Chapter 36: Novel Hybrid Mechanisms in Public International Law Dispute Resolution: Conciliation, Review Panels, and Expedited Grievance Mechanisms

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I INTRODUCTION

Public international law is reputed to be a conservative field steeped in, and often constrained by, history. Yet, the pace of innovation in public international law dispute resolution has quickened. Recent years have seen the emergence or re-emergence of various additional forms of dispute settlement, presaging an expanding universe of options to keep up with the ever-evolving needs of the modern international community.

Three recent examples are surveyed below. Their common thread is found in their hybrid forms and in the emphasis on expedited and non-contentious dispute resolution, with a view to rendering these mechanisms more efficient and effective. Their nature serves also to make them nimble enough to serve as part of the international legal and regulatory architecture, no longer confining public international

law dispute resolution only to big questions of principle, looked upon with hindsight and regret at their non-observance by one party or another. And these novel mechanisms come not a moment too soon, given the fraught international landscape and the myriad challenges on the horizon.

II INTER-STATE CONCILIATION: THE *TIMOR SEA CONCILIATION*

On 11 April 2016, Timor-Leste took a leap into the void. (1) It commenced a compulsory conciliation against Australia. No one had commenced an inter-State conciliation under the *United Nations Convention on the Law of the Sea* (UNCLOS), or at all since the *Jan Mayen Conciliation* in 1981. (2) Yet, the oxymoronically-named 'compulsory conciliation' had certain redeeming qualities.

Timor-Leste had already brought two inter-State claims against Australia under the Timor Sea Treaty. The first concerned allegations that Australia had engaged in spying on the Timorese delegation during the negotiation of a resource-sharing arrangement concerning a large gas field in a disputed area of the Timor Sea. (3) The second arbitration concerned tax jurisdiction over the exploitation of other oil and gas resources in disputed areas of the Timor Sea. (4) Timor-Leste had also commenced yet another case against Australia before the International Court of Justice, claiming a violation of sovereign immunities and the privilege and confidentiality attaching to communications with its lawyers when, on the eve of the procedural meeting in the first of these inter-State arbitrations, the Australian Security and Intelligence Organisation (ASIO) raided the offices of one of Timor-Leste's legal advisers in Canberra. (5)

Each of these cases concerned a legitimate dispute in its own right. However, each of the existing cases dealt with accessory issues relating to a broader dispute. None would help Timor-Leste move more than a small step towards its ultimate goal of

settling its permanent maritime boundary with Australia and achieving sovereignty over the natural resources found in the Timor Sea. A conciliation under Annex V of UNCLOS at least had maritime boundaries as its essential subject matter. In fact, the conciliation provided a platform to address all those other existing irritants in the same sweep. That is exactly what came to pass, as all three existing inter-State

proceedings, along with a slew of other transitional and governance matters, were settled in the course of early confidence-building measures undertaken in the conciliation process. (6)

The conciliation also engaged certain helpful general principles and good faith obligations embodied in UNCLOS. The dispute resolution provisions of UNCLOS – the adoption of which was a major coup for multilateral dispute resolution – reflect a general obligation to resolve disputes arising under the Convention. While States are afforded broad autonomy in the choice of means for dispute settlement, they cannot opt out altogether, except in respect of pre-existing disputes and certain narrow categories of sensitive cases. Compulsory conciliation thus represented a bottom line that Australia was obliged to accept, notwithstanding any existing instruments purporting to provide otherwise. (7) And if compulsory conciliation failed, UNCLOS stipulated that Australia would be obliged to 'negotiate an agreement on the basis of [the conciliation commission's] report' and then 'shall, by mutual consent, submit the question to one of the [binding dispute resolution] procedures provided for in section 2 [of Part XV of UNCLOS]'. (8) Timor-Leste's principal grievance was Australia's unwillingness to negotiate permanent maritime boundaries during a fifty year 'moratorium' imposed by the resource-sharing agreements already in place. The legal framework of the conciliation helped to highlight the inconsistency of this state of affairs with the aforementioned principles embodied in UNCLOS, as eventually found by the Conciliation Commission in its Decision on Competence. (9)

The last redeeming quality of the compulsory conciliation was that it was quick. Annex V of UNCLOS prescribes that a conciliation commission shall render its report within twelve months of its constitution. As noted by the Conciliation Commission, this

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time limit serves to 'ensure that a party is not compelled to continue endlessly a conciliation process that, in its view, has no hope of success'. (10)

The gamble on this untested procedure paid off. Although in a first phase of the proceedings, Australia initially resisted and objected to the competence of the Conciliation Commission, it ultimately accepted the Commission's decision dismissing those objections, and the successful implementation of the confidence-building measures mentioned above further encouraged it to take part in the process in earnest. (11) That engagement between the two States led to the *Comprehensive Package Agreement* of 30 August 2017, setting forth the agreed-upon elements for a full resolution of their dispute. Thus, beyond settling the various pending contentious proceedings, the conciliation was ultimately successful in resolving the two States' maritime boundary, transitional arrangements, and a special regime for joint development and resource-sharing in respect of the Great Sunrise gas fields in the Timor Sea. This agreement was then rendered into a comprehensive maritime boundary treaty regulating all these matters, signed at the United Nations in New York on 6 March 2018.

The simple fact that Timor-Leste and Australia managed to go from 'deeply entrenched' legal positions that 'had frustrated previous efforts to achieve a settlement through negotiation' to a comprehensive and fully implemented resolution of their dispute in less than two years makes the conciliation a precedent worthy of study. (12) The advantages of inter-State conciliation exhibited by the *Timor Sea Conciliation* have been invoked to justify the renewed interest in inter-State conciliation as a means of public international law dispute settlement.

