QUEST FOR AN INTERNATIONAL ENVIRONMENT COURT:

A LEGAL ENQUIRY

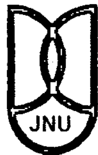
Dissertation Submitted to Jawaharlal Nehru University

In the Partial fulfillment of the requirement

Of the award of degree of

MASTER OF PHILOSOPHY

BALRAJ KAUR



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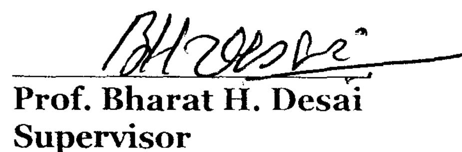

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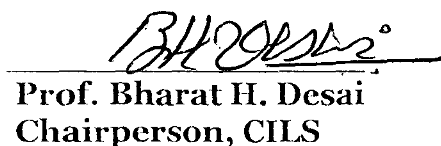

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PREFACE

The growth of international environmental law coupled with increasing stress on global environment and acute resource related conflicts have unleashed prospects for international environmental disputes among the sovereign states. It does call for concerted effort to diagnose the challenge of international environmental dispute settlement. In view of the current state of environmental dispute settlement, it has been debated among scholars for some time that an establishment of an International Environment Court (IEC) could possibly fill a serious gap in the field. In fact such a specialized structure could substantially contribute to institutionalized dispute settlement mechanism as well as help in remedying the situation. The area of my research work is futuristic and has a lot of potential. The churning for the establishment of IEC has already started among scholars, practioners and international organizations. I propose to expand this work into International Environmental Dispute Settlement : a Study of Existing Structures.

The completion of this work fills me with a sense of satisfaction and fulfillment and for that I am thankful to the Almighty.

Words cannot explicate the feeling of gratitude that I wish to evince of my esteemed supervisor, Prof. Bharat H. Desai(CILS), School of International Studies, JNU, New Delhi, for his intellectual guidance, encouragement, creative suggestions and parental attitude throughout my M.Phil work. I also feel indebted to the faculty members, especially Prof. B.S. Chimni and Dr. V.G. Hegde of the CILS.

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New Delhi

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(Balraj Kaur)

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CHAPTER I

INTRODUCTION

The existing international framework for settlement of disputes through law based forums such as courts and arbitral tribunals is fraught with limitations. These limitations are becoming apparent in disputes involving various areas of international law. This is especially so in case of disputes concerning environmental matters. It seems the limitation in particular relates to the non compulsory nature and inter-state character of the dispute settlement procedures.

In the post-United Nations period, various international judicial or arbitral forums have addressed transnational environmental disputes. Despite the existence of such courts and tribunals, some concerns have been expressed as regards their ability to address the challenge of environmental dispute settlement. They include technical nature of these disputes and perceived lack of adjudication expertise in environmental issues. This has led to questions regarding utility of existing structures and, as a corollary, quest for the establishment of an international court dedicated to the resolution of environmental disputes.

Overview of Environmental Trends

In the aftermath of the Rio Earth Summit (1992) the global environment has continued to witness serious deterioration[1]. The varied threats and damage to the environment has been seen especially in environmental catastrophes (both natural and manmade). This disturbing trend remains unabated in spite of quantum jump in intensified regulatory efforts at the national, regional and global level.

Among the various threats[2] to the global environment, issues such as severe erosion of the natural resource base, disappearance of species, depletion of the ozone layer, loss of biological diversity, deforestation and desertification as well as spiraling increase in hazardous wastes,

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[1] P Birnie & A Boyle (2002) "International Law & the Environment", *Oxford University Press,* 139, 141. See, Philippe Sands (1999), " International Environmental Litigation and Its Future", *University of Richmond Law Review*, 32:1619, p.1619.

[2] Susan M Hinde,(2004),"'The International Environment Court : Its Broad Jurisdiction As Possible Fatal Law" *Hofstra Law Review*,32:1,pp.7-8.

chemicals and persistent organic pollutants. Thus the global environmental problems seem to be increasing. They in fact pose a serious regulatory challenge for environmental law and necessitate innovative tools and techniques to grapple with sector specific environmental issues. As a result body of environmental law has been rapidly expanding. In fact it has been noticed that cumulative effect of the law-making process at work has been literal *institutionalization* of international environmental law[3]. In turn, it has contributed to the growth of sizeable body of domestic environmental law. This growth of international environmental law coupled with increasing stress on global environment and acute resource related conflicts have unleashed prospects for international environmental disputes among the sovereign states. It does call for concerted effort to diagnose the challenge of international environmental dispute settlement.

