ARBITRATION OF ENVIRONMENTAL DISPUTES THAT CROSS NATIONAL BOUNDARIES

Lisa B. Bingham
Indiana Conflict Resolution Institute, School of Public and Environmental Affairs, Indiana University, Bloomington, Indiana, USA

David Cameron Prell
Indiana University School of Law, Bloomington, Indiana, USA

Keywords: arbitration, climate change, environmental disputes, environmental law, Kyoto Protocol public law, private law, trans-boundary ,Vienna Convention

Contents

1. Introduction

This article examines the use of arbitration to resolve environmental disputes that cross national boundaries. For purposes of this chapter, the term “state" refers to a sovereign nation. First, the article defines arbitration, discusses the forms it can take, and describes its procedural characteristics. Second, it reviews the sources of authority for arbitration of international environmental disputes, problems of jurisdiction, and the major treaties, protocols, or other agreements that provide authority to use arbitration for environmental disputes. Third, it examines major international environmental arbitration cases to which states have been a party, organized chronologically by tribunal. Fourth, it

examines major international arbitration tribunals to which private parties may seek recourse, and the few published cases available from these generally confidential sources, again organized in chronological order by tribunal. Finally, it discusses reasonably foreseeable trends and the future of arbitration for trans-boundary environmental disputes.

1.1. Arbitration Defined

Arbitration is a consensual, quasi-judicial means of resolving conflict. It is a form of alternative dispute resolution (or ADR) often used after voluntary negotiation and mediation have failed to resolve the conflict. In arbitration, the parties to a conflict mutually agree upon a private judge or judges whom they empower to decide disputed issues of law, fact, or both. All aspects of the hearing procedure are subject to negotiation by the parties. While arbitration hearings can resemble a trial or litigation proceeding, they differ fundamentally in that the parties are the source of the arbitrator's power. In a trial or litigation proceeding, a sovereign state's constitution gives power (also called jurisdiction) to a judicial body or branch, which in turn may compel unwilling parties to appear before it and participate in the trial. The UN encourages consensual dispute resolution as the preferred means for resolving all international disputes. However, the capacity of the UN to compel states to yield to the authority of the UN or its judicial bodies is still in evolution. At the time of writing, the great majority of international environmental disputes handled through quasi-judicial proceedings are for all practical purposes arbitrations, because they stem from a voluntary or negotiated agreement by a state to submit the dispute to a quasi-judicial forum. That agreement may take the form of a permanent treaty or an ad hoc submission. While the role of the UN is changing, there is as yet no worldwide sovereign government with legal authority and power to compel an unwilling state, to absent a voluntarily negotiated treaty, or to submit an environmental dispute that crosses national boundaries to the jurisdiction of any one forum. The state must consent to the forum's jurisdiction through treaty or ad hoc agreement to arbitrate. For this reason, arbitration is and will continue to be the dominant quasi-judicial form of dispute resolution for international environmental disputes.

1.2. Forms of Arbitration

Arbitration can take a wide variety of forms. It may be arbitration of rights or interests. Rights arbitration occurs when the arbitrator decides parties' obligations under an existing agreement, treaty, law, or other standard. It is retrospective, and generally determines which party was right or wrong on a given standard of conduct with respect to certain past behavior. Examples include grievance arbitration under a collective bargaining agreement, or commercial arbitration concerning rights under a contract for goods or services. Interest arbitration occurs when the arbitrator assists the parties in developing an agreement, treaty, or standard for their future dealings. It is prospective, and establishes the rights and obligations of the parties with respect to future behavior. Examples include public sector labor arbitrations to resolve a dispute regarding wages and terms and conditions of employment in a successor collective bargaining agreement. Arbitration may also be final and binding, or non-binding and advisory. At the national level, binding arbitration is usually enforceable through the judicial system.

