International Dispute Settlement

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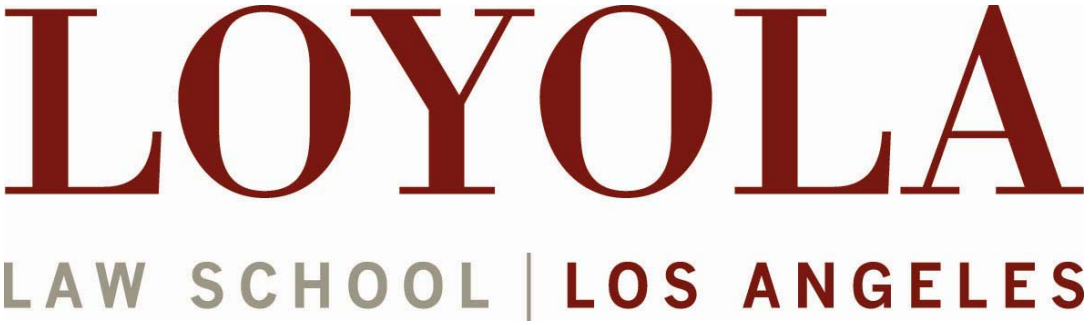

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CHAPTER 45

INTERNATIONAL DISPUTE SETTLEMENT

CESARE P.R. ROMANO

1 Introduction

Typically, in all international agreements, as well as in all manuals of international law, the section on dispute settlement comes last. This handbook is no exception. The reason for this seemingly universal rule is quite obvious. Dispute settlement is to international law what pathology is to medicine. It is about the worst-case scenario, when the consensus that made it possible for rules to be created does not exist anymore, and parties argue as to what these rules actually mean and if, by whom, to what extent, and with which consequences, they have been violated. It is a place where parties hope they will never have to go.

Of course, in international treaties, dispute settlement clauses follow the description of the agreed rules. As a result of this eventual and ancillary function, the law and procedure of international dispute settlement has long been the Cinderella of international law. After lengthy negotiations on the substance of an environmental agreement, diplomats tend to cut and paste dispute settlement procedures from previous treaties without much thought about what would happen if these procedures actually needed to be used.

In the past two decades, a series of considerations has modified this casual attitude towards international dispute settlement, particularly in the environmental sphere. Environmental factors have been increasingly acknowledged to be a relevant source of international tension and disputes and even of actual threats to international peace and security.[1] Four considerations seem to justify heightened attention to the prevention and settlement of environmental disputes. First, there is the growing demand and need for access to natural resources, coupled with a limited or at least shrinking resource base. Second, the nature and extent of international environmental obligations has enormously increased as states assume broader and deeper commitments. The thickening web of agreements and norms increases the likelihood that disputes might arise about how to interpret the scope of these obligations. Third, as these increasing international environmental obligations affect national interests, and impose on states large administrative, economic, and political burdens, states that do not comply with environmental obligations are perceived to gain an unfair competitive advantage (→ Chapter 39 'Compliance Theory'). Fourth, as national economies are increasingly globalizing, states are more likely than ever to be dragged into international disputes caused by environmentally degrading activities of their nationals or in defence of nationals affected by activities elsewhere.

[1] The Inventory of Conflict and the Environment, a project of the School of International Service of the American University, lists more than 120 examples of international disputes or outright conflicts caused directly or indirectly by environmental problems during the nineteenth century. While the criteria used for inclusion in the database are rather large, and, at the same time, the database does not claim to be comprehensive, it can still provide some useful insight on the range, scope, and complexity of the field. The Inventory of Conflict and the Environment, information available at <http://gurukul.ucc.american.edu/ted/ice/ice.htm> (14 January 2006).

The canonical way of treating international dispute settlement begins by recalling the obligation that states have under the UN Charter to settle international disputes peacefully and by means of their own choice. Then, traditional exposés analyze one by one the whole gamut of typical dispute settlement means available, ranging from the so-called 'diplomatic means', such as negotiation, enquiry, mediation, or conciliation, to those whose outcome is legally binding (also known as adjudicative means), such as arbitration and settlement by way of standing international judicial bodies.

While this tried and tested approach has some merits, it is by and large a vestige of an old world where adjudication was ultimately regarded as a sort of 'continuation of diplomacy by judicial means,' to paraphrase the famous quote from Carl von Clausewitz. The traditional approach puts too much stress on the *settlement* of disputes, while environmental policy usually focuses on the *management* of environmental problems leading to disputes. Whether a dispute caused by an environmental problem is settled depends, first and foremost, on whether the environmental problem that caused the dispute is resolved. The legal case eventually litigated can address only a specific aspect, typically a specific *legal* aspect, of a complex environmental problem. Closure of this particular aspect, diplomatically or judicially sanctioned, can exhaust a case but, *per se*, does not necessarily mean that the whole dispute is extinguished. This depends on how the environmental problem is managed, which is largely why there is a trend towards equipping modern international environmental regimes with two salient characteristics. First, there is the internalization of dispute settlement procedures. Complex environmental regimes contain within themselves the institutions, procedures, and rules to tackle disputes arising out of the implementation of the regime's norms (→ Chapter 38 'Treaty Bodies'). In these regimes, law-making and law-enforcement functions are part of the same continuum. Second, the development of so-called non-compliance procedures (→ Chapter 43 'Compliance Procedures') has very often blurred the classical distinction between diplomatic means and adjudication, and warped the classical categories of international law such as state responsibility and liability (→ Chapter 44 'International Responsibility and Liability'), counter-measures, and, of course, dispute settlement.

The settlement of environmental disputes can be explored along many other different themes and variables. One could explore permanent bodies and procedures and compare them to ad hoc solutions. Or one could look first at cases where, for a certain body or procedure to be activated, the consent of both parties needs to be obtained and compare this to cases where the will of just one of the parties suffices to start compulsory dispute settlement. Procedures and bodies whose pronouncements have a binding effect could be compared to those that do not have binding powers. Bodies and procedures where only states have standing could be contrasted with procedures that are open to non-state entities. Dedicated dispute settlement bodies and procedure could be contrasted to non-specialized ones. Each of these themes would likely yield valuable insight.

