Journal of Law and Society
Vol. XLVII, No. 69

Law College
University of Peshawar
July 2016

ENVIRONMENTAL DISPUTES SETTLEMENT UNDER INTERNATIONAL LAW

Muhammad Nadeem[1] and Inayat Ullah Khan[2]

Abstract:

The world is facing increasingly complicated environmental problems generated or exacerbated by human activities. Those problems are either global or Trans boundary and require significant actions to be addressed.

The first answer from the International Community to address them has been the signature and ratification of more than eight hundred agreements at international level.[1] The objectives of those conventions are to create a legal framework of protection of the environment wherein states will be obliged to take action in the purpose of this protection. This legal framework was weakened and made less effective because States wish to keep environmental issues within the diplomatic arenas where these issues will remain under their sovereign control. In some environmental harm which has direct impact on people's health or their income like hazardous waste dumping or water pollution, the perpetrators are mostly fined for the civil liability and not for their criminal responsibility. Some similar cases already occurred in several developing countries.[2] Most of these countries have not adequate environmental regulations to deal with such issues and international environmental law must provide a forum to hold the perpetrators accountable for environmental harm.

The current status of international law provides states with means to settle their disputes (including environmental disputes) peacefully[3]. The existing fora for disputes resolution, particularly arbitration and litigation bodies, have laid down several decisions regarding environmental disputes[4].

[1] Assistant Professor Law College, University of Peshawar. Email: mnf@uop.edu.pk

[2] Associate Professor Law College, University of Peshawar. Email: inayatullahkhan.g@gmail.com

The objective of the present paper is to assess how the DRMs have contributed and can still add a lot towards the development and effectiveness of international environmental law.

Keywords: UN Charter, arbitration, Dispute Resolution Methods

Interstate Environmental Disputes and Disputes Resolution Mechanisms

The existing DRMs are enumerated in Article 33[5] Charter of the United Nations which permits states to reach a peaceful resolution of their disputes. These mechanisms play a significant role to in the developing international environmental law in the context of states' responsibility and compliance with the norms stemming from the treaties currently governing the field.

A dispute in international law is a "disagreement involving a matter of fact, law or policy whereby a claim or assertion of one party is met with refusal, counter-claim or denial by another."[6] This definition could be extended to environmental dispute by defining it as any disagreement opposing two different perspectives or claims involving an issue related to an environmental harm. The international techniques available for environmental disputes settlement are of two natures: the political or diplomatic mechanisms and the legal techniques.

The Political Means of Environmental Disputes Resolution

Known as non legal mechanisms, the political mechanisms of disputes resolution are the most used in matters involving international environmental law[7]. Indeed, the question of states' sovereignty and the common objective for states to protect the environment make the dispute more likely to be a "problem to solve than a claim to be settled or a wrong to be adjudicated"[8]. The political mechanisms don't only enable states to settle their disputes but also provide them with prevention measures that could be crucial to international environmental law.

Prevention of Environmental Disputes

Article 33 doesn't provide any classification of DRMs nor does it specify any kind to be a preventive measure. The rapid development in the field of international environmental law and the concern of states to

address environmental issues at an early stage so they do not reach the irreversibility threshold lead them to adopt some standards facilitating such an early intervention. Among those standards, can be mentioned two principles: the duty of consultation and notification and the principle of prior informed consent. These preventive measures are actually part of negotiation if we talk strictly about DRMs.

Notification and Consultation

Notification requires a State to provide in advance all necessary information to other states which may be affected by an activity it is planning to carry out within its own territory[9], in order to avoid presenting affected states with the "fait accompli"[10] where they would have no other remedy than going into a dispute. Thus, in the case of Transboundary environmental harm, a state planning to build, for example, a factory causing pollution or some other harm would be under an obligation to notify the likely affected States and will then enter in consultation with them. Consultation enables potentially affected states to enter into discussion with the acting state and to review a planned activity for adjustment and modification. The interests of the affected States will then be taken into account even though the acting State is not obliged to conform to those interests.[11]

Notification and consultation were consecrated as an international obligation for states in the Rio Declaration on Environment and Development[12] and in some international conventions.[13] This obligation does not require States to receive the consent of the affected states in order to proceed with the planned activity, but to take their interests into account. When it comes to the principle of PIC; prior informed consent, the affected state has a veto on the planned action.