Enforceability of international binding arbitration is less certain, although in theory decisions of the International Court of Justice (ICJ) are enforceable through the power of the UN. Non-binding or advisory arbitration results in an award either party may reject; however, its moral suasion is such that in most cases parties accept the award and voluntarily comply with it. In international accords, the term “conciliation” often refers to a form of non-binding or advisory arbitration.

1.3. Characteristics of Arbitration Procedures

Arbitration procedures vary widely as a function of the negotiated agreement of the parties, which is often called the “compromis" in international arbitration. The parties may negotiate a submission defining the scope of disputed issues submitted for decision, and the powers and limitations of the tribunal. They may agree on the number and nature of the arbitrators. For example, they may use a single neutral arbitrator, or a panel of multiple neutral arbitrators. They may choose instead a panel including both neutral and advocate or party arbitrators who continue to advocate for one party during the deliberations stage of the hearing. They may choose the English common law tradition, which uses an adversarial proceeding, or the European code tradition, which uses an inquisitorial proceeding. In an adversarial proceeding, parties hire counsel to present evidence in support of their view of the case. The arbitrator is a passive recipient of evidence, and counsel are partisan. In an inquisitorial proceeding, the arbitrator takes an active role in collecting the evidence, and any counsel owe their primary obligation to the arbitrator. Counsel in theory act in support of the arbitrator, not the parties. The parties may agree on particular means and timetables for exchanging relevant evidence (also called discovery), the nature of admissible evidence (testimony, affidavit, videotape, telephone, personal inspection, etc.), the availability of confrontation and cross examination of witnesses, the use of experts, the timetable for the proceedings and award, the form of the award (simple or reasoned), payment for the expenses of the arbitrators and costs of the proceeding, and the award's enforceability. They may also agree upon the treaty, law, or substantive standard for the arbitrator's decision on the dispute.

2. Sources of Authority for Arbitration of Trans-boundary Environmental Disputes

This section examines sources of direct authority to arbitrate provided expressly in a treaty or agreement. There is relatively little arbitration case authority under the below cited treaties and protocols. Moreover, most of these international accords provide for more than one possible arbitration forum. Since any arbitration case authority would provide persuasive precedent in a variety of arbitration forums and under a variety of accords, and since even within a single forum prior decisions are often treated as persuasive, not binding precedent, this article first presents the treaties and accords, and a subsequent section examines case authority organized chronologically by arbitral forum.

2.1 Substantive International Environmental Law: Public, Private and Mixed

International environmental law falls roughly into two categories: public law and private

law. In addition, some cases involve mixed questions of public and private law. Public law governs states as parties to a trans-boundary environmental dispute, for example, treaty violations (e.g. non-compliance, breach of obligations), or damage caused by nuclear testing. Private law governs individual citizens from different states, for example oil drilling or other commercial dealings that result in collateral environmental damage. Domestic law governs citizens from the same nation in a conflict originating within its territory, and is outside the scope of this article. The majority of published environmental arbitration awards concern public environmental law, even though the disputes may originate in private law when an individual citizen seeks recourse from his or her own government for environmental damage caused by an actor across the national border. Generally, arbitration awards involving private international law are confidential and not published. Cases involving mixed questions of public and private law include international trade, development and investment. These cases may involve both states and private citizens as parties, and concern rights arising under treaties and commercial dealings. For example, several arbitration cases examine the question whether nationalization of oil resources violates contracts between oil companies and a state (Texaco Overseas Petroleum Co. and California Asiatic Oil Co. v. Libya, 53 ILR 389 [1977] and Kuwait v. American Indep. Oil Co., 66 ILR 519 [1982]). This article focuses primarily on public law.

2.2 International Public Environmental Law and Arbitration

The twentieth century has seen the emergence of efforts to forge an international consensus on environmental policy. Through a series of international conferences, states have negotiated a variety of conventions, protocols, declarations, agreements and other texts providing substantive guidance on the obligations of states to protect the world's environment. These texts often provide enforcement mechanisms requiring the use of dispute resolution processes, generally moving from consensual negotiation, to mediation with the assistance of a third party neutral, to a quasi-judicial binding or advisory arbitration process before a named forum or before other arbitrators to be designated by the disputants. This section examines authority to arbitrate under selected major relevant texts.

