CONCILIATION IN INTERNATIONAL ENVIRONMENTAL DISPUTES

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# ABSTRACT

When we look at the current existing paradigm of the international dispute resolution regarding environmental disputes the situation is particularly jarring as the parties generally involved in such disputes find most the existing methods of dispute resolution unacceptable. In order to deal with such situations the 1992 Convention on Biodiversity had mandated mandatory conciliation, which included an annexure with detailed guidelines on the founding of an conciliation commission, but the existing situation is truly saddening and unfortunate that this convention has not become a reality and has been buried in the quagmire of international diplomacy and discussion.

The current world order is facing a fast deteriorating global environment, which threatens the very existence of our life. Ecology needs to be created by the world community to devise a dispute resolution system not marred by decades of delay and incompetence which is typical of multiple formal methods of dispute resolution. The critical problematic is the absence of central dispute resolution systems or doctrine when it comes to environmental dispute resolution, which is workable and effective.

The lack of a proper dispute resolution doctrine or a commission put the states involved in environmental dispute in quandary and further worsens the critical climate conditions as a whole. This paper argues for the establishment of a proper international conciliation and dispute resolution convention adopting the mandates similar to as the one forwarded in the 1992 Biodiversity Conventionmandating mandatory conciliation and so forth.

# INTRODUCTION

The paper primarily discuss Conciliation as an Alternate Dispute Resolution mechanism as an international environmental dispute resolution mechanisms or the establishment of a commission to facilitate that, but before that the paper explores the existing paradigm of international dispute resolution relating to environmental disputes. At the first glance, when one views the current situation, one finds that different approaches, forums and tribunals in which these environmental disputes can be resolved have definitely increased in numbers over the years due to increasing complexity of the world and international relations and looking at the surface we can say that the situation is improving but we see on the other hand that the advent of globalization and liberalization has created a more connected world with the removal of trade barriers and the amount of goods and services traded has reached an all-time high in human history.

This has left the environment around us all too vulnerable to exploitation due to the aforementioned factors regardless of the major picture being the coming up of the many dispute resolution methods. The multiplicity of the mechanisms has led to its own problems, as for instance the exercise of dispute resolution remains fragmented. There are risk of duplication, lack of coordination, and most importantly the problem of nations trying to “shop around” forums in which they believe they have the maximum chance of a favorable settlement. The most recent case showcasing this glaring problem is the EU–Chile swordfish dispute in which the EU requested WTO to establish a dispute resolution panel while Chile went for International Tribunal for the Law of the Sea.

This paper tries to analyses the universal narrative that seeks to define an environmental dispute but the problem with this is that there is no universally accepted definition because of the nature of international environmental dispute being related to capital investment, foreign trade and the extraction of natural resources among others and thus creating problems for the creation of a uniform system or the resolution of these disputes

This paper finally shows how the multiplicity of dispute resolution mechanisms in relation to international environmental disputes affects the outcomes of such disputes and suggests how mandatory conciliation might be the solution to it as most of these mechanisms tend to be adversarial in nature promoting noncompliance among the state involved in such disputes. The paper is primarily descriptive rather than being an analytical one, and does not attempt at prophesying definitive course for the future – though it speaks about certain probabilities and thoughts about changes that need to be taken or may appear in the in future.

## DISPUTE RESOLUTION

The United Nations expects its member states to resolve its disputes in a peaceful manner which is enshrined in the United Nations Charter. As it says, “All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered”[[1]](#footnote-1) and also defines the mechanisms that can be used to settle the disputes, “The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.”[[2]](#footnote-2) Although the United Nations does not necessarily require the disputes to be resolved as such, therefore, the consent of the nation’s states involved becomes paramount in nature. Accordingly the United Nations does not require the parties to resolve their disputes through strict and formal legal procedure; it just makes sure that the means applied for the resolution of such disputes is peaceful, and thus opening a room for alternate methods of dispute resolution ranging from mediation, arbitration, conciliation and also many others.

Thus, when a dispute or an environmental dispute arises between two parties, then it entails two things - first, that whether or not the parties involved want to have their dispute resolved as such that a resolution to the dispute would be acceptable to the parties involved and secondly, what form of ADR mechanisms they are willing to apply to achieve that.