In particular, the result of the conciliation on the maritime boundary was notable in that it drew a line that, while eminently justifiable on the basis of the legal principles in question, was unlike the outcome that might be expected from an arbitral tribunal or judicial decision. The new boundary gave different weight to the various relevant factors in different sectors. It provided contingent outcomes that accommodated expected future scenarios vis-à-vis Timor-Leste's further boundary negotiations with Indonesia. And it set forth transitional and governance arrangements likely beyond the remit of any arbitral or judicial body to pronounce. The flexibility of the conciliation process allowed the Commission not just to focus on the immediate elements of the

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dispute but to comprehensively address all relevant issues necessary to enable reaching an amicable and durable settlement. (13)

Yet, it is precisely these characteristics of the outcome that draw to the fore a less evident but crucial ingredient for the success of the conciliation: the hybrid legal and facilitative character of the process stemming from conciliation's origins as a cross between good offices and commission of inquiry. Inter-State conciliation requires more active engagement by a conciliation commission than mediation or good offices alone, engaging to a certain degree with legal issues, even if their resolution is not strictly required in order to settle the dispute. The ability to move back and forth from evaluative to facilitative mediation, from legal assessment to identification and reconciliation of interests, defined the successful approach in the *Timor Sea Conciliation*.

This feature remains underappreciated as a key ingredient and distinguishing factor of inter-State conciliation among the spectrum of other means of public international law dispute resolution, and the value that it may add over simple interests-based mediation. Diplomacy already provides a well-oiled machine for interest-based negotiation, and even good offices. But the dignity of States may require that long-held legal positions be recognized and given weight in contemplated outcomes before the political will to find a compromise solution can emerge. In this sense, conciliation offers a truly neutral, independent, and disinterested third party uniquely placed to offer the 'careful mix of diplomatic and legal skills, backgrounds, and approaches [that need to] be deployed in varying combinations at different stages of the process' to reach a resolution of an otherwise intractable dispute. (14)

Perhaps because the legal aspects are second nature to those active in binding adjudicatory procedures, this genesis of inter-State conciliation was addressed only in passing in an early footnote in the Commission's Report:

> Historically, international mediation was generally carried out by another sovereign power. Thus, while focused on the achievement of an amicable settlement, mediation was generally characterized by the independent political authority (and, potentially, interest in the dispute) of the mediating power. International commissions of enquiry, in contrast, largely replicated the arbitration procedures of the 1899 Hague Convention for the Pacific Settlement of International Disputes, but were focused solely on the determination of disputed facts. In contrast to mediation, the hallmark of a commission of enquiry was the absence of any independent political authority or interest in the dispute and the commission's reliance instead on its expertise and judgment in considering the facts at hand. In practice, early commissions of enquiry, as in the *Dogger Bank Case*, were sometimes mandated to go beyond a strict presentation of facts and address the apportionment of responsibility between the parties, *de facto* engaging in conciliation. This combination of inquiry, combined with recommendations as to the amicable settlement of the
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> dispute was then codified as conciliation in the many bilateral treaties on the resolution of international disputes concluded in the 1920s and 1930s. [15]

And perhaps because the facilitative, non-legal aspect of the proceedings presented the most novel challenge for seasoned international jurists, the Commission's account of the proceedings evinces trepidation with respect to engaging the two States on substantive matters of international law. However, between emphasizing the 'risk of entrenching positions' by inviting legal submissions and admonishing itself 'not to pronounce for its own sake on questions of international law', the Commission's Report did recognize that engagement on the law 'had the associated benefit of requiring the Parties to define their own positions in a more precise manner, especially where some of their own priorities may not yet have been reconciled within their respective governments and delegations', that the conciliation 'truly became productive at the point at which both Parties became convinced that the Commission's objective was not to push them to abandon long-held positions, but rather to understand and assist the Parties to identify a solution they had been unable to reach themselves', and most importantly that 'a conciliation commission should not encourage parties to reach an agreement that it considers to be inconsistent with the Convention or other provisions of international law'. [16]

Counterintuitive as it may be, it is the substantive legal engagement by highly-qualified independent and impartial jurists who could credibly render an arbitral award in binding dispute settlement proceedings that comprises an innovative element that aided in the success of the *Timor Sea Conciliation*. Embracing this evaluative-facilitative character of inter-State conciliation may yet help resurrect it from the annals of public international law.

III REVIEW PANELS: THE *SPRFMO REVIEW PANELS*

Signed in 2009 and entered into force in 2012, at a time when overfishing saw several species in the South Pacific in catastrophic decline, the *Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean* (SPRFMO Convention) [17] is one of the more recent international fisheries treaties concluded in the context of UNCLOS [18] and the 1995 Fish Stocks Agreement, [19] both of which envisage

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the establishment of regional fisheries management organizations (RFMOs) as a means of conserving and managing fisheries on the high seas. The Convention establishes the South Pacific RFMO (SPRFMO), which includes a Commission that is empowered to 'adopt conservation and management measures to achieve the objective of this Convention, including, as appropriate, conservation and management measures for particular fish stocks'. [20] Decisions by the Commission are taken by consensus, but in the event that this is not possible, then decisions are made by a 75% majority of the Members of the Commission. [21]

Most fisheries treaties establish negotiation and arbitration, either individually or in combination, as the means of dispute resolution, using traditional dispute settlement provisions as found in many other kinds of bilateral and multilateral treaties. Aside from a number of historic cases, there have been relatively few fisheries disputes brought to formal dispute resolution of any kind. [22] The SPRFMO Convention stands out, however, in the robustness of its dispute resolution framework. [23] Beyond formal dispute settlement procedures, the SPRFMO Convention establishes objection and review procedures in Article 17 and Annex II of the SPRFMO Convention, whereby any Member may present an objection to a decision on a question of substance adopted by the Commission within sixty days of the notification of the decision, on the grounds that the decision: (i) 'unjustifiably discriminates in form or in fact against the Member'; or (ii) 'is inconsistent with the provisions of the SPRFMO Convention or other relevant international law, as reflected in [UNCLOS] or the [Fish Stocks Agreement]'. [24]

Any SPRFMO Member that presents an objection must, at the same time, adopt 'alternative measures' that are 'equivalent in effect' to the decision to which it has objected. [25] A Review Panel of fisheries experts is then constituted to hear the objection, with one member appointed by the objecting State, one by the Chairperson of the SPRFMO Commission, and the chair of the panel appointed either by agreement or, where there is no agreement, the Secretary-General of the PCA. [26] Most significantly, the Review Panel must then hold a hearing within thirty days of its establishment and issue, within forty-five days of its establishment, its 'findings and recommendations on

