

TRANSFRONTIER POLLUTION RULES FOR INTERNATIONAL SETTLEMENT OF CONTROVERSIES

WOLFGANG HENDEWERK

INTRODUCTION

Controversies between nations¹ arising out of transfrontier environmental damage—whether over measures to be taken for the prevention of the damage or over the basis and amount of compensation payable—can be settled through diplomatic channels. An agreement reached in this way has the advantage—as opposed to other possibilities for solution, e.g., the decision of an independent legal body—that it considers the subjective interests of both parties and consequently will be observed by the parties concerned. On the other hand, such a compromise can be disadvantageous from the viewpoint of international protection of the environment when the interests of the parties involved prevail over the concern for the environment.

When the controversy is not settled at the diplomatic level, then, in the absence of a special agreed-upon international legal procedure, the only alternative is the International Court of Justice (ICJ). However, a process before this Tribunal can have weak points as opposed to a conciliation procedure especially created for controversies arising out of border-crossing environmental damage:

Local and regional conditions and traditions play an important role, especially in differences of opinion over “traditional” border crossing environmental damage between neighbouring states. It is quite possible that considerations of this kind either will not be adequately appreciated or will not be appreciated at all by the ICJ,² which was established for the

¹ For the rules of dispute settlement arising from transfrontier pollution between private individuals, see National Report (FRG) on Liability for Transfrontier Environmental Damage, by same author.

² This was, i.a., according to the memorandum of the Federal Government to the Agreement Concerning the Withdrawal of Water from the Lake of Constance (see *infra* sub 2) the reason for the establishment of an arbitral commission under that agreement, see BT-Drucks. V/1665, p. 7.

settlement of controversies of supra-regional importance. In addition, a complaint, unjustified by the factual situation, lodged before such a tribunal can heighten the dissension and tension between the parties. Other arguments against the general qualification of the ICJ to mediate in controversies of this sort, are the lack of flexibility, the duration of process, and often the lack of familiarity of the judges with scientifically complicated factual situations.

Of all the agreements made between the FRG and other states,³ essentially only three agreements provide their own rules for the settlement of controversies. They are in chronological order, based on effective date:

- 1) The German-Dutch Border Treaty (1963);⁴
- 2) The Agreement Concerning the Withdrawal of Water from the Lake of Constance (1967);⁵
- 3) The German-Austrian Airport Treaty (1974).⁶

Other agreements, such as the Protocol over the Establishment of an International Commission to Protect the Mosel from Pollution, also provide, in fact, mechanisms for the settlement of controversies, but only for procedural controversies,⁷ whereas the three agreements mentioned above provide a mediation procedure for controversies arising out of questions of *fact*. Therefore, only these agreements will be elucidated here.

(1)

The *German-Dutch Border Treaty* provides two methods for the settlement of controversies: a) a three-stage procedure for controversies over

³ For details see Bothe, Transfrontier Pollution Prevention and Control, Report on the Federal Republic of Germany, and Liability for Transfrontier Environmental Damage, Report on the Federal Republic of Germany, by this author.

⁴ Treaty on the Course of the Joint Land Frontier, on the Border Waters, on the Real Property in the Border Area, on the Transfrontier Inland Traffic, and on Other Border Questions (Border Treaty) of April 8, 1960, BGBI., 1963, II, p. 463, put into effect on August 1, 1963, BGBI., 1963, II, p. 1078.

⁵ Agreement of April 30, 1966, Between the Federal Republic of Germany, the Republic of Austria, and the Swiss Confederation, BGBI., 1967, II, p. 2313; put into effect on November 25, 1967, BGBI., 1967, II, p. 2544.

⁶ Treaty of December 19, 1967, Between the Federal Republic of Germany and the Republic of Austria Concerning the Effects of the Salzburg Airport and Its Operation on the Territory of the Federal Republic of Germany, BGBI., 1974, II, p. 13; put into effect on May 17, 1974, BGBI., 1974, II, p. 783.

