RESOLVING ENVIRONMENTAL DISPUTES FROM NEGOTIATION TO ADJUDICATION

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It is a great pleasure to be at this conference organised by the Biopolitics International Organisation. This organisation has, under the inspiring leadership of Dr. Agni Vlavianos-Arvanitis, shown an unfailing commitment to impress upon the international community that, with regard to our environment, we have quite literally reached the "eleventh hour" and that, therefore, concrete steps must be taken without further delay to adequately protect it. For this, the organisation deserves to be commended.

This brings us immediately to what I, and many others with me, consider the heart of the matter. Over the past years, those concerned with the environment have become ever more dissatisfied and disillusioned with the way in which the present international legal system works to protect it. Voices of discontent have grown, and will continue to grow in both number and intensity, as shortcomings in the system manifest themselves. Dissatisfaction has been evidenced most clearly in a number of trade disputes, leading one pre-eminent scholar in the field to remark that "we cannot allow the international legal order to continue with these sorts of self-contained and self-referential regimes that do not reach out to meld a set of broader societal interests which are not necessarily irreconcilable."[1]

As is to be expected, similar conflicts lie at the heart of investment disputes that have an environmental component, conflicts that are, in other words, the result of tensions between the societal interests in protecting the environment and conserving nature on the one hand, and the interests of the investor on the other.

The need for balancing potentially competing normative values has become a burning issue, since free trade and investment have to take into account environmental realities, just as environmental measures must be respectful of economic freedom. The need to treat developmental needs with environmental needs is referred to as the principle of "sustainable development," as illustrated in the Rio Declaration on Environment and Development. You may recall that the International Court of Justice invoked that very principle not too long ago in the Case concerning the Gabcikovo-Nagymaros Project.

So there is a need for balance. Can such a balance be achieved? And if so, how? In the field of trade, the discussion of this issue is a robust one indeed. The WTO Appellate Body is moving towards seeking to reconcile the societal demands of free trade and environmental protection in the context of what one scholar has coined "an holistic international legal order."[2]

Those who have, from a distance, followed the OECD negotiations regarding the Multilateral Agreement on Investment (MAI) are aware of similar difficulties in reconciling the principles of foreign investment and environmental principles. Some take the position that the collapse of these negotiations in 1999 was related to the failure to reach exactly this balance of those potentially competitive normative values.

So how has the international legal order faced up to the challenges? Some modalities rely on a consensual process that prefers agreement and common interests in the search for negotiation, instead of imposition. These modalities have emerged as a consequence of the limits of State authority imposing standards and applying sanctions, which has many times resulted in the ineffective implementation of standards. These consensus based modalities ensure, in the view of some, a broad application of environmental standards. In the view of others this approach, however, has produced only limited, and therefore disappointing, results.

Are the prospects offered by arrangements within the framework of international organisations and special conventions any brighter? When two sets of norms are mutually supportive, i.e., when international environmental conventions have an impact on, for instance, investment behaviour in such a way that the objectives of environmental protection are achieved, that is obviously the case. Not so, however, when two sets of norms actually conflict with one another.

Then the dilemma presents itself: should there be a hierarchy of one set of norms over another? What are the implications if and when domestic law interferes? And, conversely, what are the implications of international processes for domestic legal orders? For nationals? Issues in this field are challenging national and international courts as well as arbitral tribunals.

Some contend that such "challenges" as well as other considerations, such as legal access, require, for their resolution, a separate international environmental court – the topic of our discussion this evening. Others argue strongly against that point of view, warning that this argument is based on a misunderstanding of the very nature of international environmental law and of its role within the international legal system. As one scholar has pointed out, "There are very few disputes that are solely environmental in nature; indeed, there may be no such disputes. Other issues are at stake, whether they relate to trade or investment or intellectual property or biotechnology, or the sovereign rights of one kind or another. The international system does not need or want, as this stream of thought goes, a proliferation of international tribunals covering each of these areas of international law. What it needs is one or more dispute resolution fora capable of handling all these areas of law and of integrating them in a just and equitable

manner."[3]

However, the matter cannot be left there. Too many problems present themselves. One thing is abundantly clear: there is presently no unified forum to which States, intergovernmental organisations, non-governmental organisations, multinational corporations, and private parties can have recourse when they have agreed to seek resolution of controversies concerning environmental protection, and the conservation of natural resources. That is a serious flaw. Recent case-law indicates a growing willingness of States and other actors to have such recourse to international mechanisms to resolve disputes relating to natural resources and the environment. Pending the possible establishment of the type of separate Environmental Court that many would like to see, provisions giving adequate guarantees to all parties concerned must be put in place the soonest. After all, as mentioned before, we are at the eleventh hour.

A growing number of scholars foresee a role here for the Permanent Court of Arbitration. For some this choice is motivated, in part, by considerations of legal access beyond that of States alone, including NGO's and individuals.

Some three years ago, a study was prepared in the context of, and with a view to contributing to, the implementation of Principle 26 of the 1992 Rio Declaration on Environment and Development, which called on States to resolve their environmental disputes peacefully and by appropriate means in accordance with the Charter of the United Nations. It proposes specific roles for the PCA in the prevention and settlement of environmental disputes. These Guidelines for Negotiating and Drafting Dispute Settlement Clauses for Environmental Agreements have been in use for some time now and have contributed somewhat to the alleviation of the imbalances of the past.

However, bolder steps are now required. At the end of last year I submitted to the PCA's governing body, the Administrative Council, a report prepared by a drafting committee and supported by a working group, introducing actual draft rules of procedure for the settlement of disputes pertaining to natural resources and protection of the environment through arbitration under the auspices of the PCA. These draft rules provide for instance for:

- provisional measures of protection and security, tailored also to multiparty arbitration
- a panel of experts in environmental science available at the option of the parties to assist either the parties or the tribunal
- a panel of arbitrators, experienced in natural resources and environmental law, who can make themselves immediately available to the parties
- confidentiality procedures designed to protect information impacting national security and, for commercial parties, intellectual property, trade secrets, and other proprietary information
- fast track procedures at the parties' option which permit a speedier response to the issues presented to the respective arbitral tribunal

The proposals have been given serious consideration by Member States and, although they would like to see some adjustments here and there, those adjustments seem relatively minor and are mostly useful improvements to the text. My understanding is that now Member States have come to appreciate more clearly that arbitration does indeed provide an effective method for resolving disputes with an environmental component because the process is inherently consensual – parties must have agreed upon arbitration *a priori* – and because it lends itself to the co-operation necessary for the solution of environmental problems.

Member States have expressed strong support for the proposals and this support has been, as far as I can ascertain, across the board. This fares well for the future – a future in which the PCA also hopes, later this year, to submit draft rules of procedure for conciliation/mediation and for fact-finding commissions of inquiry. The international community would then have a full set of mechanisms to resolve international environmental disputes. This will be, for the immediate future, our organisation's contribution to the international community for dealing more effectively with the challenges to which the environment is currently being subjected. I can only commend those embarking on additional, complementary initiatives.

References

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3. **Sean Murphy, "Review of Existing International Judicial Mechanisms and Treaties for the Resolution of International Environmental Disputes,"** ***The George Washington University Law School Third Annual J.B. and Maurice C. Shapiro Environmental Law Conference*****, April 15-17, 1999**

Tjaco T. van den Hout, Secretary General of the Permanent Court of Arbitration, was educated in The Netherlands and the USA, studying law at

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