INTERNATIONAL ADJUDICATION: AN OVERVIEW

The system of international law is based upon the consent of the sovereign states. The rules and principles of international law get crystallized as per the interests and needs of the member states. The system in general works without great problems. However, in view of hard headed national interests of the sovereign states, it is quite likely that there could be situations wherein violations of rules and principles of international law in general and treaty obligations in particular could take place[4]. Thus, it is essential part of the system of international law to have a mechanism to resolve disputes among sovereign states.

International adjudication could contribute in the resolution of transboundary conflicts among nations. In general, the States have an inclination to comply with judicial decisions in view of in-built element of 'reciprocity'. As such it generally works even in the absence of external sanctions for the purpose. There have been several such cases wherein the states have jettisoned

[3] Philippe Sands (2007), "Litigating Environmental Disputes: Courts, Tribunals and the Progressive Development of International Environmental Law", www.oecd.org/investment/gfi-7

[4] Posner, Yoo (2005), "Judicial Independence in International Tribunals", *California Law Review*, 93:1,p.48.See, Helfer and Slaughter (2005), "Why States Create International Tribunals: A Response to Professor Posner and Yoo", *California Law Review*,93:899.

reservations concerning sovereignty and decided to prefer contentious cases for international adjudication. Some of these cases include *Qatar v. Bahrain*[5], *Libya v. Malta*[6], etc.

The problem of international adjudication has remained persistent from the time of the constitution of formal courts and tribunals for settlement of disputes. The states show general reluctance to refer disputes for third party adjudication. This underscores the lack of large volume of disputes taken to formal dispute settlement mechanisms.

EXISTING ENVIRONMENTAL DISPUTE SETELLMENT MECHANISMS

There are numerous international forums that seek to address international environmental disputes. In this context a legal enquiry is useful to ascertain whether these forums are capable enough to resolve rapidly rising environmental disputes.

International Court Of Justice (ICJ)

The International Court of Justice (the World Court) is the principal judicial organ of the United Nations. The jurisdiction of ICJ over a dispute depends upon consent of two or more sovereign states. This could materialize either through 'optional clause' jurisdiction of special agreement between the disputant parties. Thus ICJ could practically accept any dispute in the field of international law. However, such disputes including environment related ones could be brought by the sovereign states as only they have a standing[7]. It can be said in this regard that state interests do not always coincide with those of its citizens.

Moreover, non state entities such as NGOs which are often most ardent supporters of environmental interests or other entities directly affected by environmental standards such as private parties or TNCs do not have direct access to ICJ.

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[5] *Maritime Deliinitation und Territorial Questions between Qatar uncl Bahrain, Jurisdiction und Admissibility~, Judgment,I. C. J. Report. 1994.* p. 112.
[6] I.C.J. Report 1985.

[7] Patrick Kelly (1987), "The International Court of Justice", *Yale Journal of International Law,* 12:342, p.342.

ICJ has established within its structure a seven judge standing Chamber of Court for Environmental Matters (CEM)[8]. It was established in 1993. Interestingly, till date no single state has submitted a dispute to ICJ's environmental chamber. Though the ICJ statute allows possible formation of ad hoc chambers, yet the composition of such chamber is pre-determined[9]. It allows no input in the composition of the chamber (unlike an arbitration panel)[10] from the parties to the dispute. So there appears to be little benefit for states to bring a dispute to CEM rather than full court of ICJ (as the court normally sits in plenary session).

In September 1997 court rendered judgment in a case involving Hungary and Slovakia concerning the *Gabcikovo Nagymores Projec[11]t*. This case concerned a dispute over whether or not to build certain barrages on the Danube River shared by Hungary and former Czechoslovakia. In fact the court had an opportunity in this case to address a wide range of international legal issues including law of the environment. But the judgment fell short of detailed exposition on various aspects of law including environmental law. After a field visit – first time in the history of international adjudication – the court made only a passing mention of adverse environmental consequences involved in the case. It merely preferred to address the dispute on the narrow ground of breach of 1977 Treaty between the two parties.