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whether the grounds specified for the objection presented by the [objecting Member(s)] are justified and whether the alternative measures adopted are equivalent in effect to the decision to which objection has been presented'. (27)

Depending on its 'findings and recommendations', the outcome of the Review Panel broadly falls into the following categories:

- if the Review Panel finds that the objection is *not justified* and the alternative measures proposed are not equivalent in effect, then the objecting SPRFMO Member can choose to abide by the original decision or institute formal dispute settlement proceedings under the SPRFMO Convention; (28)

- if the Review Panel finds that the decision *discriminates* against the objecting Member, and the alternative measures adopted by the objecting Member are *equivalent* in effect, then the alternative measures replace the original decision for that Member (noting that the Review Panel may also recommend modifications to the alternative measures that would render them equivalent in effect); (29)

- if the Review Panel finds that the decision *discriminates* against the objecting Member, but the alternative measures adopted by the objecting Member are *not equivalent* in effect, then the Review Panel will recommend other measures that are equivalent in effect, which the objecting Member may challenge by requesting an extraordinary meeting of the Commission or instituting dispute settlement proceedings; (30)

- if the Review Panel finds that the decision is inconsistent with the SPRFMO Convention or other relevant international law as reflected in UNCLOS or the Fish Stocks Agreement, then an extraordinary meeting of the Commission is convened within forty-five days to reconsider the decision. (31)

This procedure has already been used on three occasions. In a first case, Russia objected on the grounds of discrimination for not being allocated any allowable catch of *Trachurus murphyi* (Chilean jack mackerel), the main species of fish managed by the SPRFMO, claiming that its historical catch justified an allocation of 19,944 tonnes for 2013. (32) Russia proposed as an alternative measure that it be granted a 19,944 tonne catch limit in 2013, although it later qualified this proposal by stating that it would cease fishing when the total allowable catch of 360,000 tonnes had been reached. (33) The key issue in dispute was whether Russia could prove the historical catch on which it

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based its current claim, all purportedly attributable to a single vessel, the *Lafayette*. (34) There were reasons to doubt this figure, including a news report suggesting the *Lafayette* was a processing rather than fishing vessel, a French inspection in January 2010 of the vessel which did not find any fishing equipment on board, inconsistent information in Russia's annual report to the SPRFMO for 2009, and information submitted by Peru showing that four of its vessels had transhipped 31,275 tonnes to the *Lafayette* in 2010. (35)

The Review Panel found that it did 'not have sufficient basis to determine the source of the portion of the *Lafayette's* reported catch that is not attributable to the Peruvian vessels'. (36) It therefore concluded that the failure to allocate any catch to Russia had resulted in unjustifiable discrimination against Russia. (37) However, it rejected Russia's alternative measure and instead recommended that Russia authorize its vessels to catch *Trachurus murphyi* in the Convention Area in 2013, but only after Russia concluded from data reported by the SPRFMO that it is likely the total catch in 2013 will not reach the 360,000 tonne total allowable catch, and until the SPRFMO reported that the total allowable catch had been reached. (38) Russia did not refer the matter to further dispute settlement and followed the Review Panel's recommendations. (39)

In a second case, Ecuador objected that the 1,377 tonne allocation it had received for 2018, despite repeated requests for a more-than-proportional increase, made it 'unfeasible and economically unsustainable' for Ecuador to operate even a single vessel. Ecuador claimed that this was discriminatory and inconsistent, given that: (i) Peru, South Korea, and Cuba had been granted more-than-proportional increases; (ii) decisions on catch limits going forward several years had been made at a SPRFMO Commission Meeting that Ecuador could not attend due to an earthquake; and (iii) basing catch allowances solely on historical catch data contravened norms protecting the special needs of developing coastal States under UNCLOS. (40) Ecuador therefore recommended an alternative measure of increasing its catch limit by an extra 5,123 tonnes, which would increase the total catch limit, but which was still below the 576,000 tonne limit recommended by the SPRFMO Scientific Committee. (41)

In response, the Review Panel held that relying exclusively on historical catch would indeed be inconsistent with the SPRFMO Convention, but that it was unconvinced that this was an accurate depiction of the SPRFMO Commission's decisions. (42) The Review Panel also held that there was no unjustifiable discrimination against

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Ecuador in either the process or the decisions being challenged. (43) The Review Panel then noted that the 'reserve' that Ecuador had sought to draw on in its proposed alternative measures was intended for areas under the national jurisdiction of Ecuador and Peru rather than the high seas, such that the alternative measures were not equivalent. (44) Notwithstanding these findings, the Review Panel discussed 'how

Ecuador's aspirations in developing a future high seas fishery for *Trachurus murphyi* could be addressed', [45] and 'invite[d] the Commission to consider exploring the possibility of adjustments to the allocation transfer system that would address the sorts of difficulties experienced by Ecuador'. [46] Ecuador did not challenge the findings of the Review Panel and in fact cited the final part of the findings and recommendations approvingly in its submissions before the SPRFMO Commission in 2019. [47]

In the latest case in 2023, Russia objected to its catch allocation as part of a ten year quota arrangement from 2023-2033 devised by a working group of the SPRFMO Commission. [48] China then also objected to its share, but subsequently withdrew its objection. [49] In terms of inconsistency with the Convention, Russia argued that its quota had been twice reduced without taking into account historical catch data and other criteria set out in Article 21. [50] Russia proposed, as alternative measures a 35,452 tonne catch limit (i.e., a 20% increase on its 2022 allocation), which it submitted was consistent with the recommendations of the SPRFMO Scientific Committee. [51]

