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Going Green by Adopting and Adapting Arbitration for Environment Related Disputes

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ABSTRACT

Despite the fact that the law has evolved in addressing the array of concerns existing by often immediate and irreversible damage to the soul environment, the working of the law has been plagued by an unsuccessful dispute settlement mechanism with little detailing on its administration. International environmental treaties are gradually making more space for alternative dispute resolution (ADR) methods for dispute settlement. The Permanent Court of Arbitration Environment Arbitration Rules, 2001 are a set of rules with a little novel features addressing concerns which are exclusive for environmental disputes – the role of the non-state actors and multi-party disputes. The rules are formed in a manner that would make possible for any group of parties to dispute state, NGOs, multinational corporations and even individuals. The policy is also formulated to tackle multi-party disputes. Another important characteristic of these rules are that they also addresses the cost aspect of international dispute settlement process - member states have access to the environment assistance fund. Permanent Court of Arbitration (PCA) and the environment rules fill the place of forum for environmental disputes with expertise. The paper makes no endeavor to state that there is nonexistence of normative structure with reference to dispute resolution in trans-boundary environmental disputes. Rather it aims to demonstrate the normative insufficiency in the methodology adopted to address the content of the dispute resolution mechanisms and present ADR methods as a successful methodology for resolution of environmental disputes. It starts with a concise discussion on the characterization of an environmental dispute and the difficulty in the present legal regime. This is followed by a short overview of the dispute settlement structure in international law. It then discusses the mechanism of conciliation, mandatory and optional, exemplified in the course of a few international environmental instruments. Further there is a dialogue on the Permanent Court of Arbitration Optional Rules for Conciliation in Environmental Disputes, 2001 (Hereinafter rules, 2001). The next part discusses the instrument of arbitration, mandatory and optional, as exemplified through state practice in a few arbitrations like the Mox Plant Arbitration, and the International Tribunal for the Law of the Sea (ITLOS) arbitrations. Additionally there is a conversation on the rules, 2001 and how they could be of importance by customizing them for disputes like the trans-boundary freshwater disputes. The paper concludes with an assessment of the rules.

Key words : *Alternative dispute resolution, Environmental disputes, Environmental ADR, PCA.*

Introduction

Addressing the mission for a forum for deciding the rising volume of disputes concerning environmental damage has occupied much of the discourse in

international environmental law. Such reconciliation can happen only by an appropriate forum for dispute resolution. Contemporary chroniclers of environmental concerns have expressed the disillusionment with the international legal system and its

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functionalities in addressing the growing concerns about the environmental degradation (Tjaco and den Hout, 2020).

The courts ability to tackle complex issues has been always a topic of debate. This has led to the need of an alternative environment dispute resolution mechanism. The demand for an alternative forum to settle on the environmental disputes has been desired by a number of persons outside as well as within India. In United Kingdom, Lord Wolf pointed out a need for multi-faced multi-skilled body, rendering the services provided by the existing court, tribunals and inspectors in the environment field. It would be 'one stop shop', which would lead to faster, cheaper and more effective resolution of disputes in environmental matters (Harvard Law Review Association 1960). In India, the need for environmental court was first advocated by former P.N. Bhagwati J in *Oleum Gas Leak Case (Mehta Vs. Union of India, Air, 1987)*. The court pointed out that cases involving issues of environmental pollution, ecological destruction and its conflicts over natural resources involved assessment and evolution of scientific data and, therefore, according to the court, there was an urgent need of involvement of experts in the administration of justice (*Vincent vs UOI. Air, 1987*).

What are Environment Related Disputes?, Historical Context and cause for rise of Disputes

It is important to first discuss how one identifies and characterizes an "environmental dispute". In my considered view it is more appropriate to talk about disputes which have an environmental or natural resources component or which relate to the environmental or natural resources than to characterize a dispute as an environmental dispute. The grounds for these are simple. In my experience it is unlikely that both (or all) the parties to a dispute would willingly agree on characterizing it as environmental dispute. In the *Gabcikovo/ Nagymaros* case at the International Court of Justice, for example, concerning the construction of barrages on the Danube river, Hungary treated the case as primarily an environmental case, whereas for Slovakia the cause was about economic development and the law of treaties. Due to which the Environmental Chamber of the International Court of Justice, which was created in 1993 and never invoked, seems lately to have been dispensed with. The mere characterization of a dispute as a environmental dispute will have impli-

cations for a case. For this reason it is imperative that there will be established in the future an International Environmental Court which some observers have called. It would be preferred to follow the effort, for example, of the Permanent Court of Arbitration to develop model rules on arbitration of disputes relating the environment and natural resources, which rules take into account the particular characteristics of environmental disputes.