Permanent Court of Arbitration (PCA)

The PCA was established at The Hague following the first Hague Peace Conference (1899). It is the oldest institution dedicated to resolving international disputes. In 2001, the ninety four member states of PCA adopted by consensus the Optional Rules for Arbitration of Disputes relating to Natural Resources and/or Environment[12]. It is based on the widely used Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).

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[8] Peddy Rodgers Kalas, (2001), "International Environmental Dispute Resolution and the Need for Access by Non-State Entities", *Colorado Journal of International Environmental Law and Policy*, 12:191,p.232

[9] *Ibid.*

[10] *Ibid.*

[11] *Gabcikovo-Nagymaros Project (Hungary v.Slovakia),* I. C. J. Reports 1997, p. 7.

[12] See, http://www.pca-cpa.org/upload/files/ ENV% 20 CONC pdf

However, the forum shares a common weakness among dispute settlement mechanisms concerning lack of compulsory jurisdiction for international disputes. Further, PCA has jurisdiction over the dispute when at least one party is a state or an organization of states and when both parties to the dispute expressly agree to submit their dispute to the PCA for resolution[13]. Moreover, the Rules promulgated in 2001 may be inadequate to address certain new challenges in so far as they simply transplant the UNCITRAL Rules from the commercial context to the environmental context.

World Trade Organization (WTO)

WTO's Dispute Settlement Body has also sought to address several environment related disputes among the WTO member states. However, questions have been raised as regards trade focused organization's competence to adjudicate upon environmental matters[14]. This has been seen in several cases dealt with by this dispute settlement body.

In *Tuna Dolphin*[15] dispute, the U.S. imposed a ban on imports of tuna from Mexico due to the Mexican tuna fleet's incidental killing rate of dolphins during tuna harvesting. The fleet's killing rate exceeded permitted limits under the US Marine Mammal Protection Act of 1973. The WTO ruled that US embargo violated international trade rules. It also turned down the US arguments that the environmental measures are justified under Article XX exception of GATT.

In another case, the US import prohibition of certain shrimp and shrimp products case (*Shrimp Turtle case*[16]) decided by WTO's Appellate Body in October 1998 dealt with the extra territorial application of US Endangered Species Act. US imposed ban on the imports of shrimp harvested without use of turtle excluder device (TED). The WTO held that the US import ban of shrimp

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[13] Peddy Rodgers Kalas, (2001), "International Environmental Dispute Resolution and the Need for Access by Non-State Entities", *Colorado Journal of International Environmental Law and Policy*, 12:191,p.232. See, http://www.pict-pcti.org/courts/PCA.html.

[14] Jeffrey L.Dunoff (1994), "Institutional Misfits : The GATT, The ICJ & Trade-Environment Disputes", *Michigan Journal of International Law,* 15:1043. See, Richard Skeen (2004), "Will the WTO Turn Green? The Implications of Injecting Environmental Issues into the Multilateral Trading System", *Georgetown International Environmental Law Review,* 17:161, p.162.

[15] GATT Dispute Settlement Panel Report on United States Restrictions on Imports of Tuna, 30 I.L.M. 1594 (1991); GATT Dispute Settlement Panel Report on United States Restrictions on Imports of Tuna, 33 I.L.M. 839 (1994).

[16] 38 I.L.M. 121 (Oct 12, 1998).

from various countries violated GATT finding especially that US had made no effort to negotiate with those countries (rather unilaterally developed the trade policy).

Hence, WTO's Tuna Dolphin and Shrimp Turtle decisions reflect the WTO's crisis of perception concerning environmental issues. It places significant limits on a country's internal environmental regulations.

Multilateral Environment Agreements (MEAs)

In the recent years, there has been rapid growth in the number of multilateral and regional environmental treaties. These MEAs are product of consensual regulatory approach at work to address specific environmental problems. The contracting parties to these treaties undertake specific legal obligations. Violation of the terms of the treaty or failure to give effect to respective obligations could trigger a dispute. There is, however, scope for potential disputes resulting from transboundary effect of certain activities conducted within the territory of a state that has adverse effect in another country[17]. This could cover a wide range of situations and movements of substances (such as chemicals and wastes) that across national borders. These situations could result in international environment disputes between two or more states. Some of MEAs provide within its framework method for resolution of such environmental disputes. Apart from traditional means for settlement of disputes (such as good offices, negotiations, mediation, conciliation, arbitration or judicial settlement), many of the recent MEAs provide for non compliance procedure [18](e.g. the Montreal Protocol for Substances that Deplete the Ozone Layer).

