LEGAL FRAMEWORK – TOWARDS AN INTERNATIONAL COURT OF THE ENVIRONMENT?

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The Biopolitics International Organisation (B.I.O.) 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 B.I.O. deserves to be commended.

Over the past years, those concerned with our 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 are manifested against the backdrop of the ongoing process of globalisation.

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." The Rio Declaration on Environment and Development illustrates this. 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]

In the OECD negotiations regarding the Multilateral Agreement on Investment (MAI) similar difficulties arose 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. However, in the view of others, this approach 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 – for instance, 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 the other? 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. 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, we cannot leave the matter 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 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 some would like to see, provisions giving adequate guarantees to all parties concerned must be put in place soonest. After all, as was 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 multi-nationals, NGOs 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 their use has 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:

- 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 they will hopefully be approved by the PCA Administrative Council in exactly ten days from now.* To demonstrate their commitment to the broader societal interests of environmental protection, profit oriented companies should include a dispute resolution clause with specific reference to these rules of the Permanent Court of Arbitration in the contracts and agreements they conclude. Arbitration is a very 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.

These new rules will be, for the immediate future, the PCA'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, such as those discussed by Roland Werdel, in the banking industry, and those that although not mentioned today are equally important: innovative provisions in insurance and re-insurance policies in certain countries.

All these steps are not mutually exclusive. On the contrary, they should, ideally, go hand in hand. A "green" approach by financial institutions, such as banking, insurance, etc., should be supported by some underlying legal framework. This can be achieved by including the appropriate provisions discussed above in the contracts they conclude with their clients. It is this complementarity that might help protect future generations from the type of environmental degradation we have had to witness to date.

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*Editor's note: The PCA Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment were adopted at the extraordinary meeting of the Administrative Council on June 19, 2001.

References

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Tjaco T. van den Hout, Secretary General of the Permanent Court of Arbitration, was educated in The Netherlands and the USA, studying law at the University of Leiden and economics at Harvard University. He graduated from Leiden University in 1973 and joined the Dutch Foreign Service the following year. He has served at various posts abroad, such as The Netherlands Delegation to the Conference on Security and Co-operation in Europe (CSCE) in Geneva, and at Embassies of The Netherlands in Africa and Asia. He was subsequently assigned to the Permanent Mission of The Netherlands to the United Nations in New York. During the earliest part of this assignment he was on the Governing Council of UNDP and the Executive Board of UNICEF. He returned to the Ministry of Foreign Affairs in The Hague in 1989 to take up the position of Deputy Director of the Foreign Service. In January 1994 he took up the post of Consul General in New York, representing Dutch interests in the North-eastern part of the USA. After completion of this assignment in December 1996, Mr. Van den Hout returned to the Ministry of Foreign Affairs and was subsequently appointed Deputy Secretary General of the Ministry, a post he held until January 1999. In May 1999 he was elected to the post of Secretary General of the Permanent Court of Arbitration for a five-year term.