# TYPES OF ENVIRONMENTAL DISPUTE RESOLUTION MECHANISMS

There are a number of dispute resolution mechanisms for the resolution of environmental disputes. Follows an overview of these mechanisms. The multiplicity of dispute resolution systems might seem as a welcoming scenario in the present world order but on the contrary it entails a number of problems ranging from the loss of coherence, to multiplicity or mixed hierarchies and many others

INTERNATIONAL COURT OF JUSTICE (ICJ)

The ICJ was established in 1945 after the second world war being a standing court its article 36.1 of its statutes provides that its jurisdiction ‘comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force’[[3]](#footnote-3) due to its standing the decision of ICJ have a lot of political and moral impact on the international level.

The ICJ is immensely competent when it comes to multiple aspects of international environmental law to the extent that certain MEA’s directly stipulate that they come under the jurisdiction of ICJ.

The glaring issue is that even since the formation of a special chamber of 7 members in 1993 specifically dealing with environmental disputes no cases as of the writing of this paper has been presented to it showing us a glaring flaw that states don’t want to show their disputes as “environmental” thus remaining hesitant to confer these cases to international adjudication.

European Court of Justice (ECJ)

The ECJ has risen up to become a competent court dealing with multiple environmental disputes because of the powers given to it by the European countries, though this cannot be replicated around the world because ECJ is a regional phenomenon with powers given to it by the homogenous European states with similar characteristics, economic systems and way of governance so as to replicate this at a global level seems unrealistic at best.

PERMANENT COURT OF ARBITRATION

The 1899 Hague Convention for the Pacific Settlement of Disputes included a number of provisions on international arbitration, the object of which was deemed to be under article 15, ‘the settlement of differences between states by judges of their own choice and on the basis of respect for law’. This became the accepted definition of arbitration in international law[[4]](#footnote-4). Established in 1899 to facilitate arbitration and other forms of dispute resolution between states, the PCA has developed into a modern, multi-faceted arbitral institution perfectly situated to meet the evolving dispute resolution needs of the international community.[[5]](#footnote-5)

The problem lies however that

As arbitration in PCA is worth what the arbitrator is worth, it seems logical that arbitrators should be someone who are lawyers and have a full command of language of law. On the other hand arbitrators have a wide freedom to determine his own jurisdiction. In this regard it might be thought that arbitrators should be lawyers. But in practice we already see that the parties choose lawyers as arbitrators. Inherently, as long as international arbitration is needed to be fast and practical, having common sense in that area would be enough to be a good arbitrator. What is important that the arbitrator should decide within equity and justice?**[[6]](#footnote-6)**

Another flaw being PCA is becoming what it had sought to replace in the first place, its facing the problem of The increasing ‘judicialisation’ of international commercial arbitration meaning both that arbitrations tend to be conducted more frequently with the procedural intricacy and formality more native to litigation in national courts and that they are more often subjected to judicial intervention and control.

Although there are multiple more dispute resolution mechanisms though these were the central ones and the glaring flaws present in these mechanisms are also to certain degree are present in others thus showing us to a greater degree the problem of currently established ADR mechanisms dealing with environmental disputes

# MANDATORY CONCILIATION AS AN EFFECTIVE MODE OF ALTERNATIVE DISPUTE RESOLVING SYSTEM

When we look at ADR for environmental dispute Conciliation can serve as an effective tool that can end up negating the multiple flaws present in the currently existing ADR mechanisms, Conciliation means „the settling the disputes without litigations‟. It is a process in which independent person or persons are appointed by the parties with mutual consent by agreement to bring about a settlement of their dispute through consensus or by using of the similar techniques which is persuasive[[7]](#footnote-7).

Procedure of Conciliation

Either party involved in the environmental dispute or any other form of dispute can begin the conciliation procedure. When one party to the dispute welcomes or request the other party for the settlement of their dispute through conciliation, only after this the conciliation procedures can be concluded to have been started. At the point when the other party acknowledges the request, the conciliation procedures begin. On the off chance that the other party rejects the request of dispute resolution through conciliation, there is no conciliation in order to settle the dispute and come to an agreement. By and large, just a single conciliator is named to determine the contest between the sides involved in the disputes. The involved parties of the dispute can delegate the sole conciliator by shared assent. There is no bar to the arrangement of at least two conciliators. In conciliation procedures with three conciliators, each party names one conciliator. The third conciliator is selected by the gatherings by shared assent. Dissimilar to arbitration where the third arbitrator is known as the Presiding Arbitrator, the third conciliator isn't named as Presiding conciliator. He is only the third conciliator. The conciliator should be unbiased and direct the conciliation procedures in a fair way. He is guided by the standards of objectivity, decency and equity, including any past strategic approaches between the sides involved in the dispute. The conciliator isn't bound by the principles of methodology and proof. The conciliator does not give any honour or request. He attempts to bring a worthy understanding with regards to the conflict occurring between the parties involved in the dispute.