2.2.1 The Role of the United Nations in Public Law

The Convention on The Hague on the Peaceful Settlement of International Disputes (1907) introduced a policy that all disputes between nations or states should be settled peacefully. The Charter of the United Nations provides a policy promoting the peaceful settlement of disputes between member nations in Art. 2, para. 3, and provides explicitly for use of negotiation, mediation, conciliation, arbitration and judicial recourse in Art. 33, para. 1. In 1989, United Nations General Assembly Resolution 44/228 convened the UN Conference on Environment and Development (UNCED) "to assess the capacity of the United Nations system to assist in the prevention and settlement of disputes in the environmental sphere and to recommend measures in the field, while respecting existing bilateral and international agreements that provide for the settlement of disputes." Principle 10 of the Rio Declaration calls on states to provide "effective access to judicial and administrative proceedings, including redress and remedy" and on states to "resolve all their environmental disputes peacefully and by

appropriate means and in accordance with the Charter of the United Nations."

2.2.2. The Problem of Compulsory Jurisdiction in Public Law

The UN does not have the power of compulsory jurisdiction over member states concerning environmental disputes. All jurisdiction is a product of agreement and bilateral or multilateral treaties between and among states. A number of such agreements exist, and the international community continues to negotiate more. This means that there is no authoritative, or de jure, common international law of the environment that governs every nation in the world. However, the multiplicity of agreements and avenues for redress are gradually creating a de facto international customary law. For this reason, arbitration case precedent from one forum may provide persuasive authority to arbitrators in another forum or interpreting another treaty with similar language.

2.3. Major Treaties, Conventions, and Protocols Concerning the Environment that Provide for Arbitration

The below described accords provide express authority for arbitration of disputes arising under them.

2.3.1. Optional Protocol Concerning the Compulsory Settlement of Disputes to the Vienna Convention on Civil Liability for Nuclear Damage (1963)

The Vienna Convention is a global convention to address necessary financial responsibility for installing nuclear facilities by making the operators absolutely and exclusively liable for nuclear damage, and by requiring insurance coverage unless they are states. It supplements the Paris Convention on Third Party Liability in the Field of Nuclear Energy (1960), which provides for jurisdiction in the national courts where the nuclear accident occurred. It provides for voluntary submission of disputes to arbitration. It only treats environmental protection in the form of liability to victims for the economic costs of nuclear damage. Relatively few states have ratified the Vienna Convention, and even fewer have ratified the Optional Protocol Concerning Compulsory Settlement of Disputes. The accident at the nuclear power installation at Chernobyl demonstrated that this system is inadequate, and there are efforts to revise it.

2.3.2. United Nations Convention on the Law of the Seas [UNCLOS] (1984)

UNCLOS establishes comprehensive, substantive international obligations to protect the hydrosphere from environmental damage. It incorporates parts of numerous prior accords concerning the law of the sea. Part XV on Settlement of Disputes creates an obligation to settle disputes concerning the interpretation or application of the Convention by peaceful means pursuant to the UN Charter (Art. 279), gives the parties power to agree mutually to any peaceful method for settling the dispute (Art. 280), and provides that any agreement or treaty to submit the dispute to a process that entails a binding decision shall supersede the general compulsory procedures of UNCLOS (Art. 282, 286). Otherwise, when signing, ratifying or acceding to UNCLOS, a state must declare in writing which procedure it will use to settle disputes, including the

International Tribunal for the Law of the Sea, the International Court of Justice (ICJ), an arbitral tribunal under Annex VII, or a special arbitral tribunal under Annex VIII. The default for a state that fails to make a written declaration or where two states make differing declarations is arbitration under Annex VII (Art. 287). However, all disputes about deep sea-bed mining are subject to the Sea-Bed Disputes Chamber under Part XI.

