International Legal Means of Disputes Settlement: Judicial Settlement and EDR

1.**Introduction**

The many situations when population had been exposed to dramatic environmental damages raised awareness with regard to the strong footprint that humans have on the environment and with regard to the necessity to keep it healthy. *"Unfortunately, examples of incidents resulting in serious environmental damage are numerous. Well-known illustrations include such events as: […] the 1986 Chernobyl nuclear power plant accident which caused radioactive contamination of the natural environment and very substantial damage to human health across the borders in Europe and Asia; […] the cyanide spill in the year 2000 from the Baia Mare mine in northwestern Romania, resulting in toxic pollution of the Danube and its tributaries in downstream countries, killing hundreds of tons of fish in some sectors of the river; and the marine oil spill incidents that have caused massive damage to the coasts of a number of countries, especially in Europe."* 1 (***Training Manual on International Environmental Law*** http://www.unep.org. p.51)

2.Liability

As result of the impact of these unfortunate events, the nations identified which are the values that have to be protected by law and the outcome was translated into 10 emerging principles and concepts of the environmental law are: Sustainable development, integration and interdependence; Inter-generational and intra-generational equity; Responsibility for transboundary harm; Transparency, public participation and access to information and

remedies; Cooperation, and common but differentiated responsibilities; Precaution; Prevention; “Polluter Pays Principle”; Access and benefit sharing regarding natural resources; Common heritage and common concern of humankind; and Good governance.

Anyone who acts act against these values, which , by now, had been transposed in legal provisions, falls under the liability regime and will have to pay for restoration of the affected environment or compensating for the damage caused. The subject may be individuals (private or legal persons) as long as the polluter is identified and the damage is concrete, but quantifiable, as well. But the main actor may be also a State. In this case, a distinction must be made, between the type of act that generated the damage. If we dealt with wrongful acts, the responsibility of the State is engaged. If we dealt with lawful activities, the State is liable. As we may notice, the difference is made by how the State had breached obligations arisen out of international commitments.

Basically, these are the key-elements for a dispute to arise, and this the moment when the claimants chose the fora for settling it, according to the provisions their situation falls under.

3.Dispute Settlement according to UNFCCC

The UNFCCC dedicates Article 14 to settlement of disputes, according to which, “*in the event of a dispute between any two or more Parties concerning the interpretation or application of the Convention, the Parties concerned shall seek a settlement of the dispute through negotiation or any other peaceful means of their own choice. When ratifying, accepting, approving or acceding to the Convention, or at any time thereafter, a Party which is not a regional economic integration organization may declare in a written instrument submitted to the Depositary that, in respect of any dispute concerning the interpretation or application of the Convention, it recognizes as compulsory ipso facto and without special agreement, in relation to any Party accepting the same obligation:*

(a) Submission of the dispute to the International Court of Justice; and/or

(b) Arbitration in accordance with procedures to be adopted by the Conference of the Parties as soon as practicable, in an annex on arbitration."

There are several fora for settling environmental disputes around the world, but maybe too few and not very easy to access, compared to how many damages are cause every day because of maltreatment that environment is exposed to. The strongest barrier to overpass in order to improve this mechanism is a political one – there is a continuous fight between the citizen's interest and the State's interest (especially in economic terms). And until this situation is fixed, covering the lost for each and any damage will be an exceptional victory and not a daily business.

4.Courts of Justice

Beside the European Court of Justice and various international human rights courts (European, African, Inter-American), which deal with environmental issues due to their profile, the most important player is the International Court of Justice, which acts under the auspices of the United Nations and is competent over a dispute, only when fulfilling a sine qua non condition – the two or more States gave their consent with regard to ICJ jurisdiction over their dispute. Unfortunately, "*some of these bodies were established in an environmentally innocent era, when the protection of the environment was not elevated as a fundamental societal value at the international level. Their procedural rules do not accommodate needs of environmental victims. The international courts function within the nascent frameworks of international law and often lack compulsory jurisdiction and enforcement mechanisms.*" 2 (Avgerinopoulou, Dionysia-Th. – ***The role of the international judiciary in the settlement of environmental disputes and alternative proposals for strengthening international environmental adjudication***. Yale Center for Environment, 2003 http://www.yale.edu/gegdialogue/docs/dialogue/oct03/papers/Avgerinopoulou.pdf , p.18)

5.Environment Dispute Resolution – EDR

Usually, in climate-related disputes, where victims who are potential

claimants against insurers, government agencies, and others, another way of settlement of disputes is needed (at least a faster one, for obvious reasons): EDR (Environment Dispute Resolution). Claimants prefer conciliation, negotiation, mediation or arbitration. But this EDR are not chosen only by private or legal persons, but also by States.