A conciliator isn't relied upon to act, after the conciliation procedures are finished, as an arbitrator except if the gatherings explicitly concur that the conciliator can go about as arbitrator. Similarly, the conciliation proceedings are confidential in nature. Rules of Conciliation of most of the international institutions provide that the parties shall not rely on or introduce as evidence in arbitral or judicial proceedings, (a) the views expressed or suggestions made for a possible settlement during the conciliation proceedings; (b) admissions made by any party during the course of the conciliation proceedings; (c) proposals made by the conciliator for the consideration of the parties; (d) the fact that any party had indicated its willingness to accept a proposal for settlement made by the conciliator; and that the conciliator shall not be produced or presented as a witness in any such arbitral or judicial proceedings.[[8]](#footnote-8)

## DIFFERENCE BETWEEN CONCILIATION AND MEDIATION

Similar to the dispute resolution method of mediation conciliation interest based, flexible to certain extent and is based on the interests of the parties involved in the dispute, the parties try to reach to a settlement or solution that is amicable in nature a leave no room for future disputes.

The main difference between conciliation and mediation proceedings is that, at some point during the conciliation, the conciliator will be asked by the parties to provide them with a non-binding settlement proposal. Mediators, by contrast, will in most cases and as a matter of principle, refrain from making such a proposal. [[9]](#footnote-9)

Conciliation is a form of proceeding that is entirely voluntary in nature, where the involved parties in a dispute are free to disagree or agree and attempting to resolve their by conciliation as a resolution mechanism. The process is flexible, allowing parties to define the time, structure and content of the conciliation proceedings. These proceedings are rarely public. They are interest-based, as the conciliator will when proposing a settlement, not only take into account the parties' legal positions, but also their; commercial, financial and / or personal interests. [[10]](#footnote-10)

Like in mediation proceedings, the ultimate decision to agree on the settlement remains with the parties.

## AN ALTERNATE MODEL BASED ON CONCILIATION DEALING WITH ENVIRONMENTAL DISPUTES

The essence of Conciliation is trying to reach an agreement that the parties can agree to via appointing a conciliator, though this portion will deal with how a Mandatory Conciliation Governing International Environmental Disputes in the light of proposal mandated in 1992 Convention on Biodiversity.

A Global Organization of Conciliators

A body of Conciliators with knowledge and experience to understand scientific analysis and possessing a certain level of knowledge and Expertise about Environmental can be an apt problem to the current scenario of lack of expertise among the present legal organisation dealing with Environmental evident from the facts that major fault with the existing courts and tribunals is the absence of judges and arbitrators having the requisite expertise and experience to adjudicate accurately on  both the law and the science in complex international environmental issues.[[11]](#footnote-11) ICJ has been on the receiving end of a lot of criticism, particularly with reference to the Pulp Mills case for its ‘failure to grapple with and draw conclusions from the scientific evidence presented’[[12]](#footnote-12).

A Neutral Conciliator

In light of the pulp mill case or Whaling in the Antarctic (Australia v. Japan) the Major issue facing ICJ was that both sides were presenting Experts who were pointing to the contrary to the idea and scientific evidence presented by the other side, mainly due to their affiliation to their respective countries, especially in the Pulp mill case in which both the side presented their own scientific expert who were presenting points and evidences as to why the pulp mill will or won’t affect the environment and pollute the river, with the ICJ not being able to come to a conclusion due to lack of expertise. Although with the ability of the international org. For conciliators being established we can draw on conciliators who lack these affiliations and can assist in environmental disputes even in cases of parties wanting a conciliator of their choosing a neutral third conciliator can be appointed to the better facilitation of the disputes.

Mandatory

The procedure being Mandatory would reduce the problem of countries shopping around forum to choose the forums in which they feel like the chances of victory is the highest, thus this malpractice can be avoided, cases such as the EU–Chile swordfish dispute in which the EU requested WTO to establish a dispute resolution panel while Chile went for International Tribunal for the Law of the Sea; will be reduced to the minimum.