This chapter examines international dispute settlement in the field of the environment by contrasting dispute settlement by way of procedures contained in international environmental agreements (endogenous) to dispute settlement by way of procedures either of non-environmental agreements or of environmental agreements other than the one under which the dispute arose (exogenous). While the frequency of endogenous procedures is on the rise, their relevance has been historically minimal, and has been further undermined by the emergence of non-compliance procedures. However, resort to exogenous procedures is on the rise and has yielded a substantial record.

The reason why this peculiar approach has been chosen, out of all possible ones, is that it highlights some emerging problems affecting international dispute settlement well beyond the specifically environmental realm: the problem of disharmonic dispute settlement clauses; the phenomenon of fragmentation of a single dispute into several distinct cases; the fact that international environmental disputes, being polymorphous, very often can be looked at from the point of view of different and uncoordinated legal regimes or specific sets of international law; and, lastly, the ongoing multiplication of fora, actors, and levels of jurisdiction. Interestingly enough, these issues first emerged in the context of certain environmental disputes that will be discussed later in this chapter.

2 Dispute Settlement within International Environmental Agreements

Many of the earliest international environmental agreements, concluded between the nineteenth century and the 1970s, did not provide for any dispute settlement procedure at all. Yet, gradually things have changed. In 1972, a study on the frequency of dispute settlement clauses in international treaties, in all areas of law, not only in environmental treaties, determined that only a quarter contained express provisions for the settlement of disputes.[2] However, the same study also found that the frequency of dispute settlement clauses had constantly increased over time both in absolute and relative terms. Another study carried out at the beginning of the 1980s, this time focused only on multilateral environmental agreements (MEAs), concluded that one-third of existing agreements contained some dispute settlement

[2] C. Reithel, *Dispute Settlement in Treaties: A Quantitative Analysis* (Ph.D. dissertation, University of Washington, 1972).

provisions.[3] During the mid-2000s, more than 20 years and hundreds of treaties later, more than half of all MEAs contain some dispute settlement provisions.[4]

While it is evident that dispute settlement provisions in international environmental agreements are becoming increasingly frequent, one must wonder whether they are bringing anything new to the field. *Prima facie*, the answer is no. After all, the classical categories of judicial and diplomatic means have been crystallized by a century-long practice, and it is hard to imagine any new procedure for the settlement of disputes that could not be traced back to them. Despite the large number of agreements containing settlement clauses, cutting and pasting reduces diversity. Most of the environmental agreements containing dispute settlement provisions offer the same two-stage scheme, with marginal variations. First, there is a general obligation to peacefully settle disputes by having recourse to any diplomatic means to which the parties can agree. Such means generally track Article 33 of the UN Charter verbatim. Then, should the dispute fail to be settled, there are two options: either the agreement leaves it at that, not providing for any further method or forum, or it provides for a specific further stage of dispute settlement. Typically, this further stage consists of either conciliation, resolution by international adjudication (either by an arbitral tribunal whose procedure might be spelled out in an annex or by a standing international body, such as the International Court of Justice (ICJ)), or reference to some organs of the treaty in question whose decision will be binding. This second level can be activated either unilaterally—that is, at the request of either party to the dispute, with built-in mechanisms and timetables to prevent stalling by the other party—or it needs the consent of both parties to be activated.

Nonetheless, closer scrutiny reveals some distinctive features. First, while in the early years, the designation of standing institutions or procedures for dispute settlement, such as the ICJ or the Permanent Court of Arbitration, was relatively rare and states relied on special or ad hoc arrangements, this trend has been recently reversed. Second, it is undeniable that procedures contained in environmental agreements have taken advantage of the increased level of sophistication of modern dispute settlement mechanisms. The most recent agreements provide parties with a spectrum of options rather than a single procedure. Several include no less than three or four mechanisms, some of which may be invoked simultaneously, providing for an ideal, though not desirable, escalation of the dispute, from informal, non-contentious, and non-adversarial procedures such as consultation and negotiation, to more formal, contentious, and adversarial procedures such as adjudication. This process indicates the existence of a trend to move away from the treatment of dispute settlement clauses as a sort of afterthought, opting instead to include articulated, carefully drafted, and broad provisions. This tendency reached its apex with the 1982 United

[3] A.C. Kiss, 'Le reglement des différends dans les conventions multilaterals relatives à la protection de l'environnement,' in R.J. Dupuy, ed., *The Settlement of Disputes on the New Natural Resources* (The Hague: Martinus Nijhoff, 1983) at 120.

[4] C. Romano, *The Peaceful Settlement of International Environmental Disputes: A Pragmatic Approach* (London: Kluwer Law International, 2000) at 39.

Nations Convention on the Law of the Sea (LOSC), which contains what is probably the most detailed, comprehensive, and complex dispute settlement clause ever. Dispute settlement options are tailored to particular categories of disputes, by providing, for instance, the establishment of special chambers within the International Tribunal for the Law of the Sea (ITLOS) or the exclusion of certain categories of disputes from the otherwise mandatory and binding procedures.

Be that as it may, although dispute settlement procedures in environmental agreements are becoming increasingly common and elaborated, in reality they are very rarely used. Traditional dispute settlement can be crudely summarized as a procedure that can be used only as a result of a breach of international law, and is bilateral and confrontational in nature, where a judicial or quasi-judicial body external to the agreement makes a decision, allocating blame for past action without providing a positive remedy.

Traditional international dispute settlement can work if it can be resorted to without causing great prejudice to the political relations between the parties. Disputes can occur without ever being made public and leaving a trace. Disagreements between states might remain merely at the level of cocktail party anecdotes without ever becoming suitable for public examination. Diplomats and dispute management processes might be able to dispose of them swiftly without letting them reach a critical level. Indeed, even when a dispute is brewing, diplomats usually tend to avoid dangerous labelling. Funnelling a dispute through a formal procedure (even when the procedure is nothing more than a generic call for negotiations) obliges the parties to the dispute to recognize being in disagreement. Such recognition might be undesirable, however obvious it might be, simply because it might affect other areas of the parties' relations.