The most know arbitral tribunals which deal with environmental disputes are the International Centre for the Settlement of Investment Disputes (deals with environmental disputes in a foreign investment context), World Bank Inspection Panel (considers environmental disputes as long as they interfere with the World Bank activities), the Dispute Settlement Understanding (is the main function of the World Trade Organisation), or the International Tribunal for the Law of the Sea (functions under UNCLOS).

The Permanent Court of Arbitration (PCA) 3 (http://www.pca-cpa.org/), is an international organisation based in The Hague in the Netherlands, since 1899 (the oldest institution for international dispute resolution). Taking into account the growing importance of environmental affairs, the PCA has established a very elaborated Environmental Dispute Resolution mechanism, by adopting Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment 4 (http://www.pca-cpa.org/showpage.asp?pag_id=1058). Since the establishment of these rules, the administrative council of the PCA is constantly promoting the activities of the PCA in this field.

A specialized arbitral tribunal is the International Court of Environmental Arbitration and Conciliation (ICEAC) (with permanent seats in Spain and Mexico). This Court settles disputes that are submitted by states, private parties, or NGOs (allow individuals, NGOs, and other private entities to bring disputes on equal footing with governments). 5 (Kalas, Peggy – ***International environmental disputes resolution, Why we need a global approach*** – INTGLIM 2002 http://www.wfm-igp.org/site/files/WSSD_Kalas_DisputeMechs_Aug2002.pdf . p.2)

It is true that EDR are developing, but, most of the times, the physical

issues at stake are mastered only by scientists, biologists, chemists (the experts), while lawyers, mediators and specially the disputants are not prepared to grab the scientific phenomenon their dispute is about. Reason for which, in order to reach greater success, the EDR practitioners need a *"rigorous and dynamic base, one that integrates a sophisticated appreciation and understanding of the environment with a contemporary and innovative approach to resolving dispute."*6 (Painter, An – ***The Future of EDR (Environmental Dispute Resolution***) – Natural Resources Journal. Vol.28 (Winter 1988) http://lawlibrary.unm.edu/nrj/28/1/07_painter_future.pdf)

Bibliography

1. ***Training Manual on International Environmental Law*** http://www.unep.org.51
2. Avgerinopoulou, Dionysia-Th. – ***The role of the international judiciary in the settlement of environmental disputes and alternative proposals for strengthening international environmental adjudication***. Yale Center for Environment, 2003 http://www.yale.edu/gegdialogue/docs/dialogue/oct03/papers/Avgerinopoulou.pdf , p.18
3. http://www.pca-cpa.org/
4. http://www.pca-cpa.org/showpage.asp?pag_id=1058
5. Kalas, Peggy – ***International environmental disputes resolution, Why we need a global approach*** – INTGLIM 2002 http://www.wfm-igp.org/site/files/WSSD_Kalas_DisputeMechs_Aug2002.pdf . p.2
6. Painter, An – ***The Future of EDR (Environmental Dispute Resolution***) – Natural Resources Journal. Vol.28 (Winter 1988) http://lawlibrary.unm.edu/nrj/28/1/07_painter_future.pdf

Global Warming and Climate Change – The International Approach

Abstract:

This article shows the efforts and the results of the international community for mitigation and adaptation to climate change but it also emphasizes that international cooperation must improve.

1.Introduction

Due to the scientists' pessimistic outcomes, the international community decided to take a stand and keep global warming below 2ºC (compared to the temperature in pre-industrial times = no more than 1.2ºC above today's level). But this was not a decision taken without any efforts, on the contrary, for a long period of time, many of the international "players" have denied the phenomenon, its effects and have struggled against taking any actions. This was the moment when the European Union (the main character analysed in my paper) faced the reality and turn itself into a driving force in fighting Global warming and Climate change (GW & CC), by negotiating at international level, developing the UN Framework Convention on Climate Change and the Kyoto Protocol, and making the world aware of the gravity of these issues.

2.History of the International Approach – until the United Nations Framework Convention on Climate Change (UNFCCC)

For a long period of time, there had been a big gap between the scientific reality, public opinion and political decisions, not only at national level,

but especially at international scale. It takes time at least to uniform the opinions, if not harmonize the decisions for choosing a single path to go on. But, as history had clearly shown, the best driving force in reaching (if not also implementing) an international agreement is almost never a positive one, but a common danger – hardly to admit, especially by huge egos.