2.3.3. Montreal Protocol (1989)

The Montreal Protocol supplements the Vienna Convention for the Protection of the Ozone Layer (1985) to establish substantive international obligations to protect the atmosphere from environmental damage attributable to controlled substances that deplete the ozone layer. It provides for arbitration of disputes in a manner similar to UNCLOS, but does not provide for compulsory jurisdiction. Under the Vienna Convention (Art. 11), parties with a dispute concerning the interpretation or application of the Convention must first resort to negotiation and mediation. Parties may declare in writing that unresolved disputes will be subject to the compulsory jurisdiction of arbitration or the ICJ. However, if they do not accept compulsory jurisdiction, then the dispute will go to a conciliation commission, a form of advisory arbitration. The commission is comprised of an equal number of party members and a jointly chosen neutral chair. Together they must render a final recommendatory award for the parties to consider in good faith.

2.3.4. Rio Declaration on Environment and Development (1992)

The Rio Declaration reaffirms the Declaration of the United Nations Conference on the Human Environment (Stockholm 1972) and adopts the policy of sustainable development, which makes environmental protection an integral part of the development process in order equitably to meet the developmental and environmental needs of present and future generations. In Principle 26, it provides that states shall resolve all their environmental disputes peacefully and by appropriate means in accordance with the UN Charter.

2.3.5. Convention on Biological Diversity (Rio de Janeiro 1992)

The Convention on Biological Diversity establishes international obligations to protect the biosphere from environmental damage in the form of loss of biological diversity, defined as diminished variability among living organisms from all sources including terrestrial, marine and other aquatic ecosystems, and includes diversity within species, between species and of ecosystems. Art. 27 provides for settlement of disputes first by negotiation and mediation, and if those fail, permits but does not require a state to declare a compulsory means from either arbitration or the ICJ. If the state has not declared a compulsory method, Annex II provides for conciliation. Annex II describes an arbitration procedure that provides a tripartite panel, in which the two states each select a party arbitrator, who in turn select the neutral president of the panel. The president may not be a national, resident, or employee of either state. The panel has jurisdiction to determine the scope of arbitration where the parties are in dispute over the subject matter, and to determine its procedure in the absence of an agreement between the parties. Annex II provides an obligation to disclose information to the

arbitrators, and renders the proceeding confidential. The arbitration award is final and binding unless the parties have agreed in advance to an appellate procedure. If a state has not declared a compulsory method of dispute settlement, the conciliation provisions of Annex II provide for non-binding advisory arbitration.

2.3.6. Climate Change Convention [CCC] (1992)

Again, Art. 14, para. 2 of this agreement permits a state to declare in a written instrument that it will submit any dispute concerning the interpretation or application of the convention either to arbitration or to the ICJ. Art.14, para. 7 provides for parties to adopt procedural rules for arbitration as soon as practicable. Art. 14, para. 5 provides for conciliation if the parties have not resolved the dispute within twelve months after notice. The parties cannot unilaterally block appointment of an arbitrator or the conciliation commission members, because recent rules provide for the UN Secretary-General or the ICJ to make a proxy appointment after a certain time period has elapsed.

2.3.7. Kyoto Protocol (Not yet in Force)

This protocol attempts to elaborate further the policies and measures of the UN Framework Convention on Climate Change. Through the joint implementation procedure, countries agree to reduce their greenhouse gases proportionate to their respective pollution levels. They also agree to emissions trading. Parties agree to approve appropriate and effective procedures and mechanisms to determine and to address cases of non-compliance (Art. 18). Article 18 of the Protocol allows for the provisions of Article 14 of the CCC on settlement of disputes and arbitration to apply mutatis mutandis to any subsequent non-compliance amendments.