The Review Panel held that it had 'no reason to conclude that the Commission has acted outside of its wide margin of discretion', [52] and that, therefore, there had not been any inconsistency with the provisions of the SPRFMO Convention, UNCLOS, or Fish Stocks Agreement. [53] However, the Review Panel ultimately concluded that 'insufficient attention' was paid during the CMM 01-2023 process to 'ideas, factors, criteria, and proposals of interest to Russia and similarly situated Members', which was 'due in part to the relatively short duration of the negotiations, especially when compared to the relatively long [ten years] duration for which the allocation percentages will in principle remain unchanged, and that this hurried process culminating in the adoption of CMM 01-2023 by a divided vote resulted in unjustifiable procedural discrimination with respect to Russia's allocation interests'. [54] The Review Panel ultimately recommended a modification of Russia's alternative measures, reducing the

increase on Russia's 2022 allocation from 20% to 15%, in line with the Scientific Committee's estimation of the overall sustainable increase in total allowable catch. [55]

The Review Panel also reflected on its duties being focused on 'problems and certain limited short-term responses', noting that 'longer term solutions' are entrusted to the Commission and commented that 'the further strengthening of the deliberative and negotiating processes would contribute to the effectiveness of the CMMs adopted in meeting the objectives of the Convention'. [56] It stated that 'Russia, jointly with other interested Commission Members, could advance the prospects of success in such an endeavour by indicating their willingness to find means in accordance with the Convention to enhance the fairness, transparency, and stability of allocations to Members whose flag vessels fish for *Trachurus murphyi*.' [57]

The simple fact that this procedure has thrice been able to resolve multiparty disputes involving several States and an international organization is already notable. The 'Solomonic' aspect of the panel decisions rendered has also been commended, allowing both the objecting and non-objecting Members room to compromise and move forward without need for further formal dispute settlement, [58] while at the same time 'assisting RFMOs to find ways to address more fundamental disagreements or differences of opinion which can give rise to these disputes in the first place'. [59]

Once again, the hybrid nature of the process enabled these positive outcomes. The Review Panels in each instance render a report of 'Findings and Recommendations'. The panel's findings act as a legal gateway that circumscribes the panel's mandate such that it does not veer wholly into equity and *amiable composition* that would usurp the SPRFMO Commission's mandate and discretion. The 'alternative measures' that an objecting Member is required to put forward also mean that it 'must identify not only the problem, but also a potential solution', which can then be further explored and refined by the Review Panel. [60] And the combined framework of such findings and recommendations allows for a process and a decision that remains non-binding on its own, but nevertheless transforms it into a binding dispute settlement through the absence of invocation of further procedures by the objecting Member(s).

The fast-track procedure stipulated by the SPRFMO Convention is even more remarkable. [61] In addition to requiring a hearing within thirty days, the Review Panel mechanism allows not only the objecting Member(s) and the representatives of the SPRFMO Commission but also cooperating non-contracting parties and all other members of the Commission to participate in the proceedings through oral and written submissions. Despite this high degree of procedural complexity – the conclusion of an inter-State proceeding involving multiple States and an intergovernmental organization within forty-five days being previously unheard of in international dispute settlement – the procedure has now been carried out successfully on three occasions. In fact, the speed of the process helps emphasize the less adversarial character of the procedure and the more active and inquisitorial role of the review panel, serving as an intermediate step prior to formal dispute settlement under the SPRFMO Convention.

Taken together, the nature and speed of the review panel procedure facilitate its integration into the broader regulatory structure of the SPRFMO Convention. The mechanism provides for an expeditious and flexible procedure to address real-time compliance with multilateral decisions against specific legal standards, while also affording the review panel latitude to make broader recommendations with respect to alternative measures, with a view to promoting adherence to said decisions and the overall objectives of the SPRFMO Convention. That is, the mechanism allows the review panel's decisions to plug into the Commission's iterative decision-making and SPRFMO Members' fishing

activities as they occur. [62] Case in point, following the 2023 Review Panel decision, a new working group chaired by Vanuatu was convened during the following SPRFMO Commission session to consider the latest Findings and Recommendations and was able to achieve consensus on a new distribution of the increase in total allowable catch for both 2023 and beyond. [63]

IV BUSINESS AND HUMAN RIGHTS GRIEVANCE MECHANISM: THE *INTERNATIONAL LABOUR ARBITRATION AND CONCILIATION RULES*

On 24 April 2013, the Rana Plaza building collapsed, killing over one thousand people labouring in the garment industry in Dhaka, Bangladesh. Subsequent investigations

discovered that building and fire safety measures were deficient and responsible for the tragic and profound loss of human life. This disaster nevertheless galvanized the international community and the various players in the fast-fashion industry in Bangladesh to do better and prevent any similar catastrophe from recurring. The outcome of these efforts was the signature on 15 May 2013 of the Accord on Fire and Building Safety in Bangladesh (Bangladesh Accord), a legally binding agreement facilitated by the International Labour Organisation between global brands and retailers on the one side and trade unions on the other to establish fire and building safety standards for workers in the textile industry in Bangladesh. In a first, however, these standards were accompanied by binding and enforceable dispute resolution mechanisms. The Bangladesh Accord established a multi-tier dispute resolution mechanism ending with arbitration under the UNCITRAL Arbitration Rules. [64]

A short time thereafter, this mechanism was put to the test. In July and October of 2016, two arbitrations were commenced under the Bangladesh Accord, claiming that certain brands had failed to uphold the commitments made in the Accord. [65] These arbitrations provided the proof of concept for an arbitration backstop to voluntary human rights commitments, but they also exposed the particular nature of business and human rights disputes. For example, the tribunal grappled early on with the transparency regime that should be applicable to the case. The tribunal not only noted that there was a significant public interest involved in the dispute but also recognized that privacy and reputational considerations formed the heart of the bargain struck in the Bangladesh Accord:

> [There is] a genuine public interest in the Accord, including on the part of other stakeholders who would have a direct interest in its interpretation. [...] On the other hand, the Tribunal must take into account competing factors stemming from the language of the Accord and the practice under it, which point to an obligation to protect certain information about the participating brand companies. [66]

The tribunal ultimately decided 'to balance both sets of interests emphasized by the Parties by disclosing certain basic information about the existence and progress of the arbitration proceedings, while at the same time keeping confidential the identity of the Respondents'. [67] Yet, this apparent compromise solution was partially frustrated by the fact that the UNCITRAL Arbitration Rules constrained hearings to be held in private and any award to be published only with the consent of all parties, even if inconsistent with the principles just enunciated. [68] Had the tribunal reached the fact-finding phase of the case, they may have encountered further challenges there as well. However, on 17

July 2018, the Tribunal constituted in the two arbitrations issued termination orders following the settlement by the parties of both sets of claims, those settlements remaining entirely confidential as well.