Adjudication will be resorted to only if the law is fairly, but not too, clear or if the parties agree to give the dispute settlement body a large leeway or even to engage in creative law-making. Yet, states are unlikely to take action that will result in a precedent being set by which they themselves might later be judged. Few states have an environmental record so clean as to be able to throw the first stone. In addition, increasingly specific legal regimes or organizations are endowed with dispute settlement bodies or procedures that provide an alternative to 'external' bodies and procedures. The emergence of the so-called non-compliance procedures (→ Chapter 43 'Compliance Procedures') has not only dramatically changed the way in which international environmental regimes work but it has also further undermined classical dispute settlement procedures. In contemporary international environmental law, there is a strong tendency towards the institutionalization and internalization of decision-making and dispute management processes within individual treaty regimes. Several multilateral environmental agreements and, in particular, those concluded since the beginning of the 1970s, establish permanent institutions (for example, a conference of the parties, a secretariat, several technical and scientific bodies, a fund) to pursue the agreements' goals, manage the resources that have been entrusted to them, and monitor compliance and address issues as they arise.

Yet, most importantly, traditional international dispute settlement works mostly in cases where an environmental dispute is essentially localized, in contrast to being widespread or global. Environmental problems that concern a large number of states and actors at once, where the issues at stake are of a common or even global nature, are ill-suited to traditional dispute resolution, unless two clearly divided groups can be identified, which is very rarely the case. Indeed, traditional dispute settlement is essentially a bilateral exercise, where the claims of one party are rebutted by another part and the opposing legal claims are scrutinized by a standing body through the crucible of the presentation of submissions and responses.

It should not be surprising therefore that there are very few examples of international environmental disputes arising out of environmental agreements that have been addressed through the formal dispute settlement procedures (diplomatic or adjudicative) contained in the same agreements. Among the most recent examples, one can cite the *MOX Plant Case (Ireland v. United Kingdom)*, which was tackled through the dispute settlement clauses of two different environmental agreements and which will be discussed (and cited) later in this chapter.

3 Dispute Settlement outside International Environmental Agreements or through Procedures Contained in Environmental Agreements Other Than the One at Issue

International environmental agreements and their dispute settlement clauses do not exist in a void. They are part and parcel of a much wider canvass. It is a principle of international law that, although states have an obligation to settle their disputes peacefully, they are free to use whatever means they can agree on to do so. At any time, the parties to a dispute, by agreement, can decide to resort to other dispute settlement procedures and institutions outside the confines of the given treaty. To illustrate with some examples in the environmental field, the 1996 Protocol to the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter provides that, should the parties not be able to settle a dispute by diplomatic means, the dispute shall be settled by arbitration 'unless the parties . . . agree to use one of the procedures listed in . . . the 1982 United Nations Convention on the Law of the Sea [LOSC]' (Article 16.2). Incidentally, under the 1996 protocol, arbitration can be restored to regardless of whether the parties to the dispute are also parties to the LOSC.

More broadly, the 1997 Joint Convention on the Safety of Spent Fuel Management and the Safety of Radioactive Waste Management provides that, should the parties not be able to settle a dispute by diplomatic means, 'recourse can be made to the mediation, conciliation and arbitration mechanisms provided for in international law' (Article 38).

The agreement to resort to dispute settlement procedures and institutions outside the scope of the given agreement can also be reached *a priori*. For instance, Article 33(1) of the 1997 Convention on the Law of the Non-Navigational Uses of International Watercourses reads: 'In the event of a dispute between two or more parties concerning the interpretation or application of the present Convention, the parties concerned shall, in the absence of an applicable agreement between them, seek a settlement of the dispute by peaceful means'. Hence, should such an agreement exist, it would normally take precedence over the dispute settlement clauses of the convention itself, but as we will see, this seemingly straightforward issue is not devoid of considerable difficulties.

Obviously, environmental agreements are only a specific facet of the larger world of international law. The disputants might be parties to other non-environmental treaties that might provide for different dispute settlement procedures. For instance, it is common practice among states to conclude so-called bilateral Treaties of Friendship, Commerce and Navigation, which provide that in case of a dispute between the parties, one, or both by agreement, may refer it to a permanent or ad hoc body or procedure. There are also a number of multilateral treaties that provide for specific procedures or fora. For instance, the 1928 General Act of Arbitration for the Pacific Settlement of International Disputes provides that '[a]ll disputes with regard to which the parties are in conflict as to their respective rights shall . . . be submitted for decision to the Permanent Court of International Justice [now the International Court of Justice], unless the parties agree . . . to have resort to an arbitral tribunal' (Article 17).

In addition, a number of international organizations are endowed with their own very sophisticated judicial bodies and dispute settlement regimes. For instance, all members of the World Trade Organization (WTO) are subject to the dispute settlement system of that organization. To become members of the Council of Europe, ratification of the 1950 European Convention on Human Rights and its protocols is required. It follows that acceptance of the jurisdiction of the European Court of Human Rights is necessary to become members of that organization. The acceptance of the jurisdiction of the European Court of Justice is implicit in the ratification of the EC Treaty. Interestingly, the jurisdiction of these bodies is compulsory—albeit not necessarily exclusive—thus providing an exception to the general principle of freedom of choice of dispute settlement means.

Since it is quite common for a particular dispute to touch upon more than one treaty (and environmental disputes, being multifaceted, are particularly prone to do so), and because a given act of a state may violate obligations under more than one

treaty, these exogenous dispute settlement clauses and institutions provide for a much larger array of means to which states, perhaps unsurprisingly, increasingly resort. Yet that is not all. As much as states might have disputes over the implementation of particular treaty provisions, disputes might also arise about the interpretation and compliance with obligations arising out of customary international law and general principles of law in the field of the environment, such as the obligation not to use one's territory as to cause damage to others or the so-called 'precautioary principle'.