2.4. International Public Commercial Law and the Environment

The 1990s have seen increasingly frequent clashes between international trade policy and international environmental policy, usually at the expense of the environment and the global commons. Often the parties to a dispute are reluctant to characterize it as environmental, because this may give rise to arguments that third parties have standing to participate in the dispute resolution process. Thus, environmental disputes may arise under trade and other agreements. These agreements sometimes contain language recognizing the environmental policy component of certain trade restrictions.

-
-
-

Bibliography

Evans, Malcolm D. (1998). *Remedies in International Law: The Institutional Dilemma*. Oxford, UK: Hart Publishing. [This book begins with chapters that explore the nature of institutional mechanisms and

procedures for the settlement of disputes, and then proceeds to examine a variety of other dispute-settlement mechanisms that fall under the rubric of alternative dispute resolution. One chapter focuses specifically on recent developments in Environmental Dispute Settlement vis-à-vis the specific manner in which the dispute is viewed. Although this book is not primarily focused on international environmental arbitration, it does provide the reader with a foundation on which to build discussions about that subject matter.]

Globelaw: International and Transnational Law (last modified July 20, 1999) <http://www.globelaw.com/sources.htm>. [This website contains numerous sources, reference materials and links to information about international conventions and international law and policy, including multilateral convention sources, (i.e. US law, European law, and other domestic law), general United Nations documents, International Court of Justice, international environmental law and policy, climate change, the Law of the Sea, Nuclear Weapons and the Non-Proliferation Treaty, nuclear testing and CTBT, toxic waste and toxic waste trade material, human rights, the World Trade Organization, the Antarctic, biodiversity and other miscellaneous topical areas.]

Guruswamy, Lakshman D., Sir Geoffrey W. R. Palmer, Burns H. Weston and Jonathan C. Carlson (1999). *International Environmental Law and World Order: A Problem-Oriented Coursebook*, (second edition). St. Paul, MN, USA: West Publishing Co. [This text contains general substantive matter regarding International Environmental Law, as well as specific case studies. As such, the casebook provides useful discussions of applicable theories and practices. The casebook also includes an extensive table of treaties and a table of arbitral and judicial decisions. It should be noted that the authors frequently cross-reference "basic documents" from the supplement. (See the citation below).]

Guruswamy, Lakshman D., Sir Geoffrey W. R. Palmer, Burns H. Weston and Jonathan C. Carlson (1999). *Supplement of Basic Documents to International Environmental Law and World Order: A Problem-Oriented Coursebook*. St. Paul, MN, USA: West Publishing Co. [This presents a comprehensive compilation of original source documents for international environmental law including treaties, conventions, protocols and other international agreements. The book is also divided into several topical sections, namely, the atmosphere, the hydrosphere, the lithosphere, and the biosphere, as well as a constitutive/organic and miscellaneous section.]

International Court of Environmental Arbitration and Conciliation. <http://www.greenchannel.com/iceac/> [This website provides information on statutes and cases which may be helpful to those doing research in International Environmental Arbitration.]

Jackson, John H., William J. Davey, and Alan O. Sykes, Jr. (1995). *Legal Problems of International Economic Relations*. St. Paul, MN, USA: West Publishing Co. [Although largely pertaining to international economic relations, several sections of the book are helpful in gaining insight about international environmental arbitration. Specifically, chapters on Dispute Settlement, GATT and the Environment, and Escape Clauses, Safeguards, and Adjustment Policies, in addition to other chapters inform the study of international environmental arbitration.]

Lowenfeld, Andreas F. (1993). *International Litigation and Arbitration.* St. Paul, MN, USA: West Publishing Co. [The common theme of this volume concerns controversies among litigants in different nation-states. One chapter specifically focuses on the arbitration of international disputes, and several other chapters, such as those covering jurisdiction and enforcement, may be helpful to those doing research in the area of international environmental arbitration.]

Permanent Court of Arbitration. <http://www.pca-cpa.org/>. [This website has extensive general information, in addition to news, environmental dispute resolution, basic documents, case studies, UNCITRAL, and publications.]