Prior Informed Consent (PIC):

The prior informed consent (PIC) is required when the acting state wants to operate in another state. The acting state must, therefore, seek a PIC from the state within whose territory he is planning to operate and if the later does not agree, the operation will not take place. The PIC principle has also been consecrated in many international environmental agreements[14].

The measures analyzed above play a useful role in environmental law for they prevent a dispute from arising and provide a means to protect the environment at an early stage. That is the reason why they are increasingly mentioned in environmental law instruments from "soft law" documents, i.e. declarations of principles and codes of conduct, to concretely binding norms.

In the event a state breaches its international environmental obligation or causes an environmental harm to another state, the preventive measures are no longer of importance for settling the conflict that may stem from this misconduct. The floor is then given to non legal remedial measures.

Political Remediation of Environmental Disputes

An international dispute stems from the principle of state responsibility which "arises when the rights of one state are disturbed by the breach of another state's correlative duties"[15]. By this principle, "states may be accountable in *interstate claims* under international law".[16] States are unwilling to give up control over the outcome of disputes that they can manage by means within their own sovereignty to a rule-based third party. Also, international law doesn't mandate on them to choose a specific mechanism but, to search a pacific settlement of the dispute (article 2, (1) of the UN Charter and principle 23 of Rio Declaration). Moreover, the legal third party resolution of disputes (arbitration and adjudication) can be expensive and time-consuming for states. This situation makes them recourse to diplomatic means or non legal dispute solution. Those means are: negotiation, enquiry, mediation, conciliation (Article 33 of the UN Charter) and good offices[17].

Negotiation is commonly known as "a consensual bargaining process in which the parties attempt to an agreement on a disputed or potentially disputed matter"[18]; concretely this is the process of exchanging proposals and counterproposals in order to reach an agreement upon the dispute among the parties. As for mediation, it comprises the intervention of a "neutral third party which will try to help disputing parties reach a mutually agreeable solution"[19]. We can easily qualify mediation as an "assisted negotiation" as the only difference it presents with the later is the neutral third party's intervention. Inquiry aims to elucidate the facts at issue in a dispute by means and conscientious

investigation (Art. 9 of the Convention of 1907 for the pacific resolution of disputes). It is limited to the statement of facts. Conciliation is the mechanism in which a neutral third party establishes the facts of the case and proposes a solution to the dispute. It appears as a combination between mediation and inquiry[20].

Among the mechanisms outlined above, negotiation emerges as the most used. This remains the case when states still have the feeling that the benefits of the negotiation outweigh its costs. If a state's interest is likely to be compromised by the negotiation, it would prefer to seek recourse from a third-party to settle the dispute.

The political resolution of environmental disputes does not contribute towards developing international environmental law. Indeed, by giving the possibility to parties to ignore the laws and choose and alternative means to resolve a question that a substantive law was created to manage, those mechanisms are in favor of a slow evolvement of law, or the stagnation of the laws in the field of environmental protection.

In addition to political means, the United Nations system also provides many institutions that could serve as frameworks to disputes settlement in international environmental law. Those institutions (e.g. the General Assembly and Security Council) provide what some authors call the "middle of the road" between the political mechanisms of disputes resolution and judicial ones.[21]

The Legal Resolution of Environmental Disputes

The legal DRMs for environmental disputes resolution are the mechanisms that seek the solution of the dispute in the substance of international environmental law or, in the case of arbitration, in laws that the parties asked to be applied. The two legal DRMs in international law are arbitration and adjudication.

Arbitration

Arbitration is a settlement technique in which a third party (the arbitral tribunal or an arbitrator) is chosen by the parties to a dispute, with the assurance that their decision will be binding. It is the first form of legal

mechanism of dispute settlement to be developed and inspired states to establish permanent bodies.[22]

In an international dispute, if the parties decide to refer the dispute to an arbitral tribunal in an agreement called '*compromise'*, they may choose arbitrators or a single arbitrator from the Permanent Court of Arbitration; (PCA). The appointment of arbiters is done by negotiation and each party chooses an equal number of "national" arbitrators and the remaining "neutral" is appointed by agreement.[23] The same negotiation process governs the procedural arrangements and the issue or issues the arbitrator is to decide.[24] All this preparatory work, including the applicable law[25] is included in the *compromise*.