The tension between the design of the UNCITRAL Arbitration Rules and the particular characteristics of arbitrations in the business and human rights field led to the creation of the *Hague Rules on Business and Human Rights Arbitration* (Hague Rules). [69] The UNCITRAL Arbitration Rules – originally created with commercial arbitration in mind, but aspiring to such flexibility that they had been successfully employed in investor-State and inter-State arbitration – worked well in the *Bangladesh Accord Arbitrations*. However, the human rights context exhibited particular features that still warranted specialized rules and guidance. [70] Likewise, the UN Guiding Principles already codified international standards to be met by human rights remedy mechanisms. The Hague Rules thus sought to marry the neutrality, expertise, flexibility, and enforceability hallmarks of international arbitration with the legitimacy, accessibility, equity, and other criteria stipulated by the UN Guiding Principles. [71]

The Hague Rules also included a nod towards expedited and facilitative mechanisms. Seeing as these elements were secondary to the core principles of the Hague Rules, however, they addressed each of them in a single additional article, [72] in a manner ironically reminiscent of the simplicity of the UNCITRAL Arbitration Rules as compared to the specialized provisions of the Hague Rules.

In the meantime, the Bangladesh Accord example developed and evolved, eventually into the International Accord for the textile industry and with an eventual view to expansion to other industries as well. At the same time, although reflection on the *Bangladesh Accord Arbitrations* remained very positive, aspirations grew for a more operational-level expedited form of dispute resolution, capable of swiftly addressing an individual claim. The *Bangladesh Accord Arbitrations* had addressed a number of broader questions and proven the value of arbitration in this context, but also entailed time and costs that would preclude claims that did not rise to the same level of systemic importance. [73]

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This provided the impetus for the development of the *International Labour Arbitration and Conciliation Rules* (ILAC Rules), developed in 2021 to incorporate 'best practices for speedy and efficient resolution of disputes arising under international labour agreements' into the Hague Rules model. [74] This rapid-response mechanism takes after some of the characteristics common to labour arbitration, notably a default timetable which foresees an early hearing at which the issues may be crystallized and refined, with written submissions to follow thereafter. [75] The ILAC Rules also feature an early administrative conference to be convened in parallel to the appointment of the arbitrator and which provide an explicit off-ramp towards conciliation proceedings (also to be administered and supported actively by the PCA). [76]

The ILAC Rules mechanism remains untested as of yet, but that test would seem to be imminent based on reports from the front lines. The 2021 version of the International Accord Agreement incorporated the ILAC Rules only as an option. The ILAC Rules themselves were only finalized in the midst of those negotiations. The most recent 2023 version of the International Accord Agreement, however, now provides that 'any arbitration shall be governed by the International Labor Arbitration and Conciliation Rules' instead of the UNCITRAL Arbitration Rules.

The ILAC rules also coincide with another major shift in the business and human rights landscape that augurs the use of these and other mechanisms. In 2024, the European Parliament and the Council of the European Union adopted *Directive 2024/1760 on Corporate Sustainability Due Diligence* (CSDDD). Representing a crystallization of the UN Guiding Principles into regional hard law, the CSDDD imposes due diligence obligations on companies meeting certain thresholds on the number of employees and turnover to prevent potential adverse impacts or to mitigate or bring to an end actual adverse impacts arising from their own operations, those of their subsidiaries, or their business partners when related to their chain of activities. [77] The CSDDD adopts a dual enforcement approach. On the one hand, it requires companies to establish grievance mechanisms through which persons or entities concerned with actual or potential adverse impacts can submit complaints, allowing for 'participation in collaborative complaints procedures and notification mechanisms, including those established jointly by companies, through industry associations, multi-stakeholder initiatives or global framework agreement'. [78] On the other, it introduces the possibility of civil liability, enabling legal proceedings against companies that fail to meet their obligations. [79]

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While formally addressed to European companies and some non-EU companies, [80] its due diligence obligations extend across global value chains. This extraterritorial reach is likely to produce a Brussels Effect, accelerating the use of business and human rights grievance mechanisms and other means of dispute resolution across the globe. Efforts are already underway by the European Working Group for Responsible and Sustainable Supply Chains to translate the CSDDD's obligations into a set of model clauses. [81] The current iteration, known as the Zero Draft, outlines a tiered mechanism that begins with a dialogue-based resolution process involving an independent facilitator (an operational-level grievance mechanism) and escalates to arbitration or national courts if the grievance remains unresolved. [82] The Zero Draft expressly refers to the Hague Rules, the underlying model used to create the ILAC Rules, and an apt choice considering that they can accommodate multi-stakeholder participation. [83]

In the meantime, even as they await further implementation and operation, the ILAC Rules remain yet another example of using hybrid expedited dispute resolution at an operational level to support a broader system and policy objectives.

V CONCLUSION

The commercial dispute resolution community has seen a decided increase in interest for expedited and non-contentious dispute resolution options. Albeit in different configurations, States have shown an equal increase in appetite for diverse, ever speedier and more efficient alternatives in public international law as well. While the words of the 1899 Hague Convention still ring true – arbitration remains a 'most effective [and] equitable means of settling disputes that diplomacy has failed to settle' – its growing company and increasing number of flavours is to be welcomed. The tried-and-tested models of dispute resolution remain fit for purpose, but optimization and adaptation may be precisely what is needed to unlock their potential in novel contexts. Given the myriad conflicts plaguing the world today, States need as many tools in their arsenal as they can muster. One can only hope that agile mechanisms of the kind just explored might facilitate international cooperation and help the world adapt to the ever-evolving dynamics of global society.