Daragahi, Borzou (1994). Environmental ADR: Demand for Arbitration Raises Practical Concerns. *New York Law Journal*. September 20, 1994; 212(48): p5. [This article examines the use of arbitration in environmental disputes. It suggests that, although many plaintiff and defense lawyers currently involved in environmental litigation support arbitration, issues such as lack of discovery and unqualified arbitrators need to be resolved to ensure success. Although not specifically focused on international environmental

arbitration, the propositions in the article may be applicable and interesting to scholars and practitioners in the field.]

Gamman, John K. (1994). *Overcoming Obstacles in Environmental Policymaking: Creating Partnerships Through Mediation.* Albany, NY, USA: State University of New York Press. [This book examines international efforts at environmental conservation and development by profiling the Caribbean Island nations of St. Kitts, St. Lucia, and Barbados. The author argues that efforts to protect natural resources in these areas are failing, and that environmental policy can only be accomplished using a modified negotiation/mediation strategy. This book does not pertain specifically to arbitration; however, the author's propositions are important to consider in light of the push for greater use of arbitration of international environmental disputes.]

Kalas, Peggy Rodgers and Alexia Herwig (2000). Dispute Resolution Under the Kyoto Protocol. *Ecology Law Quarterly*. 27 Ecology L.Q. 53. [This article provides a brief overview of two of the flexible trading regimes envisioned under the Kyoto Protocol and then examines current dispute settlement mechanisms, including arbitration, established under various international treaties. It then summarizes potential disputes that may arise under the Kyoto Protocol's trading regimes, and suggests appropriate methods of dispute resolution according to the participants and types of disputes. Finally, it examines lessons learned from experiences with other treaties' dispute settlement mechanisms and suggests how those might be eventually applied in the design of the Protocol's dispute settlement mechanism.]

Biographical Sketches

Lisa B. Bingham is Keller-Runden Professor of Public Service and Director of the Indiana Conflict Resolution Institute at the Indiana University School of Public and Environmental Affairs, Bloomington, Indiana. A graduate of Smith College (A.B. magna cum laude with high honors in Greek 1976) and the University of Connecticut School of Law (J.D. with high honors 1979), she practiced labor and employment law for ten years and was a partner in the law firm of Shipman and Goodwin, of Hartford Connecticut. She joined the faculty of Indiana University in 1989 as a lecturer at the School of Law. In 1992, she joined the faculty of the School of Public and Environmental Affairs. Professor Bingham co-founded the Indiana Conflict Resolution Institute in 1997. The Institute is supported by a grant from the William and Flora Hewlett Foundation and conducts applied research and program evaluation on mediation, arbitration and other forms of dispute resolution. Professor Bingham is director of the National REDRESS™ Evaluation Project for the United States Postal Service, a research project on transformative mediation of employment discrimination disputes. She has also served as a consultant on evaluating conflict resolution systems to the National Institutes of Health, the United States Air Force, the Occupational Safety and Health Review Commission, and the United States Department of Agriculture. Professor Bingham is a member of the labor arbitration panels of the American Arbitration Association and the Federal Mediation and Conciliation Service, and a member of the National Employment ADR Task Force of the American Arbitration Association. A winner of three teaching awards and four peer-reviewed awards for her research, she has published over twenty articles and book chapters. Her work appears in the *Review of Public Personnel Administration, Industrial Relations, McGeorge Law Review, Labor Law Journal, Arbitration Journal, Employee Rights and Employment Policy Journal,* and the *International Journal of Conflict Management,* among others.

David Cameron Prell completed his juris doctor at Indiana University School of Law, Bloomington, Indiana in 2000. He served as a research associate with the Indiana Conflict Resolution Institute, School of Public and Environmental Affairs at Indiana University, in 1999. He is currently practicing law in Washington, DC with the firm of KPMG LLP.