Arbitration is still an effective mechanism to settle environmental disputes. It has the ability to result in a binding decision on parties, which any political means cannot provide. In the field of environmental law, arbitration is important as to the clarification and the enforcement of laws.

The latest development in environmental disputes resolution was the adoption by the PCA of new rules for environmental disputes arbitration. Indeed, the Administrative council of the PCA adopted the Optional Rules by consensus for Arbitration of Disputes Relating to Natural Resources and the Environment ("Environmental Arbitration Rules") at an extraordinary meeting held in June 19, 2001.[26] The PCA Environmental Rules stemmed from the work of the secretariat of the PCA with a working group and the drafting committee of experts in environmental law and arbitration. Some comments were added by the PCA Member States. The "rules seek to address certain lacunae in environmental dispute resolution identified by the working group and PCA Member States."[27] They are very flexible and allow countries to determine, to a large extent; how the process is run (e.g. they can determine whether one, three or five members sit on a panel).[28] This makes the PCA the first international institution to develop specific rules for international environmental disputes resolution. The PCA also came with an innovative idea that opens the arbitration forum to private actors who can call upon the court and the settlement of the dispute is binding upon the parties.

Judicial settlement of environmental disputes

An interstate environmental dispute can be referred to an international judicial body for a binding decision.[29] The judicial architecture in international law is currently composed of many fora that are statutorily capable to cognize environmental matters or environmentally related matters: International Court of Justice (ICJ), European Court of Justice (ECJ), the judicial body within the World Trade Organization (WTO) and the International Tribunal for the Law of the Sea (ITLOS). All these bodies have had the opportunity to render decisions on environmental disputes. In the cases where non-state actors (individuals, corporations or NGO) are involved, other fora like the International Criminal Court (ICC) and the Human rights tribunals could be competent to hear them. These courts will be studied in Part II of the present paper which deals with non-state actors' implication in environmental disputes.

- The International Court of Justice (ICJ)

As at random, the first case to be cognized by the ICJ, namely the *Corfu Channel case,*[30] confirmed the *no harm principle* generated by the *Trail Smelter* and the *Lake Lanoux* arbitrations. This case was not an environmental dispute. However, it had an implication for international environmental law as to the confirmation the court provided to the no harm principle by holding Albania responsible under international law for breaching "certain general and well-recognized principles, namely: …every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States."[31]

The jurisprudence of the ICJ includes several cases of environmental disputes. This jurisprudence allows us to measure its contribution to the development of international environmental law.[32] The most important of cases in which the ICJ dealt with environmental issues have been judged during the 1990s.[33]

Problems analysis and potential solutions

The previous chapters have showed how weak the current international system is when it comes to handling environmental disputes in the existing fora. The weakness of the system includes the following: absence of standing for individuals and groups, the need of International

Organizations to be part of environmental disputes, the lack of expertise of some fora in the field of environmental law.

To solve these problems or to make the system work better in face of the increasing pressing environmental problems confronting the international community, two different proposals emerged: the establishment of an international environmental court and the reinforcement of the existing system.

A. Establishment of the International Environmental Court;

The call for the establishment of an international environmental court (IEC) emerged in 1989 at a Conference held in Rome. The Conference gathered experts from thirty countries and generated a final recommendation in which it called for, the establishment of an International Court for the Environment, which will be accessible to States, United Nations organs, and private citizens."[34] The proposed international environmental court (IEC) would have jurisdiction over disputes involving "the infringements of the right to the environment, international ecological violations, and possibly the issues to be dealt with in an International Convention on the Environment."[35]

In 1992, the draft convention establishing an IEC was presented by Judge Postiglione (director of the International Environmental Court Foundation ICEF[36]) at a third conference in Rome[37]. This (draft) convention makes States "legally answerable to the International Community for acts causing substantial damage to the environment in their own territory, in that of other States or in areas beyond the limits of national jurisdiction and shall adopt all measures to prevent such damage."[38] The ICEF presented a Draft treaty for the IEC at a conference in Washington DC in April 1999.[39] This treaty provides for the composition, functions, jurisdiction, the applicable law and the financing system of the court[40].

