ENVIRONMENTAL DAMAGE AND THE UNITED NATIONS CLAIMS COMMISSION: NEW DIRECTIONS FOR FUTURE INTERNATIONAL ENVIRONMENTAL CASES?

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Introduction

On 30 June 2005, the panel of commissioners appointed by the Governing Council of the United Nations Compensation Commission (UNCC) to review the claims for environmental damage and depletion of natural resources resulting from Iraq’s invasion and occupation of Kuwait (the “F4” Panel, or the Panel) completed its work with the submission of its fifth and final report to the Governing Council of the UNCC.

The fact that the “F4” Panel was chaired by Thomas Mensah could already be a reason for paying attention to the work of the Panel. But this is not the only justification for the present chapter. Given the nature and number of claims concerned, the amounts of compensation involved and the important legal

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1 The members of the Panel were Thomas A. Mensah (Chairman), José R. Allen and Peter H. Sand.

issues addressed, the reports of the Panel serve as a “precedent” – the expression being used without the connotation normally associated with it in common law systems – that will be referred to, and quoted by, claimants and judges in future cases involving reparation for environmental damages.

From the outset, it must be pointed out that the reports and recommendations of the “F4” Panel were prepared in response to a specific mandate formulated by the United Nations Security Council and the UNCC Governing Council in the aftermath of an armed conflict. Hence, they are not, *stricto sensu*, international judicial decisions or awards. The panels instituted by the UNCC were not intended to constitute international tribunals. Rather they were international administrative organs set up by the United Nations to make recommendations regarding compensation for damage resulting from an act of aggression (Iraq’s unlawful invasion of Kuwait). Nevertheless, the task entrusted to the UNCC panels required them to carry out quasi-judicial functions when assessing the admissibility of claims, the existence of damage and the reparation relating thereto.3 Given the small number of international decisions on the issue of reparation for environmental damage, it may reasonably be expected that the reports of the “F4” Panel will be invoked in cases that may not have much in common with the legal and factual circumstances relating to the invasion of Kuwait by Iraq. A similar development occurred as a result of the decisions in the *Trail Smelter* and *Lake Lanoux* cases. In making their awards in those cases, the arbitrators could hardly have foreseen that selected parts of the awards would later gain autonomy and would become recognised principles of international environmental law.4

3 “The Commission is not a court or an arbitral tribunal before which the parties appear; it is a political organ that performs an essentially fact-finding function of examining claims, verifying their validity, evaluating losses, assessing payments and resolving disputed claims. It is only in this last respect that a quasi-judicial function may be involved. Given the nature of the Commission, it is all the more important that some element of due process be built into the procedure. It will be the function of the commissioners to provide this element”, Report of the Secretary-General to the Security Council, 2 May 1991, S/22559, para. 20.

4 In the *Trail Smelter* case, the arbitral tribunal concluded its response to the second question submitted to it by stating that “no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein when the case is of serious consequence and the injury is established by clear and convincing evidence” (award of 11 March 1941, RIAA, Vol. III, p. 1965). When this statement was made, its meaning was probably more limited than what was later read in it. It was based not only on “the principles of international law” but also on the “law of the United States” (pursuant to the applicable law clause in article IV of the special agreement signed on 15 April 1935 between United States and Canada, see id. p. 1908). In addition, the liability of Canada for damages by pollution caused by a private operator under its control was not an issue in this case. In its report of