Characterization of the dispute has been further affected by the normative insufficiency within the definition of 'environmental dispute'. For example, Bilder's definition of an international environmental dispute as any disagreement or conflict between states relating to the alteration, through human intervention, of natural environmental systems was highly restrictive in its implementation, limiting it to inter-governmental conflicts (Bilder, 1975).

It is appropriate to begin with some history. Environmental disputes have an impressive history. The subject is not a new one. As far back as 1893, a distinguished international arbitration tribunal gave an Award in the *Pacific Fur Seal Arbitration* (Moore's International Arbitration, 1893)

This concerned a dispute between the United Kingdom and the United States as to the circumstances in which the United States – a coastal State – could interfere with British fishing activities on the high seas. This pitted interests of conservation against interests of economic exploitation. Half a century later, an Arbitral Tribunal gave its final award in the famous *Trail Smelter* arbitration, between the United States and Canada. This concerned the Trans boundary pollution by sulphur deposits originating from Canada onto United States territory. A decade and a half later a distinguished tribunal gave its award in the *Lac Lanoux* arbitration, between France and Spain concerning the circumstances in which one State made lawfully use of shared international waters (Gupta *et al.*, 2008). What makes these cases noteworthy are that they raise the potential for conflict between economic interests from ecological interest. It is significant because this identifies issues relating to the need to balance competing interests: in the field of foreign investment rules, for example, of the need to balance the legitimate interests of community and also to protect its environmental resources and the legitimate interests of private investors to protect his or her property rights.

More recently, the environment as a discrete sub-

ject matter has reached the political agenda, both at the national and the international levels. Presently there is a greater awareness of the need to protect the environment and the environmental resources. This awareness accompanied, by the adoption of a huge number of environmental laws, both at the national level and, in form of treaties, at the international level. This environmental understanding and these new environmental laws coalesce around number of features which distinguishes environmental matters from other areas, and pose meticulous challenges to the international courts and tribunals faced with resolving disputes having an environmental component.

Procedure in Green Tribunals

As we all know, the National Green Tribunal (or, NGT) is a quasi-judicial body, the purpose behind formation of it was to provide a specialized medium for effective and speedy disposal of cases relating to environment protection, conservation of forests and for seeking compensation for damages to environment protection, preservation of forests and for seeking compensation for damages caused to people or property owing to violation of environmental laws or conditions specified whilst granting permissions.

The NGT is empowered to decide civil cases pertaining to matters relating to those of environment and questions which are linked to the implementation of laws included in Schedule I of the NGT Act. Therefore, it is noticeably evident from powers of the NGT, cases relating to the violation of the specified laws, as also decision or orders made by the Government in connection these laws may be heard before this forum.

Besides, the verity that judicial retirees are selected in the Tribunal rather than younger officers and those with academic specialization inside the framework leads to bureaucrats delivering justice in areas where they have no particular specialization. Also, in spite of the exemplary feats achieved by the Tribunal on various occasion, it may be noted that in few important cases, justice has often been delayed. It is known to us that early disposal of cases is a major problem in the judicial system, and becomes even more pronounced when matter relates to the issue of environmentalism or environmental justice.

Sadly enough, the inability to attain the completion of establishment of the National Environment Protection Act (NEPA) and establishment of NGT

which cannot make use of its potential to the fullest has made the position more demanding. If the Tribunals do not have the authorization to adjudicate upon matters of the existing environmental organizations like the Pollution Control Board and the proposed NEPA, such bodies will ultimately make more problems than that are already there, rather than solving them. Therefore, it is necessary to figure out a strong environmental authority mechanism in the country.

Environment courts, like NGT, have certainly been an important development in the justice disposal system of India, but, settlement through alternative dispute resolution (ADR) methods should also be an option here. Environmental ADR offers people with a structured dispute resolution mechanism wherein the rights and mutual benefits of all the stakeholders (developers, government agencies and citizens) remain protected.

Permanent Court of Arbitration Optional Rules for Conciliation in Environmental Disputes, 2001(hereinafter rules, 2001)

Adopted by the 94 member-states of the Permanent Court of Arbitration (PCA) for the Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or Environment Rules, 2001 are designed exclusively for the environmental disputes resolution.