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1) A. Pereira, 'Perspective of Timor-Leste' in H.D. Phan, T. Davenport, R. Beckman (eds), *The Timor-Leste/Australia Conciliation: A Victory for UNCLOS and Peaceful Settlement of Disputes*, p. 197, https://doi.org/10.1142/9789811202711_0007 (accessed 16 August 2025) ('The decision to pursue compulsory conciliation was taken only after a period of deep consideration. This was an untried, untested UNCLOS dispute resolution mechanism and Timor-Leste did not want to volunteer as the "guinea pig"'); L. Reed, 'Conclusion' in H.D. Phan, T. Davenport, R. Beckman (eds), *The Timor-Leste/Australia Conciliation: A Victory for UNCLOS and Peaceful Settlement of Disputes*, p. 197 ('It is no exaggeration to say that when Timor-Leste invoked compulsory conciliation under Annex V of [UNCLOS], there was scepticism and even cynicism in the legal community about the prospects'). *See also Timor Sea Conciliation (Timor-Leste/Australia)*, PCA Case No. 2016-10,

Report and Recommendations of the Conciliation Commission, 9 May 2018, para. 290 ('The Commission is cognizant that Timor-Leste initiated these proceedings as much due to the absence of other options as from a belief in the virtues of conciliation or in the likelihood of success.').

2) *Jan Mayen Conciliation (Iceland/Norway)*, Decision of June 1981, R.I.A.A. Vol. XXVII, p. 1.

3) *Arbitration under the Timor Sea Treaty (Timor-Leste v. Australia)*, PCA Case No. 2013-16. Publicly available details concerning the arbitration may be found at pca-cpa.org/en/cases/37/ .

4) *Arbitration under the Timor Sea Treaty (Timor-Leste v. Australia)*, PCA Case No. 2015-42. Publicly available details concerning the arbitration may be found at pca-cpa.org/en/cases/141/ .

5) *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia)*, International Court of Justice. Publicly available details concerning the case may be found at icj-cij.org/case/156 .

6) *Timor Sea Conciliation (Timor-Leste/Australia)*, PCA Case No. 2016-10, Report and Recommendations of the Conciliation Commission, 9 May 2018, paras 95-96, 106. *See also ibid.*, Annex 12: Commission's Proposal on Confidence-Building Measures of 14 October 2016.

7) *Timor Sea Conciliation (Timor-Leste/Australia)*, PCA Case No. 2016-10, Decision on Competence, 19 September 2016, para. 66.

8) S. Jayakumar, 'Compulsory Dispute Settlement and Conciliation under UNCLOS' in H.D. Phan, T. Davenport, R. Beckman (eds), *The Timor-Leste/Australia Conciliation: A Victory for UNCLOS and Peaceful Settlement of Disputes*, p. 26, https://doi.org/10.1142/9789811202711_0001 (accessed 16 August 2025) ('The Commission Report did not address the question whether UNCLOS states parties are obliged to return to the compulsory dispute settlement procedures of Section of Part XV. Fortunately, in the *Timor-Leste/Australia Conciliation*, because Timor-Leste and Australia reached a successful agreement on their maritime boundary, the meaning of 'shall, by mutual consent' remains an open question').

9) *Timor Sea Conciliation (Timor-Leste/Australia)*, PCA Case No. 2016-10, Decision on Competence, 19 September 2016, para. 62 ('In the Commission's view, what CMATS is not – and what Article 281 requires – is an agreement "to seek settlement of the dispute by a peaceful means of [the Parties'] own choice." CMATS is an agreement *not* to seek settlement of the Parties' dispute over maritime boundaries for the duration of the moratorium').

10) *Timor Sea Conciliation (Timor-Leste/Australia)*, PCA Case No. 2016-10, Decision on Competence, 19 September 2016, para. 107. *See also Timor Sea Conciliation (Timor-Leste/Australia)*, PCA Case No. 2016-10, Report and Recommendations of the Conciliation Commission, 9 May 2018, para. 68 ('the 12-month period set out in Annex V should be understood not as the timeframe in which a successful conciliation can likely be concluded, but rather as a safeguard to ensure that an unproductive conciliation is not unduly prolonged').

11) G. Quinlan, 'Perspective of Australia' in H.D. Phan, T. Davenport, R. Beckman (eds), *The Timor-Leste/Australia Conciliation: A Victory for UNCLOS and Peaceful Settlement of Disputes*, p. 185 ('Once competence had been determined, Australia decided to change tack. We had to put our previous misgivings about the way we had been brought to the process behind us'); L. Reed, 'Conclusion' in H.D. Phan, T. Davenport, R. Beckman (eds), *The Timor-Leste/Australia Conciliation: A Victory for UNCLOS and Peaceful Settlement of Disputes*, p. 201 ('Particularly noteworthy is Australia's full participation after losing its arguments against the Commission's competence').

12) *Timor Sea Conciliation (Timor-Leste/Australia)*, PCA Case No. 2016-10, Report and Recommendations of the Conciliation Commission, 9 May 2018, para. 285.

13) *Timor Sea Conciliation (Timor-Leste/Australia)*, PCA Case No. 2016-10, Report and Recommendations of the Conciliation Commission, 9 May 2018, para. 286 ('the Commission considers that a constructive outcome was enabled [...] by the possibility of managing the scope of the proceedings to encompass the elements necessary for a solution').

14) The Conciliation Commission noted this distinction as compared to the practice of inter-State mediation by high officials of third States. *Timor Sea Conciliation (Timor-Leste/Australia)*, PCA Case No. 2016-10, Report and Recommendations of the Conciliation Commission, 9 May 2018, para. 294.

15) *Timor Sea Conciliation (Timor-Leste/Australia)*, PCA Case No. 2016-10, Report and Recommendations of the Conciliation Commission, 9 May 2018, note 33.

16) *Timor Sea Conciliation (Timor-Leste/Australia)*, PCA Case No. 2016-10, Report and Recommendations of the Conciliation Commission, 9 May 2018, paras 69-70.

