

Stefan Ohlhoff, Methoden der Konfliktbewältigung bei grenzüberschreitenden Umweltproblemen im Wandel

Summary¹

The dramatic growth of the world's population and the ongoing process of industrialisation increasingly harm the global, regional and local environment and accelerate the depletion of natural resources. Continuing industrialisation and world population growth are likely to increase and intensify conflicts concerning cross-border pollution and environmental degradation. Thus, measures and institutional arrangements to prevent cross-border environmental conflicts in accordance with the rules of international law become increasingly important. Yet, at the same time, states and international organizations are called upon to develop and strengthen international legal mechanisms to resolve and settle international environmental disputes in an expeditious, efficient, equitable, fair and sustainable manner.

For various reasons, international environmental conflicts make special demands on national and international dispute settlement proceedings. *First*, cross-border environmental problems vary considerably in scope, size and significance. As a result, environmental conflicts may involve players at very different levels, ranging from the local to the global. An array of players will ask, and need, to be involved in settling environmental disputes. These players will range from, at the local level, individuals, national interest groups, and small and medium-sized businesses to, at the international level, multinational corporations, international non-governmental organizations, as well as states, regional organisations, and international organisations.

Second, the resolution of environmental conflicts is generally fact-intensive. As a result of complex and inter-related ecosystems, environmental problems often develop in an extremely dynamic and non-linear manner. Thus, it is often difficult to determine the exact causes of environmental problems. Various influences can accumulate; their ori

¹ Summary by the author.

gins might go far back in time; and in many instances scientific methods are underdeveloped and cannot ensure authoritative findings. It is equally difficult to predict their magnitude and thus their significance. In addition, it is often impossible to reverse damage to the environment, and scientific and technical uncertainties make it difficult to prevent damage through appropriate remedies and responses.

Third, in many cases, substantive rules of international law do not exist or are either unclear or disputed in respect of their existence, extent or content. Frequently, international discipline in the area of environmental protection is too general in nature and needs to be clarified for each individual case.

Finally, environmental disputes generally result in complex and multifaceted conflicts of interests. In addition to environmental interests, conflicts about (cross-border) local, regional, or global environmental problems frequently affect a range of other interests or concerns which are no less legitimate. To name but a few: opposing internal, security, and foreign policy goals; economic and development concerns; and social and cultural matters. In addition, disputes involving common environmental goods (such as climate change, the ozone layer, the high seas or the Antarctic) result in polycentric-multipolar, rather than in "classical" bipolar, conflicts of interest. In other words, global environmental disputes usually involve the interests of single actors such as states or corporations on the one hand and the interests of the international community as a whole on the other, rather than conflicting interests of two or more states or other actors. The need to accommodate both the multipolar dimension of many environmental conflicts and the multitude of - frequently conflicting - policy interests involved add to the other intricacies of environmental conflicts.

Traditional international dispute resolution, both diplomatic (including informal means such as negotiations, good offices, and mediation, as well as formal mechanisms such as inquiry and conciliation) and judicial (binding fact-finding, arbitration tribunals or international courts), meet the requirements above only in certain scenarios.

Diplomatic means to resolve environmental disputes have a number of benefits. They are generally flexible and can be tailored to suit the particular needs of a specific case. Thus, as a matter of theory, states can accommodate all interests and all players involved. In addition, some of the more formalised dispute settlement means have particular advantages in the settlement of disputes concerning cross-border environmental problems. For example, inquiry proceedings may prove very helpful to clarify disputed factual issues, and conciliation proceedings

can facilitate an agreed solution to environmental disputes, including where they involve multi-party scenarios and/or factual uncertainty. However, in practice, diplomatic dispute settlement means suffer from two major risks: First, they generally lack transparency and, second, as power-based rather than rule-oriented instruments they tend to discriminate in favour of both the more powerful parties and the more short-term interests and benefits.

Judicial dispute settlement, in particular dispute resolution by international courts, remedies both these concerns; it is generally well suited to address a typical bipolar dispute between nations, such as a case concerning cross-border pollution in a small area. Still, traditional judicial dispute settlement often proceeds too slowly and lacks efficient fact-finding tools. Thus, to achieve a fast and efficient resolution of environmental disputes through traditional judicial means, the process needs to be tightened and accelerated, using, for example, narrow time-limits, and the international arbitral tribunals' and courts' powers to issue binding interim measures need to be strengthened. In addition, states need to invest the tribunals and courts with adequate and efficient fact-finding instruments and to improve the tribunals' and courts' competence to clarify factual, often technical and scientific, issues. In particular, this may require allowing arbitrators or courts to make better use of the specific experience and knowledge of nongovernmental parties (such as scientists, technical experts, concerned individuals and organisations), and of international organisations, including through (voting or non-voting) involvement in the deliberation and decision-making processes. Some elements of the dispute resolution procedure of the 1982 UNCLOS could provide a good role model.