Similar to its efforts to promote arbitration as a dispute resolution mechanism in environmental disputes, PCA has furthered its existence in environmental dispute resolution (EDR) by a set of rules relating to the conciliation in environmental disputes. Recognized as the Optional Rules for Conciliation of Disputes Relating to Natural Resources and/or the Environment, 2002 (hereinafter referred to as rules, 2002) they were adopted by accord amongst the 96 PCA Member States on April 16, 2002. Modeled on the outline of the United Nations Commission on International Trade Law (UNCITRAL) Conciliation Rules, 2002 the optional rules reveal the particular characteristics of disputes having a natural resources conservation or environmental protection factor. Founded upon the scheme of ensuring maximum flexibility and party autonomy the rules can be used for dispute resolution by states which are parties to a bilateral or a multilateral agreement involving to access and utilization of natural resources, on differences relating to such agreement's interpretation and/or application.

By conformity of all parties to dispute, the conciliation process would dispense with the characterization of the dispute as relating to environment and/or natural resources. Parties would further concur for conciliation by a panel of one, three or five conciliators from the list of experts on the PCA arbitrators' panel/experts' panel, or propose their choice of conciliator under the rules. Failing selection by the parties within 60 days of commencement the process, the secretary-general of the PCA would do the appointment of conciliator. The responsibility of the conciliator comprises of assisting the parties in independent and impartial manner in the attempt to reach an amicable dispute resolution (PCA, 2002). At any stage of the conciliation proceedings he/she can make proposals and may communicate with the parties together or with each of them separately.

An interesting feature of the rules is the establishment of an implementation committee to monitor the implementation and thereby ensure enforcement of the settlement agreement (Biukovic Ljiljan, 2009). The rules also ensure the confidentiality of the entire process and information about the conciliation is made public only if the parties had agreed for it or is otherwise required by a court or a tribunal of competent jurisdiction.

Current and Potential use of Alternate Dispute Resolution (ADR) for Environmental Disputes

Several nations around the world have promoted alternative dispute resolution. They have been pragmatic to use administrative ADR wherein administrative bodies dedicated towards environmental regulations are under obligation to resolve disputes over issues relating to the same. Few countries are even referred by forums with internal specialization on environmental matters to solve such disputes.

In India, in order to build up a satisfactory institutional mechanism of environmental governance, the present institutions should necessarily be questioned. If we do a proportional study of the administrative ADR mechanisms of environmental dispute settlement which exists in other parts of the world, we might get a scheme of what are the advantages of developing one such mechanism in our country.

Specific Procedural features of ADR

ADR facilitates early settlement of disputes. Early settlement can be both financially and emotionally advantageous to the disputant. It may also mean that an important relationship can be repaired and

maintained, something which may be at risk in adversarial litigation. While it is true that lawyers often engage in negotiation and settlement, sometimes on the steps of the court, a successful negotiation often depends on the strength of the legal rights-based arguments, which can only be fully developed following expensive and time consuming processes such as discovery. This legalistic approach often overlooks other avenues of settlement opportunity, which may better address a client's underlying interests and needs (Fiadjoe, 2004). Alternative dispute resolution must be seen as an integral part of any modern civil justice system. It must become such a well established part of it that when considering the proper management of litigation it forms as intrinsic and as instinctive a part of our lexicon and of our thought processes, as standard considerations like what, if any, expert evidence is required.

Conclusion

Despite the increasing number of cases involving the environment, investment treaties themselves are not well-equipped to provide guidance to tribunals on environmental issues. Despite these theoretical and structural burdens, the arbitral system allows for much discretion on the part of the tribunal. Ultimately, the goal for the arbitral system is to develop the capacity to seriously consider the public policy issues and environmental concerns often at stake while fairly adjudicating the claims of investors harmed by state action.

PCA could truly be a unified forum for arbitration of environmental disputes if the criticism mentioned above could be addressed and such address read into the rules. There is no division on the opinion that arbitration has been a significant contributor the resolution of many environmental disputes, the arbitral regimes have worked towards ensuring protection and conservation of environment and natural resources. More importantly in a world that is increasingly becoming prone to irreversible damage to its environment, the PCA Environmental Rules offer a rapid response through its expedited and effective dispute resolution process. Further the rules are also a significant development in the area of international environmental law because they offer a procedure for conducting the arbitration hearings within a time frame for each section of the process, unlike other important conventions which have a dispute settlement clause referring parties to

arbitration in annex, but have not yet adopted arbitration procedures. PCA's institutional resources and the rules could be of help for states who are parties to such conventions if they could agree to refer their disputes to the Rules, thereby making the conventions complete in all respects and also contributing to the environmental dispute resolution. The PCA Optional Rules for Arbitration of Disputes relating to Environment/Natural Resources provide an immediate and extended address to the needs environmental dispute resolution in a participatory process.

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