17) *Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean* (concluded 14 November 2009, entered into force 24 August 2012), 2899 UNTS 211, available at: https://www.sprfmo.int/assets/Basic-Documents/Convention-and-Final-Act/SPRFMO-Convention-2023-update-12May2023.pdf (accessed 16 August 2025).

18) *United Nations Convention on the Law of the Sea* (adopted 10 December 1982, entered into force 16 November 1994), 1833 UNTS 3, Article 118.

19) *Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks* (concluded 4 August 1995, entered into force 11 December 2001), 2167 UNTS 3, Article 8(1).

20) SPRFMO Convention, Article 8(a).

21) SPRFMO Convention, Article 16.

22) For one relatively recent example, *see The Atlanto-Scandian Herring Arbitration (The Kingdom of Denmark in respect of the Faroe Islands v. The European Union)*, PCA Case No. 2013-30. Publicly available details concerning the arbitration may be found at pca-cpa.org/en/cases/25/ (accessed 16 August 2025).

23) R. Rayfuse, 'Settling Disputes in Regional Fisheries Management Organisations: Dealing with Objections' in *A Bridge over Troubled Waters: Dispute Resolution in the Law of International Watercourses and the Law of the Sea* (Helene Ruiz Fabri et al. (eds)) (Brill, 2020), p. 264,

https://doi.org/10.1163/9789004434950_010 (accessed 16 August 2025) ('the SPRFMO Convention establishes by far the most comprehensive formal procedure for resolving disputes over objections').

24) SPRFMO Convention, Article 17(2)(c).

25) SPRFMO Convention, Article 17(2)(b)(ii).

26) SPRFMO Convention, Article 17(5)(a) and Annex II, Article 1.

27) SPRFMO Convention, Article 17(5)(e).

28) If the Review Panel finds that the alternative measures *are* equivalent in effect to the original decision, those alternative measures will replace the original decision, pending their confirmation at the next SPRFMO Commission meeting. SPRFMO Convention, Annex II, Article 10(i)-(j).

29) SPRFMO Convention, Annex II, Article 10(a)-(b).

30) SPRFMO Convention, Annex II, Article 10(c)-(e).

31) SPRFMO Convention, Annex II, Article 10(f)-(h).

32) *Review Panel established under the Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean*, PCA Case No. 2013-14, Findings and Recommendations (5 July 2013), para. 53 (quoting Russia's objection).

33) PCA Case No. 2013-14, Findings and Recommendations (5 July 2013), paras 53, 84-86.

34) PCA Case No. 2013-14, Findings and Recommendations (5 July 2013), para. 34.

35) PCA Case No. 2013-14, Findings and Recommendations (5 July 2013), paras 27-40.

36) PCA Case No. 2013-14, Findings and Recommendations (5 July 2013), para. 91.

37) PCA Case No. 2013-14, Findings and Recommendations (5 July 2013), para. 100(a).

38) PCA Case No. 2013-14, Findings and Recommendations (5 July 2013), para. 100(c).

39) SPRFMO, 'Catch Data Submitted to the SPRFMO Secretariat' (undated), p. 7, available at: https://www.sprfmo.int/assets/Meetings/01-COMM/10th-Commission-2022-COMM10/information-papers/COMM10-Inf01-rev1-Data-Submitted-to-the-Secretariat.pdf (accessed 16 August 2025).

40) PCA Case No. 2018-13, Objection of Ecuador (28 March 2018), p. 7.

41) PCA Case No. 2018-13, Objection of Ecuador (28 March 2018), pp. 7-8.

42) PCA Case No. 2018-13, Findings and Recommendations (5 June 2018), paras 96-97.

43) PCA Case No. 2018-13, Findings and Recommendations (5 June 2018), para. 108.

44) PCA Case No. 2018-13, Findings and Recommendations (5 June 2018), paras 116-118.

45) PCA Case No. 2018-13, Findings and Recommendations (5 June 2018), para. 122.

46) PCA Case No. 2018-13, Findings and Recommendations (5 June 2018), para. 127.

47) SPRFMO, 7th Annual Meeting of the Commission, 'Proposal by Ecuador to Amend CMM 01 on Jack Mackerel (EC)' (January 2019) p. 3, available at: https://www.sprfmo.int/assets/Meetings/01-COMM/7th-Commission-2019-COMM7/proposals/COMM7-Prop02-CMM-01-Trachurus-murphyi-EC-cv.pdf (accessed 16 August 2025).

48) PCA Case No. 2023-33, Findings and Recommendations (1 July 2023), para. 4.

49) PCA Case No. 2023-33, Findings and Recommendations (1 July 2023), paras 4, 16.

50) PCA Case No. 2023-33, Objection of Russia (10 April 2023) pp. 3-4.

51) PCA Case No. 2023-33, Objection of Russia (10 April 2023) p. 5.

52) PCA Case No. 2023-33, Findings and Recommendations (1 July 2023), para. 118.

53) PCA Case No. 2023-33, Findings and Recommendations (1 July 2023), para. 121.

54) PCA Case No. 2023-33, Findings and Recommendations (1 July 2023), para. 135.

55) PCA Case No. 2023-33, Findings and Recommendations (1 July 2023), para. 143.

56) PCA Case No. 2023-33, Findings and Recommendations (1 July 2023), para. 144.

57) PCA Case No. 2023-33, Findings and Recommendations (1 July 2023), para. 144.

58) P. Tzeng, 'Fisheries Review Panels: Lessons from Russia v. Commission and Ecuador v. Commission' *Chinese (Taiwan) Yearbook of International Law and Affairs* (2020) 37, p. 233, https://doi.org/10.1163/9789004443297_010 (accessed 16 August 2025) .

59) R. Rayfuse, 'Settling Disputes in Regional Fisheries Management Organisations: Dealing with Objections' in *A Bridge over Troubled Waters: Dispute Resolution in the Law of International Watercourses and the Law of the Sea* (Helene Ruiz Fabri et al. (eds)) (Brill, 2020), p. 269, https://doi.org/10.1163/9789004434950_010 (accessed 16 August 2025) .