Many of the early landmark international environmental disputes settled by way of international adjudication arose out of the violation of customary international law and were settled outside the framework of any particular international environmental treaty. For instance, the *Trail Smelter Arbitration (United States v. Canada)* between the 1920s and 1940s, which is one of the *loci classici* of international environmental law, did not concern the violation of any particular international treaty between the two countries.[5] Nor did the *Bering Sea Fur Seals* dispute, between Great Britain and the United States, or the *Nuclear Tests* dispute, between Australia and New Zealand on the one hand and France on the other, during the 1970s and again during the early 1990s.[6] In other cases, the treaties whose breach was invoked were not, *per se*, environmental treaties, but the dispute involved environmental matters and the judgments dealt with the existence or lack thereof of customary norms of international environmental law. For example, the *Lac Lanoux* dispute between France and Spain, litigated in the 1950s before an arbitral tribunal, dealt with the 1866 Third Treaty of Bayonne, fixing the boundary between the two countries. The *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)* revolved around the 1977 treaty concluded between the two countries providing for the building of hydroelectric works. More recently, in the *Case Concerning Pulp Mills on the River Uruguay*, Argentina claimed the violation by Uruguay of the 1975 Statute of the River Uruguay, which established a common framework and institutions for the management of the river.[7]

Be that as it may, while in the early days of international environmental law international adjudicative bodies did contribute, sometimes decisively, to its development, nowadays codification and law-making by states and international organizations has greatly reduced the room that international courts and tribunals have to compose international norms and principles in the environmental field.

[5] *Trail Smelter Case (United States v. Canada)*, Award, 1941, 3 U.N.R.I.A.A. 1905.

[6] *Behring Sea Fur Seals Arbitration (Great Britain v. U.S.)*, 1898, 1 Moore's International Arbitration Awards 755, reprinted in 1 I.E.L. Rep. 43 at 67 (1999); *Nuclear Tests (Australia v. France)*, [1973] I.C.J. Rep. 99 (Interim Protection Order of 22 June); and *Nuclear Tests (New Zealand v. France)*, [1973] I.C.J. Rep. 135 (Interim Protection Order of 22 June).

[7] *Lac Lanoux Arbitration (Spain v. France)*, 24 I.L.R. 101 (1957); *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, [1997] I.C.J. Rep. 92 (25 September), and *Case Concerning Pulp Mills on the River Uruguay* (*Argentina v. Uruguay*), Provisional measures, 13 July 2006, http://www.icj-cij.org/icjwww/idocket/iauframe.htm

4 Some Problems with Contemporary International Environmental Dispute Settlement as Implemented in the Context of Environmental Disputes

As the preceding discussion has illustrated, international environmental disputes can arise both from the interpretation and implementation of treaties, and of customary international law and general principles of law. They can be tackled either through bodies and procedures endogenous to the given treaties or through those that are exogenous. To this complex matrix, one should add the existence of an extensive, and constantly expanding, array of procedures and fora for dispute settlement, which is increasingly accessible not only to states but also to a number of diverse actors, including international organizations, corporations, and individuals. This situation is both a challenge and an opportunity. On the one hand, it multiplies opportunities for disputes to be addressed in a structured and law-based institutional and legal setting before they escalate. On the other hand, it raises the question of the possible or actual conflict between different legal regimes and dispute settlement procedures. The following sections will illustrate four practical problems. Although the disputes used to illustrate them are all generated by environmental problems or concerns, these problems are also very much representative of the larger challenges international law and international dispute settlement face in the contemporary world.

4.1 Disharmonic Dispute Settlement Clauses

First, there is the problem of synchronizing dispute settlement clauses in environmental agreements with those of other treaties, environmental or otherwise. Ideally, treaties should contain provisions to this end, spelling out which dispute settlement procedure or forum takes precedence. When there is none, general principles of law, such as the *lex specialis* and the *lex anterior* principles, or rules contained in the 1969 Vienna Convention on the Law of the Treaties, could help to resolve the riddle.[8] Yet, because of the abstract and general nature of these principles and rules, their application to concrete cases might be far from automatic, and parties to the dispute might disagree on them. This disagreement creates a sort of 'Catch 22' situation, where

[8] In 2000, the issue of the fragmentation of international law and the difficulties arising from the diversification and expansion of international law was placed on the long-term work agenda of the International Law Commission (ILC). So far, the focus of the ILC work has been international law norms that can counteract fragmentation, in particular, those on the interpretation of treaties, more than international institutional considerations and dispute settlement procedures.

a third party is needed to make a binding decision about which dispute settlement procedure will be used to settle the dispute.

The *Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan)* dispute can be used to illustrate the point.[9] In a nutshell, the dispute pitted Japan against Australia and New Zealand over the conservation and management of southern bluefin tuna stocks in the south Pacific. In 1993, the three states had concluded an agreement to this end. The agreement contains a typical dispute settlement clause that is found in many environmental agreements. Article 16 of the Convention for the Conservation of Southern Bluefin Tuna (SBT Convention) provides:

1. If any dispute arises between two or more of the Parties concerning the interpretation or implementation of this Convention, those Parties shall consult among themselves with a view to having the dispute resolved by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement or other peaceful means of their own choice.
2. Any dispute of this character not so resolved shall, with the consent in each case of all parties to the dispute, be referred for settlement to the International Court of Justice or to arbitration; but failure to reach agreement on reference to the International Court of Justice or to arbitration shall not absolve parties to the dispute from the responsibility of continuing to seek to resolve it by any of the various peaceful means referred to in paragraph 1 above.

As often happens, the parties could not agree to have the dispute referred to the ICJ or an ad hoc arbitration. However, all three states were parties to the LOSC. Like the 1993 SBT Convention, the LOSC provides that states have a general duty to peacefully settle disputes. To do so, they are free at any time to agree on any means they choose, ranging from negotiations to judicial settlement. However, if settlement is not reached by means of the procedure chosen by the parties, and the parties have explicitly excluded no other procedure, then either party is entitled to trigger the compulsory dispute settlement procedure of the LOSC. Under the LOSC regime, in certain cases and for certain categories of disputes, parties can unilaterally refer the matter to adjudication. They also have a choice between two kinds of ad hoc arbitration (so-called Annex VII and VIII), ITLOS and the ICJ, with Annex VII ad hoc arbitration being the default procedure.