Some commentators proposed an IEC modeled on the United Nations Compensation Commission.[41] Even though the idea is a "worthy goal", still many problems need to be solved before the creation of such a court: the hybridity of environmental disputes (jurisdictional issue), the acceptance of States to surrender their sovereignty to a new judicial body,

B. Improvement of Existing Institutions

Conclusion

The best scenario would be an interdisciplinary approach combining the law of war with humanitarian law and international environmental law[42] to establish a treaty or a code of conduct as to "what warring parties can and cannot do to the environment."[43]

Notes and References:

[1] See Abram Chayes, Environmental Concerns: Dispute Resolution has a Key Role to Play, 25 Disp. Resol. Mag. 25 (1994).
[2] See Kalas and Cote d'ivoire
[3] Article 33 of the UN Charter (hereinafter Article 33)
[4] See infra Pat I on Arbitration and Litigation of interstate environmental disputes
[5] Article 33 (1) of the UN Charter provides: "The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice. "
[6] J. G. Merrills, International Disputes Settlement 1, Cambridge University Press ed., 1998 (1991)
[7] Richard Bilder, The Settlement of Disputes in the Field of the International Law of the Environment, 224-26 (discussing the *nonlegalistic* solutions of environmental disputes prevention and resolution) available from: http://www.law.wisc.edu/m/dy9zm/20060629093743270.pdf
[8] Supra, note 2 at 27.
[9] David Hunter et al., International Environmental Law and Policy 526-27, Foundation Press 3d ed.(2006)
[10] Supra note 3 at 4.
[11] Supra, note 7 at 527.
[12] See principle 19 of the Rio Declaration (1992).
[13] the Convention on the Biological Diversity, 1992 (Article 14) the Cartagena Protocol on Biosafety, 2001 (Article 8)
[14] See: The Basel Convention on the transportation of hazardous wastes (art. 6 (4)), the Convention on Biological Diversity (art. 15 (5)), and the Rotterdam Convention on the prior Informed Consent procedure for Certain Hazardous Chemicals in International Trade (Art.)
[15] Steven Scott young, International Law of Environmental Protection, 187 (1995)
[16] P. Birnie International Law and the Environment, Clarendon Press Oxford, 139 (1992)
[17] The Convention for the pacific settlement of disputes (version 1907) (art. 2)

[18] Bryan A. Garner, The Black's Law Dictionary 1136 (9th ed.)
[19] Id., at 1070
[20] Peter A. Morray, Environmental dispute settlement within the United Nations System, page 2. Available from: http://www.scribd.com/doc/2634846/Environmental-dispute-settlement-within-the-United-Nations-System (last visited 11/02/2009)
[21] Supra note 19.
[22] Supra note 3 at 88
[23] Id., at 92
[24] Id., at 94
[25] Id., at 99
[26] For information about these rules, See: http://www.transnational-dispute-management.com/samples/freearticles/tv1-1-roundup_12.htm (last visited 11/08/09)
[27] Id., note of Dane Ratiff, Assistant Legal Counsel, Permanent Court of Arbitration.
[28] 11. Adelphi Consult, Friends of the Earth Europe and Greenpeace: Is the WTO the only way? 16. Available at: http://iceac.sarenet.es/wto.pdf (last visited 11/09/09
[29] See supra note 4 at 121.
[30] The Corfu Channel Case (United Kingdom v. Albania), 1949 I.C.J. 4, (April 1949) (Westlaw)
[31] Id., at 22; see also Dr Jorge E. Vinuales, The Contribution of The International Court of Justice to the Development of International Environmental Law: A Contemporary Assessment 32 Fordham Int'l L.J. 232, 238 (2008)
[32] See Vinuales
[33] Id., at 232
[34] Amedea Postiglione, A More Efficient International Law On The Environment And Setting Up An International Court For The Environment Within The United Nations 20 Envtl. L. 321, 327(1990).
[35] Id.
[36] For more information on ICEF, visit: http://www.icef-court.org
[37] Kalas, supra note 48 at 232-33. The draft convention is also available at: http://www.icef-court.org/base.asp?co_id=51 (last visited 11/21/09)
[38] Art.7 of the Draft Convention
[39] See Kalas, supra note 48, at 236-37
[40] Id.
[41] Robin L. Juni, The United Nations Compensation Commission as a Model for an International Environmental Court, 7 Envtl. Law. 53, 56 (2000)
[42] See Rymn, supra note 107 at 441
[43] Dumnbl, supra note 105 at 123