Yet, in addition to the short-comings that can be remedied within the boundaries of traditional international dispute settlement, there are three more structural reasons why traditional (and in particular formal and judicial intergovernmental) dispute resolution falls short of an ideal instrument for the solution of international environmental disputes. First, traditional (formal) dispute resolution between states is not adequately designed to address complex multipolar conflicts. As an adversarial process involving two-sides, the procedural rules governing traditional dispute settlement generally mirror a primarily bipolar structure of the conflict even where there are rules to address multi-party conflicts. The interest of the community of states as a whole can only be captured by way of an *actio pro socio* where the individual interest of one of the nations concerned serves as a means to assert rights and duties *erga omnes (partes)*. Second, it is difficult to integrate the nongov

ernmental entities affected, both victims and polluters, into the settlement proceedings: their interests can only be represented indirectly as part of the state's interests using the concept of diplomatic protection. However, international courts have consistently considered the exercise of diplomatic protection to be subject to the discretion of governments. Third, judicial settlement generally results in "all-or-nothing" solutions; thus, within such proceedings, it is difficult to address the complexities of environmental disputes and to formulate pro-active, rather than negative, remedies. These deficiencies of the international dispute resolution procedures result in significant transaction costs and cause a considerable lack of enforcement of international environmental law.

In view of these shortcomings, the development and adoption of Non-Compliance Procedures in an increasing number of international environmental agreements addressing issues of "common interest" to the international community are an encouraging development. They address the problem of multi-polar conflicts and provide tools for tailored pro-active remedies. In the area of international environmental law, the parties to the 1987 Montreal Protocol of the 1985 Vienna Convention for the Protection of the Ozone Layer were the first to accept a Non-Compliance Procedure. Subsequently, similar procedures were implemented in other multilateral environmental agreements; for a number of other agreements the adoption of Non-Compliance Procedures is under consideration. These procedures may develop into a powerful *sui generis* mechanism for dispute resolution and prevention in the area of environmental protection: the abandonment of an adversarial structure for a multilateral approach with a multi-party panel representing the parties to the pertinent treaty; the procedures' focus on the enforcement of common interests of the parties as agreed within the relevant treaty; and the catalogue of flexible responses to an infringement of the agreed rules and its causes through both supportive measures and sanctions.

In contrast, the development of international procedural rights for non-governmental parties affected economically and/or politically by cross-border environmental problems (injured parties, as well as parties that cause injury) advances only slowly, unsystematically and erratically. At the international level, with very few notable exceptions (such as the acceptance of *amicus curiae* briefs by the WTO dispute settlement panels and the WTO Appellate Body) private parties are generally excluded from inter-governmental dispute settlement proceedings. Yet, more recently, a number of examples demonstrate how (and that) private parties can be involved in international environmental dispute settlement: the handling of environmental cases by regional and global human

rights systems; the United Nations Compensation Commission's treatment of environmental damages as a result of the Gulf War; the World Bank Inspection Panel and similar institutions of other development banks; the appellate procedures of the 1992 NAAEC; and, finally, the recent adoption of arbitration rules for environmental disputes by the Permanent Court of Arbitration. Nevertheless, these efforts are still exceptional; there is yet no consistent concept for the integration of private entities into environmental dispute resolution through international means. For example, the local cross-border cooperation between Luxembourg and the German Bundesland Rheinland-Pfalz in the area of water management that led to the creation of a joint administrative (arbitral) court and that provides an innovative approach to the international review of local administrative decisions, has remained extraordinary.

As regards international rules for environmental dispute resolution at the national level, the situation is similar. While there are a number of positive developments, there has not been a more systematic and general approach. There are a number of civil liability agreements that address specific cross-border environmental problems and that, in addition to substantive rules, contain rules governing the enforcement of claims for damages in national courts. Most of these agreements address the consequences of environmental disasters affecting a large area, such as disasters caused by accidents involving nuclear fuel or the transport of crude or heating oil. The attempts of the Council of Europe to adopt a broader approach to civil liability failed; the 1993 Civil Liability Convention has still not entered into force. In contrast, however, the UNECE's 1998 Access to Information, Public Participation and Access to Justice Convention has come into force. Although the success of the latter is encouraging, both the 1993 effort of the Council of Europe and the 1998 effort of the UNECE were confined to Europe. Similarly, a review of pertinent treaty law and the status of customary law reveals that the procedural right to *equal access* to justice have so far only been established in certain regions, in particular in Europe and in North America, and it has frequently been limited to certain subject matters.

In sum, the review of existing international dispute settlement instruments and of existing international rules addressing national dispute settlement undertaken in this study has revealed a number of both fundamental and practical deficiencies which prevent, to a varying degree, an expedient, efficient and sustainable settlement of cross-border environmental disputes. However, the increasing number of international environmental agreements that contain enforcement tools specifically

designed to protect the common interest of the parties (such as Non-Compliance Procedures) and the increasing number of agreements and organisations that invest private parties with procedural rights, both at the national and at the international levels, is encouraging and points the world community in the right direction.