Two bodies considered the question of which dispute settlement procedure was to be applied: the LOSC procedure providing for unilateral activation or the procedure in the SBT Convention providing for consensual activation? First, ITLOS considered the matter in the course of deciding whether it could order provisional measures to suspend Japanese fishing, as requested by Australia and New Zealand. Under Article 290(5) of the LOSC, '[p]ending the constitution of an arbitral tribunal to which a dispute is being submitted . . . any court or tribunal agreed upon by the parties or, failing such agreement within two weeks from the date of the request for provisional measures, the International Tribunal for the Law of the Sea . . . may prescribe, modify or revoke provisional measures . . . if it considers that *prima facie* the tribunal

[9] *Southern Bluefin Tuna cases* (Provisional Measures), 38 I.L.M. 1624 (1999).

which is to be constituted would have jurisdiction and that the urgency of the situation so requires.'

ITLOS found that the fact that the SBT Convention applied to the parties did not preclude them from recourse to the dispute settlement procedures of the LOSC. Only in the event that Australia, New Zealand, and Japan could agree to submit the dispute to arbitration under Article 16 of the SBT Convention would the LOSC dispute settlement procedure be overridden. Since they could not come to such an agreement, the tribunal concluded that Australia and New Zealand were not precluded from unilaterally resorting to the Annex VII arbitral tribunal.

The Annex VII arbitral tribunal found differently. It concluded that it lacked jurisdiction. While ITLOS read Article 16 of the SBT Convention not as an agreement to exclude compulsory dispute settlement procedures but rather as an agreement on the need to agree, the arbitral tribunal held that 'the absence of an express exclusion of any procedure . . . is not decisive.' The fact that Article 16 made referrals to binding settlement conditional upon agreement between the parties clearly indicated the intent of the parties to the SBT Convention to remove proceedings from the reach of compulsory procedures of any kind, including the compulsory procedures of the LOSC.

True, ITLOS reached its conclusion while seized by a request for provisional measures, where it needed only *prima facie* jurisdiction to proceed, while the arbitral tribunal had to rule on whether it actually had jurisdiction. The difference between a finding of *prima facie* jurisdiction and a determination of jurisdiction by an arbitral tribunal is profound. In order to have a finding of *prima facie* jurisdiction, it is simply necessary that a lack of jurisdiction not be manifest. The threshold of *prima facie* jurisdiction is thus much lower than the one that had to be cleared in the merits phase before the arbitral tribunal. Still, the different results are remarkable. The example illustrates how quite common and seemingly straightforward dispute settlement clauses can engender significant disagreement *per se*.

4.2 Fragmentation and Cluster Litigation

The second problem is the phenomenon of fragmentation of a single *dispute* into several distinct *cases*—that is to say, a single environmental problem (pollution by A in the territory of B) giving rise to several distinct legal cases dealing with discrete legal aspects of the same dispute. Again, another actual case helps to illustrate the point. Throughout the 1990s, Ireland and the United Kingdom were entangled in a dispute over a so-called 'MOX plant'. The plant in question, operated by British Nuclear Fuels (BNFL), a government-owned company, is located in Sellafield, in northwest England on the coast of the Irish Sea. It reprocesses fissile plutonium and uranium from spent nuclear fuel consigned by foreign utility companies to manufacture mixed oxide fuel (MOX). The Irish were concerned about routine radioactive

discharges from the MOX plant as well as the frequent transports of nuclear materials from and to the plant via the Irish Sea. In short, it was a typical environmental dispute. On the one hand, there was a state, which wanted to use its territory to carry out a legitimate, but potentially polluting, economic activity, and, on the other hand, there was a neighbouring state that questioned the risk-assessment and the cost-benefit analysis made by the first state and tried to have the activity blocked.

BNFL decided to build the plant in 1992 and got the go ahead from the UK government the year after. Alarmed by the likely intensification of MOX-related activities at Sellafield, Ireland urged the United Kingdom to prepare an environmental impact assessment, and sought to obtain environmental and safety information on MOX production at the plant and associated nuclear transports. In particular, Ireland asked the United Kingdom to supply information including: (1) details of secured and forecast sales volumes; (2) details of required annual production capacity; (3) figures for the sales volumes and sales prices assumed for MOX fuel; (4) details of plant capacity and commissioning start dates for plutonium commissioning; and (5) the number of annual voyages relating to the MOX plant operation. Without this information, which did not directly pertain to the marine environment, Ireland claimed it could not verify whether the building of the plant was economically justified as required under certain European Community directives. The information, Ireland argued, would also help it assess the pattern and intensity of the MOX plant operation, which would likely affect the environmental quality of the Irish Sea. However, the United Kingdom rejected Ireland's request, on the grounds that the information was commercially sensitive, as competitors of BNFL could take advantage of it.

After years of unsuccessful diplomatic efforts to obtain the information in question, and with the commissioning of the plant looming, Ireland started two separate dispute settlement procedures under two different conventions. First, in June 2001, it started dispute settlement proceedings under the 1992 Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention), requesting an ad hoc arbitral tribunal.[10] Article 9(2) of the OSPAR Convention provides for access to information 'on the state of the maritime area, on activities or measures adversely affecting or likely to affect it and on activities or measures introduced in accordance with the Convention.' Article 9(1) requires the parties to the convention to make such information available 'to any natural or legal person, in response to any reasonable request . . . as soon as possible and at the latest within two months.' This requirement is subject to the exceptions recognized under Article 9(3) including 'commercial and industrial confidentiality.' Second, as the British government did not yield, Ireland instituted in October 2001 arbitral proceedings against the United Kingdom under the LOSC, alleging that the United Kingdom violated