# ADVANTAGE OVER THE OTHER FORMS OF ADR IN RELATION TO ENVIRONMENTAL DISPUTE

The essence of Conciliation is trying to reach an agreement that the parties can agree to via appointing a conciliator and it has its fair number of advantages over other dispute mechanisms.

* Not Adversarial in Nature thus preventing non compliance

Most of the International environmental disputes being resolved through the present ADR mechanisms tend to be adversarial in nature with both the parties involved in the disputes presenting their own experts on the issues who will always point to the contrary of the other side due to their affiliations, the result of the trial generally being a sort of victory for one side and a defeat for the other which in multiple cases result in resistance in the form of non-compliance from the of the part of party against which the case was resolved, though in conciliation this kind of result is avoided people tending to come to a mutual agreement a setting in sync with mutual trust and alliance.

* Quickness

Quickness The parties can devote their time and energy for better and useful work as the now even arbitration is now plagued by similar problem that were plaguing other tedious formal dispute resolution methods therefore conciliation might be the right way to go.

* Social.

The parties can achieve their goals and reach a mutual agreement and can avoid bickering, enmity, which in certain cases might have provoked even the decline of amicable international relations that can be seen in cases like that of Australia Vs Timor in which the documents relating to arbitration were wrongfully taken from the delegates from Timor in Australia resulting in the discontinuity of the arbitration in which both the countries were involved.

# CONCLUSION

The central problem with the current world order is that we have inherited from our predecessors a planet plagued by environmental degradation if work is not done in order to improve the current situation it won’t be to unrealistic to imagine a world turned dystopia where humanity has left the planet inhabitable, therefore the process Conciliation in International Environmental Disputes might end up being at least a way in right direction as in most of these cases the time is of the essence in dispute relating to environment, as many times a wrong decision might not only Harm a particular nation but it might end up scaring the planet as a whole.

when we look at the latest events unfolding we can see a grim picture with the USA pulling out of The Paris agreement with non-compliance on the part of countries who are eager to pay a penalty rather than saving the environment around us, This process although not being a panacea to all the problems we face regarding ADR might very well be a step in the right direction that might hasten the environmental dispute resolution process, making it more economical and preventing conflict among nations on the issue and in the end allowing us to reach amicable solution that are not only good for the parties involved but for the planet as a whole.

1. United Nations Charter Article 2(3) [↑](#footnote-ref-1)
2. United Nations Charter Article 33(1) [↑](#footnote-ref-2)
3. ICJ statutes article 36.1 [↑](#footnote-ref-3)
4. M. N. Shaw,  International Law (5th, Cambridge University, Cambridge 2003) 952 [↑](#footnote-ref-4)
5. Home | PCA-CPA, Pca-cpa.org (2019), https://pca-cpa.org/en/home/ (last visited Jun 2, 2019). [↑](#footnote-ref-5)
6. H R Basaran,Uluslararasi Tahkim(1st, OnIki Levha Yayincilik A.S.,Istanbul 2014) 157, 158 [↑](#footnote-ref-6)
7. Dr. Ujwala Shinde, *Conciliation as an Effective Mode of Alternative Dispute Resolving System*, 4 IOSR Journal of Humanities and Social Science 1-7 (2012). [↑](#footnote-ref-7)
8. Dr. Ujwala Shinde, *Conciliation as an Effective Mode of Alternative Dispute Resolving System*, 4 IOSR Journal of Humanities and Social Science 1-7 (2012). [↑](#footnote-ref-8)
9. 2013 Christoph Greggersen, What is conciliation? - Dispute Resolution Hamburg Dispute-resolution-hamburg.com (2019), http://www.dispute-resolution-hamburg.com/conciliation/what-is-conciliation/ (last visited Jun 3, 2019). [↑](#footnote-ref-9)
10. 2013 Christoph Greggersen, What is conciliation? - Dispute Resolution Hamburg Dispute-resolution-hamburg.com (2019), http://www.dispute-resolution-hamburg.com/conciliation/what-is-conciliation/ (last visited Jun 3, 2019). [↑](#footnote-ref-10)
11. O. W. Pedersen, *An International Environmental Court and International Legalism*, 24 Journal of Environmental Law 547-558 (2012). [↑](#footnote-ref-11)
12. Hockman (n.5) p.2. [↑](#footnote-ref-12)