Not all the environmental changes come only with disadvantages, at least in a short term perspective. It is easy to acknowledge that big financial powers have the instruments to "harvest" for their benefit the results of warmer climate in some parts of the world. For example, anyone could ignore the big picture and focus only in enjoying the fact that on his territory, where decades ago no plants could grow because of the cold climate, now, the agriculture is blossoming. More than this, a big power may use all its strength in order to control also the resources remained in the hands of the weak ones. But no one, no matter the hierarchies, should act so irresponsible, without regard for the future generations. History means that I learn about someone's past and the next generation will learn about my present. Therefore, a basic conclusion arises: There has to be a next generation, in order for someone to learn about my present. But I wonder how aware are the big powers about this simple logical issue? No matter how selfish one can be, at one point, the idea of destroying the only opportunity – which is this planet – of making the history that someone could one day read, strikes the man, and pushes him act with precautions.

This is how, on 16 June 1972, the first UN conference regarding environmental issues took place at Stockholm and 113 countries adopted the Declaration of the United Nations Conference on the Human Environment. The outcome of this conference was a statement in itself. A set of principles were established, through which the UN admitted the common need for actions in preserving a clean environment and adopted a complex approach on this issue, having as starting point the legal liability with regard to the environmental damages. The core of this decision was the idea that economical and social development must take place only within the environmental protection frame. 1 (Radulescu, Catalina – ***The Open Society Reports. Policies and Environmental Rights. Soros Fundation***, Ed.Dobrogea, Contanta, 2011, www.soros.ro, p.22-23) This

conference had a worldwide impact also at a institutional level: not only that the countries agreed to promote nationally the outcome of this decision, but, the UN created UNEP, a body in charge with implementing the international principles regarding the environmental protection.

As the time went by and the nations were more and more aware of the damages created by humanity to this planet, more international agreements were issued with the purpose to set frames for protection, such as the Vienna Convention for Protection of the Ozone Layer (1985) and the Montreal Protocol on substances that Deplete the Ozone Layer (1987), amended and adjusted in 1990

At the UN Conference on Environment and Development in 1989, the General Assembly issued several resolutions with concerned the following aspects:

- the protection of global climate for present and future generations of mankind
- the possible adverse effects of sea-level rise on islands and coastal areas, particularly low-lying coastal areas
- the implementation of the Plan of Action to Combat Desertification.

Through one of the resolutions (44/228), the members emphasized the necessity for a global reunion on environment and development, reunion known as The Earth Summit, which took place in Rio de Janeiro in 1992 – event considered the strongest promoter of the international environmental law. The outcome of this Summit was the United Nations Framework Convention on Climate Change (UNFCCC), adopted with the purpose of achieving "*the stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner.*" 2 (***United Nations Framework Convention on Climate Change*. 1992** http://unfccc.int/resource/docs/convkp/conveng.pdf, Art.2)

Through this Convention, as provided by Art.7, was established the Conference of the Parties (COP), with the scope of observing the implementation of the

agreed provisions of the UNFCCC to promote them (at the national and, as appropriate, sub regional and regional levels, and in accordance with national laws and regulations, and within their respective capacities), but also to issue any other necessary instrument for achieving this purpose. The COP had as mission also to mobilize financial resources and to cooperate with competent international organizations and intergovernmental and non-governmental bodies, in order to achieve its goals. Interesting enough, the UNFCCC drew a line between the input expected from the parties, *taking into account the differing circumstances, responsibilities and capabilities of the Parties and their respective commitments under the Convention*. (Art.7.2b)) On top of this, as a purpose in itself, the Convention provided the following: *The developed country Parties […] shall provide new and additional financial resources to meet the agreed full costs incurred by developing country Parties in complying with their obligations […]. They shall also provide such financial resources, including for the transfer of technology, needed by the developing country Parties to meet the agreed full incremental costs of implementing measures* […]

All the provisions looked astonishing on paper and taking into consideration the magnitude of the event and the parties involved, this Conference gave huge hopes to the entire world. We were finally one body and mind, aiming and fighting shoulder to shoulder, rich and poor, for the same goal.

But, as history had shown us on too many occasions, there is a huge gap between words and facts, between making a decision and its implementation, and that when it comes to financial costs, our so famous United Nations splits in a second.

3.The Kyoto Protocol – a Starting Point of a Worldwide Long-Lasting Debate: the Conference of the Parties (COP)

In 1997, the third Conference of the Parties (COP 3) took place in Kyoto, Japan. The main purpose of this round of meetings was cutting off the emissions of greenhouse gas. The IPCC Report-1990 showed there was a need of 60% reduction. While the EU agreed on a 15% reduction, the US proposed not to

cut at all, but just to stabilize them. A disappointing consensus was reached: a reduction of 5.2% for the period between 2008-2012.

In 1998, The Buenos Aires Conference took place, followed in 2000 by the Hague Climate Conference, where US demanded a special treatment, wishing to be excluded us subject of the provisions regarding the carbon sinks and the nuclear energy. The EU opposed this demand, and a collapse was imminent. The World split into two groups: on one side there were US, Japan, Russia, Canada, Australia, New Zealand and, on the other side, the EU and the developing countries.