⁷ Cf., e.g., Art. 11 in connection with, e.g., Art. 2 of that Protocol, BGBI., 1962,

single measures of one of the parties to the Treaty, b) a one-stage procedure for controversies over the interpretation and application of the agreement.

a) If one party to the agreement plans, begins, or neglects definite measures which threaten to bring about, or have already brought about, substantial damage in the neighbouring state, then the latter can raise objections with the permanent border water commission.⁸ The commission is, however, not competent to decide on the justification of objections or on claims for compensation. It merely deliberates over the objections and endeavours to settle the controversy peacefully.⁹ According to the agreement, the commission shall make an effort to submit recommendations to both governments for solution of the conflicts.¹⁰

After treatment of the controversy in the commission, government level discussions are prescribed, whether the commission has agreed on a recommendation or not.¹¹ When no agreement is reached at government level, in spite of a possible commission recommendation, either government can bring the controversy before an arbitral tribunal.¹²

The arbitral tribunal consists of a permanent chairman and two *ad hoc* assessors.¹³ The chairman and his deputy are appointed by both states, parties to the agreement, for a period of five years.¹⁴ These individuals may not be citizens of either of the states concerned, and may not have their usual residence in, nor be civil servants of, either state.¹⁵ They must have the qualifications for judges in their home countries or have at their disposal special knowledge of the law pertinent to the subject.¹⁶

The arbitral tribunal gears for action when a complaint is submitted to the chairman and he sends a copy of this complaint to the other party to the Treaty.¹⁷ Only the chairman is active then, in this stage of initiating a complaint. Next, he, still acting alone, discusses the controversy with both governments, in an effort to induce an amicable agreement.¹⁸ Only after he concludes that his endeavours have been unsuccessful, is the complete arbitral tribunal constituted, after appropriate information to the

II, p. 1102.

⁸ Art. 61.

⁹ Art. 66 par. 3.

¹⁰ Art. 66 par. 8.

¹¹ Art. 67.

¹² Art. 67 par. 2.

¹³ Art. 70.

¹⁴ Art. 70 par. 4.

¹⁵ Art. 70 par. 2.

¹⁶ Art. 70 par. 3.

¹⁷ Art. 71 par. 1.

¹⁸ Art. 71 par. 3 sent. 1.

governments from the chairman.¹⁹ Each government then names a member.²⁰

The provisions of Articles 63 to 82, of the Hague Convention on Pacific Settlement of International Disputes of October 18, 1907, apply analogically to the proceedings of the Convention.²¹ These articles require, among others, that decisions be made by a majority vote²² and that they be final, i.e., without the possibility of appeal.²³

The basis for decisions of the Convention are the provisions of the Treaty (and special agreements made under Article 59) and the general rules of international law.²⁴

The arbitral tribunal has one especially important power in environmental matters: The chairman can issue temporary orders in urgent cases, on the application of one party, before the naming of the other members of the court,²⁵ without having heard the parties.²⁶ Sudden dangers to the environment, which are occasioned by a measure of a party to the Treaty, not deferred according to Article 62, can be banned early, through the exercise of this power. The tribunal in full then decides, upon application of one of the governments, if the temporary order should be lifted.²⁷ This temporary order can also be issued after the constitution of the arbitral tribunal; in this case, however, only after hearing the parties.²⁸

b) In controversies over the interpretation and application of the Treaty, the entire tribunal must be directly called up,²⁹ so that the other two preliminary stages are omitted. In contrast to the procedure under a), there exists in this instance the peculiarity that the governments, when they, by mutual consent, bring a controversy to the arbitral tribunal for decision, must furnish the chairman an arbitration agreement in which the subject of the controversy is determined,³⁰ instead of a complaint.

¹⁹ Art. 71 par. 3, art. 70 par. 7.

²⁰ Art. 70 par. 7.

²¹ Art. 72 par. 2.

²² Art. 78 of the Hague Treaty.

²³ Art. 81 of the Hague Treaty.

²⁴ Art. 72 par. 1.

²⁵ Art. 72 par. 3 sent. 1.

²⁶ Argumentum e contrario Art. 72 par. 3 sent. 3.

²⁷ Art. 72 par. 3 sent. 2.

²⁸ Art. 72 par. 3 sent. 2.

²⁹ Art. 69.

³⁰ Art. 71 par. 2.

(2)

As the German-Dutch Border Treaty, the *Agreement Concerning the Regulation of the Withdrawal of Water from the Lake of Constance* provides a three-stage process for controversy settlement.