[10] *Dispute Concerning Access to Information under Article 9 of the OSPAR Convention (Ireland v. United Kingdom)*, Final Award, 2 July 2003, 42 I.L.M. 1118 (2003).

basic obligations of the convention with regard to the protection of the marine environment, including the obligation to carry out an assessment of environmental impacts.[11] Pending the constitution of an arbitral panel, on 15 November 2001, a month before the MOX plant was scheduled to open, Ireland requested provisional measures from ITLOS to prevent the operation of the new MOX plant and to freeze the transport of radioactive materials to and from it.[12]

Despite this legal barrage, Ireland did not succeed in stopping the commissioning and operations at Sellafield. In the case under the OSPAR Convention, the arbitral tribunal denied Ireland's information requests because Ireland failed to establish that each category of the redacted commercial information pertained to an activity or measure involving 'an adverse effect' on the maritime area presently or prospectively. In the LOSC case, while Ireland had asked ITLOS essentially to order the United Kingdom to immediately suspend the commissioning of the MOX plant and to stop movements of radioactive materials through the Irish Sea, all the tribunal did was to require that the United Kingdom and Ireland cooperate in the exchange of information, monitoring, and the prevention of pollution from the MOX plant.

In short, as a result of Ireland's desperate attempts, three different international adjudicative bodies (arbitral tribunals under the OSPAR Convention, the LOSC (further discussed later in this chapter), and ITLOS) have dealt with different legal aspects of essentially the same dispute, concerning the adequacy of transboundary environmental impact assessments regarding the proposed MOX project. The example perfectly illustrates how submitting disputes to dispute settlement procedures does not necessarily lead to their settlement.

However, this is not the whole, nor the end, of the story. Besides being parties to the LOSC and the OSPAR Convention, the United Kingdom and Ireland are also members of the European Community. As such, they are both party to the Treaty Establishing the European Atomic Energy Community (EURATOM) and the Treaty Establishing the European Community (EC). They are also subject to the jurisdiction of the European Court of Justice (ECJ) in actions brought by the European Commission or by the infringement of those treaties. The European Commission tracked the dispute with a certain concern and, eventually, stepped in, reclaiming the centrality and supremacy of European institutions and legal order.

First, the Commission initiated infringement proceedings against Ireland before the European Court of Justice,[13] claiming that, by submitting the dispute to a tribunal outside the Community legal order, Ireland had violated the exclusive jurisdiction of the ECJ about issues concerning the interpretation or application of EC law. Since, upon ratifying the LOSC, the EC had deposited a formal declaration to assert its exclusive competence over pollution prevention provisions under the LOSC to the

[11] *MOX Plant Case (Ireland v. United Kingdom)*, 24 June 2003, 42 I.L.M. 1187 (2003).
[12] *MOX Plant Case (Ireland v. United Kingdom)*, 41 I.L.M. 405 (2002).
[13] *EC Commission v. Ireland*, Case C-459/03, [2004] O.J. 2004/C 7/39.

extent that such provisions affect the Community's common rules,[14] the Annex VII arbitral tribunal decided to stay the proceedings pending a decision on the matter by the ECJ. Should the ECJ find against Ireland, proceedings before the Annex VII arbitral tribunals would probably be dismissed for lack of jurisdiction.

One year later, on 3 September 2004, the European Commission threatened to start infringement proceedings against the United Kingdom before the ECJ for failure to provide appropriate information about nuclear material stored at Sellafield, and to grant EURATOM safety inspectors sufficient access to the site. Although the EC Commission's step against the United Kingdom cannot be directly linked to the Irish actions, it is surely notable that the 'guardian of the treaties and custodian of the common European interest' felt compelled to take action in the face of the UK's obstructionism over the extent and nature of operations at Sellafield after three different, and non-EC, international adjudicative bodies had been seized of the matter.

4.3 Competing and Parallel Legal Regimes

The third problem, which is a variant of the problem just illustrated, arises when the same issue can be looked at from the point of view of different and uncoordinated legal regimes (→ Chapter 7 'Relationship between International Environmental Law and Other Branches of International Law'). This is often the case in the trade and environment context, for instance. Since 1991, when Chile began preventing Spanish fishing vessels that were carrying swordfish destined for the United States from docking in Chilean ports, Chile and the EC have been at loggerheads. The Chilean unilateral regulation in question is Article 165 of the Chilean Fisheries Law, which prevents any vessel from trans-shipping or landing vessels in Chilean ports when its catches do not comply with Chilean law.

On the one hand, the EC took issue with Article 165 in that it arguably treads on notions of open trade and the freedom of the transit of goods. Safeguard measures enacted by Chile not only make exportation to Chile impossible, but they would make re-exportation to American markets impossible as well. The EC additionally took issue with the jurisdictional implications of the regulation because it applied to fish caught outside Chile's 200-mile exclusive economic zone (EEZ). On the other hand, Chile has continually maintained that Article 165 is a necessary and equitable environmental measure aimed at remedying a widely accepted and acknowledged fisheries depletion problem. Chile's goal is to pressure other nations' boats fishing beyond the 200-mile limit to pursue the activity in a responsible, transparent, and regulated manner. To this end, in 2000, Chile, Colombia, Ecuador, and Peru signed the Framework Agreement for the Conservation of Living Marine Resources on the High Seas of the Southeast Pacific, which is also known as the Galapagos Accord.

[14] Declaration made pursuant to Article 5(1) of Annex IX to the Convention on the Law of the Sea (LOSC) and to Article 4(4) of the agreement relating to the implementation of Part XI of the LOSC.

With this accord, these three countries committed to the same regulatory measures adopted by Chile a decade before.

Is this an environmental dispute or a trade dispute? Well, both. Trade *and* environmental disputes are nothing new. In the 1990s, the WTO dispute settlement system dealt with some of them (for example, *United States—Restrictions on Imports of Tuna* (*Tuna Dolphin I* and *II*), and *United States—Prohibition of Shrimps and Certain Shrimp Products* (*Shrimp-Turtle*)).[15] However, the dispute over swordfish stocks is new because it is the first case where the same dispute was submitted to two different adjudicative bodies that, to decide the case, would arguably use rather different sets of international law: trade law and the law of the sea.