60) P. Tzeng, 'Fisheries Review Panels: Lessons from Russia v. Commission and Ecuador v. Commission' *Chinese (Taiwan) Yearbook of International Law and Affairs* (2020) 37, pp. 228-229, https://doi.org/10.1163/9789004443297_010 (accessed 16 August 2025) .

61) P. Tzeng, 'Fisheries Review Panels: Lessons from Russia v. Commission and Ecuador v. Commission' *Chinese (Taiwan) Yearbook of International Law and Affairs* (2020) 37, p. 228, https://doi.org/10.1163/9789004443297_010 (accessed 16 August 2025) .

62) A. Serdy, 'Implementing Article 28 of the UN Fish Stocks Agreement: The First Review of a Conservation Measure in the South Pacific Regional Fisheries Management Organisation' (2016) 47(1) *Ocean Development & International Law* p. 22, https://doi.org/10.1080/00908320.2016.1124482 (accessed 16 August 2025) .

63) SPRFMO, 'SPRFMO Commission: COMM 12: Report Annex 9a: Report of the Chairperson of the COMM12 Jack Mackerel Working Group' (2024), available at: https://www.sprfmo.int/assets/Meetings/01-COMM/12th-Commission-2024/Report-and-Annexes/Annex-9a-Report-from-the-Chairperson-of-the-2024-Jack-Mackerel-WG-COMM12.pdf (accessed 16 August 2025); SPRFMO, 'SPRFMO Commission: COMM 12: Report Annex 7a: CMM 01-2024' (2024), available at: https://www.sprfmo.int/assets/Meetings/01-COMM/12th-Commission-2024/Report-and-Annexes/Annex-7a-CMM-01-2024-Trachurus-murphyi.pdf (accessed 16 August 2025).

64) In its first version, the arbitration provision referred to the UNCITRAL Model Law, which could have given rise to pathological consequences. Thankfully, the parties agreed that the provision should be taken as referring to the UNCITRAL Arbitration Rules instead.

65) PCA Cases No. 2016-36 and 2016-37. Publicly available details concerning these arbitrations may be found at pca-cpa.org/en/cases/152/ (accessed 16 August 2025).

66) *Bangladesh Accord Arbitrations*, PCA Cases No. 2016-36/37, Procedural Order No. 2, para. 94.

67) *Bangladesh Accord Arbitrations*, PCA Cases No. 2016-36/37, Press Release No. 1.

68) *Ibid*., ('As the Parties have agreed to apply the 2010 UNCITRAL Arbitration Rules to the present proceedings, hearings are to be held in private and any award of the Tribunal can only be made public with the consent of the Parties'); UNCITRAL Arbitration Rules, Articles 28(3), 34(5).

69) *Hague Rules on Business and Human Rights Arbitration*, December 2019, available at: https://docs.pca-cpa.org/2019/12/The-Hague-Rules-on-Business-and-Human-Rights-Arbitration.pdf (accessed 16 August 2025).

70) *See International Labour Arbitration and Conciliation Rules*, 2 July 2021, Introduction ('The parties to the Bangladesh Accord, in moving forward to arbitrate two disputes in 2016-17 pursuant to their arbitration agreement, highlighted the challenges of labour arbitration under the UNCITRAL Arbitration Rules designed for commercial actors and disputes centered around pecuniary claims rather than worker rights and safety').

71) *See UN Guiding Principles on Business and Human Rights*, Principle 31.

72) *See* Hague Rules, December 2019, Articles 56-57.

73) *See* ILAC Rules, 2 July 2021, Introduction ('Global unions and non-profits acting on behalf of workers, including the most vulnerable workers in the global economy, cannot invest disproportionate funds into the costly systems of arbitration that govern international disputes between corporate actors. Nor can they afford the time required by such procedures: left unremedied, violations of international labour agreements threaten the economic security, rights, and even the lives of workers. MNCs bring their own concerns to dispute resolution under labour agreements, as proceedings often involve sensitive business information and can have reputational consequences. All parties to international labour agreements share an interest in resolving disputes efficiently, fairly, and effectively').

74) ILAC Rules, 2 July 2021, Introduction, available at: https://docs.pca-cpa.org/2022/06/3dd0e0dd-2021-july-2-international_labour_arbitration__.pdf (accessed 16 August 2025).

75) ILAC Rules, 2 July 2021, Article 17(7) ('The hearing shall in principle take place within 30 days of the case management conference').

76) *See* ILAC Rules, 2 July 2021, Article 7.

77) *Directive (EU) 2024/1760 of the European Parliament and of the Council on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859*, 13 June 2024, Articles 7-12, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L_202401760 (accessed 16 August 2025).

78) CSDDD, Article 14.

79) CSDDD, Article 29.

80) CSDDD, Article 2.

81) Responsible Contracting Project, 'The European Model Clauses (EMCs)', available at: https://www.responsiblecontracting.org/emcs (accessed 16 August 2025). The European Working Group's final proposal might serve as a helpful resource for the European Commission to develop guidance on voluntary model contractual clauses under Article 18 of the CSDDD.

82) European Working Group, 'Zero Draft for Consultation: The European Model Clauses (EMCs) for Responsible and Sustainable Supply Chains' (July 2024), Articles 1.4, 5.1-5.2, available at: https://www.responsiblecontracting.org/_files/ugd/fcee10_538d4de3351d4b699cd1c47e81ba8f22.pdf (accessed 16 August 2025); European Working Group, 'Commentary to the Zero Draft for Consultation: The European Model Clauses (EMCs) for Responsible and Sustainable Supply Chains' (July 2024), p. 48, available at: https://www.responsiblecontracting.org/_files/ugd/fcee10_97c2e2a4323a4bf58cb20d1623cc2308.pdf (accessed 16 August 2025).

83) European Working Group, 'Zero Draft for Consultation: The European Model Clauses (EMCs) for Responsible and Sustainable Supply Chains' (July 2024), Article 5.2.