The Consultation Committee³¹ meets when planned water withdrawals of a specific magnitude³² encroach upon important interests of an adjacent state, or have caused unforeseen damage.³³ As in the German-Dutch Border Treaty, the consultation committee here has also no authority to decide; rather it only advises the concerned states professionally, in order to bring about an agreement.³⁴

If no agreement is reached in the consultation committee negotiations, then an attempt to achieve an agreement must be made at the diplomatic level.³⁵

If diplomatic efforts are also unsuccessful, either state may demand that the case be given over to an arbitral commission.³⁶

The arbitral commission must decide which of the competing interests for and against the planned water withdrawal must be restrained, when an arrangement or compensation within reasonable limits is not possible. Further, the commission decides about the amount of compensation to be paid for unforeseeable damage.

The commission is comprised of three members who may not be citizens of the states concerned. They may also not have been involved with the case before.³⁷ Unlike the arbitral tribunal provided for in the German-Dutch Border Treaty, a new commission is formed for every single controversy. Each of the two parties to the controversy—one party can consist of two adjacent states—appoints a member. These two members, in turn, choose the third which is called the Obmann (Chairman).³⁸

The commission stipulates the procedural rules, unless the parties to the controversy agree otherwise.³⁹

The basis for the deliberations of the commission are the terms of the

³¹ For details on this Commission, see Bothe, *supra* note 3.

³² See Art. 7.

³³ Art. 8 par. 1.

³⁴ The memorandum of the Federal Government to the ratification act (BT-Drucks. V/1665, p. 6) does not interpret the text of the Treaty correctly, if it says: "When no agreement can be reached *within* the consultation committee, the Parties to the Treaty should try to achieve a settlement through diplomatic channels."

³⁵ Art. 9 par. 1.

³⁶ Art. 9 par. 2.

³⁷ Art. 10 par. 1.

³⁸ Art. 10 par. 2.

³⁹ Art. 12.

agreement, the valid, pertinent agreements—general or special—between the adjacent states, and the general principles of law.⁴⁰

Just as the arbitral tribunal provided for in the German-Dutch Border Treaty,⁴¹ the arbitral commission attempts to reach an amicable solution through proposals for settlement.⁴² Only after the latter proves to be impossible do they decide by a majority vote.⁴³ The decision of the commission is final and binds all adjacent states—not only the conflicting parties.⁴⁴

(3)

The *German-Austrian-Airport Agreement* also provides a multiphasic (two level) dispute settlement procedure. This procedure is valid for differences of opinion concerning the interpretation and application of the agreement.⁴⁵ Since, according to the agreement, Austria is obligated to indemnify the FRG for all expenditures and damages which arise out of the construction and operation of the airport, this procedure can also be utilized to settle a conflict over the basis and amount of damages. Therefore, this procedure also offers a means of deciding contested questions of *fact*.

In the first phase, the differences of opinion should be settled by the competent authorities of the parties to the agreement.⁴⁶

When the problem is not solved in this phase, it is, on demand of one of the parties, submitted to an arbitral tribunal.⁴⁷

As in the Lake of Constance Agreement, this arbitral tribunal is constituted only when a case or controversy exists.⁴⁸ Each party to the agreement appoints one member, within two months of learning from the other that it wishes to submit the issue to the arbitral tribunal. Both members then agree upon a neutral third member as chairman, who must be appointed by the governments within three months.⁴⁹

The arbitral tribunal itself regulates its procedure.⁵⁰ Decisions of the

⁴⁰ Art. 11 par. 2. It may be safely assumed, that the term “general principles of law” concerns the general principles of international law.

⁴¹ Art. 71 par. 3.

⁴² Art. 11 par. 1.

⁴³ Art. 11 par. 1.

⁴⁴ Art. 11 par. 1.

⁴⁵ Art. 12 par. 2.

⁴⁶ Competent are the respective state authorities of Bavaria and Salzburg.

⁴⁷ Art. 12 par. 2.

⁴⁸ Art. 12 par. 3.

⁴⁹ Art. 12 par. 3.