First, in November 2000, the EC requested and obtained the establishment of a WTO dispute settlement panel to determine whether Chile's action restricting access to Chilean ports had violated, *inter alia*, the Articles V and XI of the General Agreement on Tariffs and Trade. When Chile, in response, threatened to refer the matter to ITLOS, alleging a violation of the provisions in the LOSC, relating to the protection of the marine environment and high seas fishing, the EC, unable to prevent the unilateral activation of the LOSC dispute settlement procedure, agreed to play along and have the case submitted to a five-judge special chamber of ITLOS. The ITLOS chamber was to decide, among other things, not only whether the EC was in breach of its obligations to ensure the conservation of swordfish under the LOSC, but also whether Chile had violated the LOSC by extending its own conservation measures to fishing on the high seas.

To summarize, the same dispute had been transformed into two completely different and arguably antithetical cases. Each party selected the forum that would apply what it perceived to be the most favourable body of law to particular aspects of the dispute. For the EC, Chile's banning of access to ports for its vessels was trade related and should be decided in light of international trade law.[16] Chile, in contrast, considered the dispute to be environmental, pertaining to the protection of an endangered marine species, which should be decided in light of the law of the sea.[17]

It is plausible to imagine that the two dispute settlement bodies seized of the matter (the ITLOS special chamber and the WTO dispute settlement system) could reach antithetically different conclusions—each correct based on the body of law the dispute settlement body applied. The ITLOS special chamber might find in favour of Chile, relying on the relatively pro-environment LOSC provisions, while the WTO, espousing the doctrine of 'free trade' and based solely on a trade-promoting treaty, might decide in favour of the EC. The LOSC system seems to provide more leeway in

[15] *United States—Restrictions on Imports of Tuna*, 39 GATT B.I.S.D. 155 (1993), reprinted in 30 I.L.M. 1594 (1991); and *United States—Prohibition of Shrimps and Certain Shrimp Products*, WTO Doc. WT/DS58/AB/R (98–000) (12 October 1998).

[16] *Chile—Measures Affecting the Transit and Importation of Swordfish*, Request for Consultations by the European Communities, Doc. WT/DS193/1 (26 April 2000).

[17] *Case Concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile v. European Community)*, Judgment of 20 December 2000, 40 I.L.M. 475 (2001).

assessing unilateral measures and in treating negotiations as a paramount, but separate, issue. The WTO clings to the notion that such measures can be adopted only after proper negotiations and must, in any event, be compatible with the agreements. Each conclusion would be legally correct because they would be reached within the confines of separate and self-contained legal regimes.

Would such decisions help settle the dispute? Surprisingly, the answer is 'possibly, despite all'. One might argue that it is exactly the far-flung implications of this embarrassing situation that led the EC and Chile to reach a negotiated deal in January 2001. Chile restored access for EC fishing vessels to Chilean ports, while the EC agreed to bilateral and multilateral scientific and technical cooperation on the conservation of swordfish stocks. Accordingly, and pending the ratification of the agreement, the EC requested a suspension of panel proceedings in the WTO, and Chile and the EC asked ITLOS to do the same.[18]

In the absence of formal rules of coordination among the various, and increasingly numerous, international judicial bodies and procedures, which could address issues of *litis pendens* and forum shopping in an organic way and, more significantly, in the presence of the worrisome phenomenon of segmenting international law into specialized, self-contained, and ultimately conflicting regimes, issues such as those raised by the *Swordfish* case will appear again. Environmental concerns, which ultimately can be found at the core of most disputes, are particularly fertile ground. Whether the result will be a clash of judgments or a remarkable convergence of minds of the tribunals asked to adjudicate these cases, within the confines of their respective bodies of law, remains to be seen.

4.4 Multiplication of Actors and Levels

All of these problems would be complex enough in a world where only states (that is, governments) have access to international fora. In this simple world, there are two parties in any dispute, which, despite disagreeing on the specific instance, have much in common and which tend to reason and act along familiar lines. Moreover, the interactions between them can be explained by relatively unsophisticated game-theory and bi-dimensional models. However, one of the hallmarks of the current age of globalization is the transformation from an international system comprised of a limited number of governmental actors to a new, and still fluid, system where a host of entities other than states are the bearers of rights and duties as a matter of international law, and act not only on the international scene but also domestically to

[18] *Case Concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile v. European Community)*, Order 2001/1, International Tribunal for the Law of the Sea (15 March 2001); and Order 2003/2 (16 December 2003). *Chile—Measures Affecting the Transit and Importation of Swordfish, Arrangement between the European Communities and Chile*, Communication by the European Communities, Doc.WT/DS193/3, adopted 6 April 2001 and Add. 1, adopted 9 April 2001 and Add. 2, adopted 17 November 2003.

protect those rights and enforce the rights of governments (→ Chapter 29 'Public Participation').

For instance, when France resumed nuclear testing in the South Pacific in 1995, a veritable barrage of actual and potential legal actions and dispute settlement procedures arose. On the classical inter-state level, diplomatic means were employed between France, Australia, and New Zealand. Then, as France did not relent, New Zealand tried to have the ICJ consider the matter,[19] and other states of the region considered invoking the activation of the conciliation mechanism contained in Article 27(4) and Annex II, Part 2, of the 1992 Convention on Biological Diversity. Individuals and non-governmental organizations instituted proceedings before the European Commission of Human Rights,[20] the UN Human Rights Committee,[21] and the ECJ,[22] as well as national courts.[23] Interestingly, all of these cases were eventually dismissed.