Later on, in 2001, US, the World's biggest polluter (20-25% of the total emissions), opposed to the Kyoto Protocol, on the grounds that China and India were not subjects to the agreement. It is important to mention that Global Climate Coalition came alive, and, on the contrary of what might seem, it was formed by a group of large business. They forced a huge propaganda and lobby, determining US not to sign the protocol. It is true that over time, important companies from this group realized how this move had affected their image, therefore, they turned the page and shifted it towards the opposite direction (at least at the surface), creating another group – the Business Environmental Leadership Council.

In 2001, a restless year regarding the Big Powers' policy on climate change, included an agreement reached in Bonn and the Marrakesh Climate Conference (US being absent at this last one), both with too low echoes.

In 2002 took place the New Delhi Climate Conference (COP 8). by that time, Japan, Brazil, China and India had ratified the protocol. But disputes between developed and developing countries arose on how much input each developing country should bring to reaching the targets (a little bit contrary to the UNFCCC provisions).

The Buenos Aires COP 10, 2004 had as main point on its agenda the entry into force of the Kyoto Protocol. This happened at the beginning of the next year (February 16, 2005) with the support of more than 30 industrialised countries which had chose to be bound by its provisions. But what is the Kyoto Protocol

– a legal instrument for cutting off the emissions of greenhouse gas – without the World's main polluter – the US?!

At the Bali COP 13, in 2007, the parties reached an agreement (the "Bali Roadmap") with regard to creating an Adaption Fund, which led once more to disputes between the two big groups (the rich and the poor), the developed countries demanded from the others similar contributions to their own, if not almost equal. The discussions regarding a post-Kyoto international agreement taking effect in 2013 were divided to be covered during three COPs: in 2007, 2008 and 2009.

The next year, at Poznan, the Adaption Fund for the developing countries was created and was allocated the disappointing amount of $60 millions. At the same time, a parallel EU Summit took place in Brussels and the Member States decided to cut off the greenhouse emissions to a 20% by 2020. 3 (***The EU Explained. Climate Action*** http://europa.eu/pol/pdf/flipbook/en/climate_action_en.pdf, p.10)

The outcome of the Copenhagen COP 15 (Denmark, 2009), not far from the previous ones, may be drawn up in a single phrase: the developing countries demanded from the main polluters to cut off emissions, while the latter resist to significant efforts as well as written and signed commitments.

The press release from COP 16 (Cancun, 2010) pointed out the raise at $30 billions in funds, the increase of technology cooperation and the design of a Green Climate Fund (operating entity provided to support projects, programmes, policies and other activities in developing countries related to mitigation. 4 (***Climate Change. Key terms in 23 Languages*** – EU Council – 2011 http://ec.europa.eu/clima/publications/docs/terms_en.pdf)). The formal structure of this latter fund was included in the "Durban Platform" – a continuation of the Kyoto protocol, created at the COP 17 (Durban, 2011).

Another opportunity to reach the same old conclusion, according to which reaching a common agreement of the Parties is neighbour to utopia, was provided by the Doha COP 18 (Qatar, 2012).

The purpose of the COP 19 (Warsaw, 2013) was to create a loss and damage pillar, as a normal consequence of the other two previous pillars which COP focused upon by then – mitigation (emissions reduction) and adaption. At least this decision seemed a realistic one. When wasting so much time on fighting amongst each other, instead of fighting global warming, when failing to agree upon a proper adaption, the most reasonable step to take is to calculate the costs of the expected effects and be prepared to bare them. But, unfortunately, not all costs may be covered financially.

The most surprising and welcome outcome of the most recent COP (Lima, 2014) is "The Lima Ministerial Declaration on Education and Awarness-rising", which calls on governments to put climate chamge into school curricula and climate awarness into national development plans. 5 (http://newsroom.unfccc.int/lima/lima-call-for-climate-action-puts-world-on-track-to-paris-2015/)

Bibliography

1. Radulescu, Catalina – ***The Open Society Reports. Policies and Environmental Rights. Soros Fundation***, Ed.Dobrogea, Contanta, 2011, soros.ro, p.22-23
2. ***United Nations Framework Convention on Climate Change*. 1992** http://unfccc.int/resource/docs/convkp/conveng.pdf, Art.2
3. ***The EU Explained. Climate Action*** http://europa.eu/pol/pdf/flipbook/en/climate_action_en.pdf, p.10
4. ***Climate Change. Key terms in 23 Languages*** – EU Council – 2011 http://ec.europa.eu/clima/publications/docs/terms_en.pdf
5. http://newsroom.unfccc.int/lima/lima-call-for-climate-action-puts-world-on-track-to-paris-2015/