⁵⁰ Art. 12 par. 5 sent. 4.

arbitral tribunal reached by a majority vote, are, like those provided for in the Lake of Constance Agreement, binding.⁵¹

(4)

The *European Convention for the Protection of International Watercourses Against Pollution*⁵² prepared by the Council of Europe, of which the FRG is a member, provides, likewise, a strife settlement procedure which is similar to the three described above. Since the procedure of the convention indicates possibly a certain trend and also proves what is possible in international law at this point of time, it shall be discussed briefly in the end.

According to the Convention, co-operation agreements on international watercourses and hydrographic regions should be concluded.⁵³ These agreements should provide for the establishment of international commissions.⁵⁴ Unless otherwise agreed, every interested party to the co-operation agreements should have one vote.⁵⁵

As in the German-Dutch Border Treaty and in the Lake of Constance Agreement, the commission here also shall have, basically, no authority to decide. Rather, it shall have the right to make suggestions concerning possible measures available to the parties to the agreement.⁵⁶ However, —and this is an advantage when compared to those commissions provided in the abovenamed treaties—the Convention determines⁵⁷ that the co-operation agreements can give binding effect to unanimously adopted proposals of the commission. This binding effect shall be waived, however, for those parties who within a certain period of time indicate to the commission their disapproval of the proposal, or their inability to express an opinion thereon. In this way, by unanimity in the commission, the decision mechanism can be substantially expedited. Here one sees, although weakly, signs of a trend to transfer controversies over transfrontier environmental damage to committees of experts, whose actions are not so hampered by diplomatic considerations.

If the commission does not agree on a definite suggestion, or if one party to the agreement does not consent to the suggestion of the com-

⁵¹ Art. 12 par. 5 sent. 1 and 2.

⁵² Cf. the *supra* note 4 mentioned National Reports.

⁵³ Cf. National Report by Bothe —*supra* note 4— p. 26.

⁵⁴ Cf. Art. 14 par. 1.

⁵⁵ Art. 16 par. 1.

⁵⁶ For details see Art. 15.

⁵⁷ Art. 16 par. 2.

mission within a reasonable period of time, the cooperation agreement shall provide for a procedure which leads at a satisfactory solution to the problem.⁵⁸

If a suggestion of the commission attains a binding effect under Article 16, par. 2, this does not imply that the implementation of the proposal cannot be appealed. If the parties disagree over the interpretation or application of the suggestion⁵⁹ and negotiations are unsuccessful, or if the conflicting parties can themselves not decide on a manner of settlement, the conflict shall be settled by the arbitration process provided for in Appendix A of the Convention.⁶⁰

This arbitration procedure is valid also for controversies between the contracting parties over the interpretation and application of the Convention or a cooperation agreement.

The Convention does not require that the parties accept the arbitration procedure for controversies relating to the cooperation agreements. Rather, it leaves it to the judgment of the parties to choose another procedure for dispute settlement. This procedure must, however, provide for a binding decision, otherwise either party to the conflict can have recourse to the procedure suggested by the convention.⁶¹

The arbitral tribunal provided for in the convention is constituted temporarily, when a case or controversy arises. The procedure and composition of the tribunal are similar to those provided for in the German-Austrian Airport Treaty.⁶²

As usual, the tribunal determines the rules of the proceedings.⁶³

The basis of its decision are the rules of international law, of the Convention, and of the Cooperation Agreement concerned, including the measures which are issued on the basis of the agreement and are binding on the parties.⁶⁴ Decisions reached by a majority vote are final and binding.⁶⁵

Abbreviations

BGBI. Bundesgesetzblatt.
BT-Drucks. Drucksache des Bundestages.

⁵⁸ Art. 20.

⁵⁹ Cf. Art. 22 par. 2: ... "including an act made in execution of such an agreement and binding upon the Parties..."

⁶⁰ Art. 22 par. 1.

⁶¹ Art. 22 par. 2. This recourse can also be had when the procedure agreed upon among the Parties does not lead to a dispute settlement within 9 months.

⁶² See *supra* sub 3 and Art. 3 of Appendix A of the Convention.

⁶³ Art. 5 par. 2 Appendix A.

⁶⁴ Art. 5 par. 1 Appendix A.

⁶⁵ Art. 6 par 1, Art. 7 Appendix A.