeding before the Court is much less burdensome than a proceeding that would be conducted by an ad hoc arbitral body specifically established for that purpose.

When it was established, the Court embodied many hopes for a better world embracing and in fact heeding the rule of law. The fact that it has stood idle for almost 20 years should not be misinterpreted as a sign that the rule of law has been pushed aside and has become defunct.

The truth is that the community of States gathered under the roof of the OSCE has been living under most favourable circumstances during that period. They have been spared major shocks after the end of the wars in the former Yugoslavia. Thus, trust could be placed in political procedures that have been most successful in overcoming tensions and frictions of all kinds. The OSCE constitutes the living example of such successful strategies. Bringing a case to an international court, on the other hand, is many times seen as a risky undertaking. This can also be observed with regard to the International Court of Justice, the European Court of Human Rights and the Court of Justice of the European Union. Inter-State cases may get lost, and the political harm resulting from such a failure may be significant. Precisely on that ground the OSCE Court offers conciliation with its almost unlimited flexibility as an alternative procedure.

In any event, the members of the Bureau of the Court are ready to put their best efforts in the service of the OSCE with a view to contributing to the main objectives of the Organization, the maintenance and promotion of peace and security, democracy and human rights in Europe.