This example illustrates, on the one hand, that there is a growing supply of forums where certain legal aspects of complex international disputes can be litigated by a large and increasingly diversified host of players. On the other hand, there is an increasing demand for redress and access to justice by non-state entities that largely stems from the shortcomings of national legal systems. Think, for example, of the difficulties encountered in holding corporations accountable for environmental damage in countries other than their state of nationality (for example, Union Carbide in India for the Bhopal catastrophe, or Chevron Texaco in Ecuador for environmental damage). Yet, as the earlier example of the nuclear tests underscores, demand for judicial redress, and the offer of such redress, rarely meet. This tells much about the inherent limitations of judicial and quasi-judicial remedies at the international level as well as about the still spotty and widely diverse role that international law plays in domestic legal systems. It also explains why, despite the remarkable list of fora—national, international, and transnational—where any given dispute, or aspects of it, could be litigated, calls for more dispute settlement mechanisms are as strong as ever, at all levels and for and by all kinds of actors. Experimentation and exploration are still very much the order of the day.

[19] *Request for an Examination of the Situation in Accordance with paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests Case* (*New Zealand v. France*), Order of 22 September 1995, [1995] I.C.J. Rep. 288.

[20] The inhabitants of Tahiti and Mangareva claimed violation by France of Articles 2, 3, 8, 13, and 14 of the European Convention on Human Rights, and of Article 1 of the Additional Protocol (right to property). *Noel Narvii Tauira and Eighteen Others v. France*, Application 28204/95, (1995) 83 D.R. 112.

[21] The plaintiffs claimed violation of Article 6 and 17 of the Covenant on Civil and Political Rights. *Vaihere Bordes and John Temeharo v. France*, Decision of 30 July 1996, Communication no. 645/1995, UN Doc. CCPR/C/57/D/645/1995.

[22] Inhabitants of Tahiti challenged, before the European Court of Justice, the decision by the European Commission not to use the powers it possess under the EURATOM Treaty in relation to the French tests. *Danielsson and Others v. Commission*, Order of the President of the Court of First Instance, 22 December 1995, Case T-219/95 R [1995] E.C.R. II-3051.

[23] *Association Greenpeace France*, Conseil d'Etat, 29 September 1995, Actualité juridique-Droit administrative, 10 October 1995, at 749.

One can mention, for instance, the creation, in 1993, by the ICJ of a Chamber for Environmental Matters, or the adoption in 2001 and 2002 by the Permanent Court of Arbitration of the optional rules for arbitration and conciliation of disputes relating to natural resources and the environment.[24] Another notable development is the creation of panels at the World Bank (1994), the Inter-American Development Bank (1995), and the Asian Development Bank (1995), which allow individuals or groups to challenge projects financed by these international organizations in violation of their own policies, such as those requiring environmental impact assessments. Under the North American Agreement on Environmental Cooperation individuals can file complaints that one of the states party to the agreements is failing to effectively enforce its environmental laws (Article 14.1).

Finally, the United Nations Compensation Commission (UNCC), which is the body created by the UN Security Council to decide on claims of reparations against Iraq for damage caused during the 199091 Kuwait war, should be noted. The UNCC received approximately 170 environmental claims from governments and international organizations seeking a total of about US $80 billion dollars in compensation for environmental damage and the depletion of natural resources in the Persian Gulf region and for costs incurred by governments outside of the region in providing assistance to countries that were affected by the environmental damage.

In addition to the intergovernmental level, there are also procedures at the grassroots and transnational levels that one could mention, including the International Court for Environmental Conciliation and Arbitration, which, despite its name, is not an international organization but rather a private association constituted under Mexican law and composed of legal scholars and environmental activists, or the Latin-American Water Tribunal (Tribunal Latinoamericano del Agua). Finally, throughout much of the 1990s, there have been discussions about the creation of an International Environmental Court that could hear international and transnational environmental cases, but to date, it still remains only a proposal.[25]

5 Conclusions

There are no international judicial or quasi-judicial bodies solely dedicated to environmental disputes, the partial exception being the Chamber for Environmental Matters of the ICJ. However, the polymorphic nature of environmental disputes

[24] Permanent Court of Arbitration, Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment, 40 I.L.M. 202 (2002); *Optional Rules for Conciliation of Disputes Relating to Natural Resources and/or the Environment* (The Hague: Permanent Court of Arbitration, 2002).

[25] A. Rest, 'Need for an International Court for the Environment? Undeveloped Legal Protection of the Individual in Transnational Litigation' (1994) 24 Envt'l Pol. & L. 173; and E. Hey, *Reflections on an International Environmental Court* (The Hague: Kluwer Law International, 2000).

makes a wide variety of fora potentially usable, which are almost impossible to list. Cases involving environmental issues have been brought before the ICJ, ITLOS, the WTO dispute settlement system, the European Court of Human Rights, the Inter-American Court of Human Rights, judicial bodies of regional economic integration organizations (such as the ECJ), inspection panels, international and transnational arbitral tribunals, and compensation and reparations bodies. This also explains why, besides dispute management and settlement procedures endogenous to international environmental regimes, there are no international judicial or quasi-judicial bodies solely dedicated to deal with environmental disputes.

The fragmentation of law in specialized and self-contained regimes; the institutionalization of international decision-making and enforcement processes; the proliferation of international judicial bodies; the erosion of the divide between the domestic and international legal spheres; and the multiplication of subjects of international law beyond the state-centric classical models, are all characteristics of contemporary international law. Many of these changes to the international law fabric originally took place in the environmental field. Between the 1970s and early 1990s, international environmental law was the *avant-garde* of international law, and the drive is not over yet. Several of the most interesting cases, heralding many of the features and problems in the field of international dispute settlement in the twenty-first century, stem from environmental disputes. While it is clear that there is no shortage of fora and procedures to address them, we are still rather far from an international judicial system (that is, a structured and organized institutional order), as the cases presented illustrate. This unsatisfactory state of affairs makes it difficult to appease the increasing demands on international dispute settlement bodies and procedures, and creates all sorts of incentives for parties (all actors, not only states) to exploit jurisdictional competition by engaging in abusive forum shopping, starting cluster litigation in multiple forums, and challenging judgments that should be final if they are ever to be able to bring about the settlement of a dispute. The road ahead is unclear, but, as much as environmental disputes have provided many of the cases that heralded these problems, it is likely that they will also provide the occasions to start addressing them.

Recommended Reading

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