However, MEAs cannot solely ensure an effective international environmental legal system. Joining of a treaty is entirely at the discretion of a sovereign state. Often there are situations wherein a state may sign a treaty but still withhold ratification. In some cases, even if majority nations agree to specific environmental principle minority nations make reservations resulting in

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[17] Bharat H. Desai (2006), "Creeping Institutionalization: Multilateral Environmental Agreements & Human Security", UNU-EHS,p.16.

[18]Jeff Trask (1992), "Montreal Protocol Noncompliance Procedure: The Best Approach to Resolving International Environmental Disputes?", *Georgetown Law Journal,* 80:1973, p., 1974.

inconsistent interpretation of treaty provisions. Most MEAs are negotiated, ratified and binding only among nations and disallow standing for non state or private entities[19].

Further, most of the MEA secretariats are 'servicing arms' as required by the Conference of the Parties (COP). As such they do not have enforcement authority *per se*. Most of these secretariats are significantly constrained by limitations concerning funding, institutional capacity and legal personality. With no centralized regulatory body to enforce MEAs, the effectiveness of international agreements depends to a great extent on voluntary compliance[20].

Despite vigorous international, national and regional attempts to enforce environmental legal norms, it appears that environmental polluters could still operate with impunity. In view of the very nature of the law-making process as well as lack of effective dispute resolution technique, the question of redressal of grievances arising from environmental wrongs remains a crucial legal challenge.

NEED FOR AN INTERNATIONAL ENVIRONMENT COURT (IEC)

In view of the current state of environmental dispute settlement, it has been contended for some time that an establishment of an International Environment Court (IEC) could possibly fill a serious gap in the field. It has been argued that such a specialized structure could substantially contribute to institutionalized dispute settlement mechanism as well as help in remedying the situation.

In 1989, the Hague Declaration on the Environment called for creation of 'new institutional authority' within UN system. Such an institutional authority would have decision making and enforcement powers and its purpose would be to address global warming[21].

The most detailed proposal for the establishment of an IEC first time emerged at 1989 conference convened at the National Academy of Lincei in Rome entitled as *Congress on a more*

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[19] Peddy Rodgers Kalas, (2001), "International Environmental Dispute Resolution and the Need for Access by Non-State Entities", *Colorado Journal of International Environmental Law and Policy*, 12:191,p.219.

[20] *Ibid.*

[21]http:/ /wrmin.nic.in /index3.asp ?subsublinkid=292 & langid=1&sslid=375

Efficient International Law on the Environment and Setting up an International Court for the Environment within United Nations[22].

In 1992 Judge Amedeo Postiglione presented draft convention for the establishment of IEC to a third conference in Rome. This version of the Postiglione Draft Convention provided for extensive provisions of environmental rights accorded to individuals as well as in the underlying responsibilities of ratifying states[23].

In April 1999 Conference in Washington DC sponsored by International Court for the Environment Foundation (ICEF) and presented draft treaty for the establishment of IEC[24]. In August 2002 United Nations Environment Programme (UNEP) hosted three day World Summit on Sustainable Development in Johanesburg with world's top judges. It was observed that global environment is in fragile sate and requires judiciary that can boldly and fearlessly implement and enforce international and national laws[25]. This global judges symposium also discussed prospects for the establishment of a new international court for environment.

Interestingly, the issue of establishment of International Environmental Court (IEC) has been globally debated among scholars as well as practioners for quite some time. The proponents of IEC argue that case for an IEC has merit as well as it is the need of the hour as seen in other areas of international law (such as international criminal court). They contend that environmental law raises issues which are distinctive and demand specialized treatment[26]. Furthermore, the evolution of the concept of international environmental crime, the widening of the ambit of international liability law for environmental damages (such as recent efforts to craft liability protocols for dealing with transboundary movements of hazardous wastes and genetically

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[22] Amedeo Postiglione, (1990), "A More Efficient International Law on the Environment and Setting up an International Court for the Environment within United Nations", *Environmental Law*, 20:321, pp.327-328.

[23] Peddy Rodgers Kalas, (2001), "International Environmental Dispute Resolution and the Need for Access by Non-State Entities", Colorado Journal of International Environmental Law and Policy, 12:191,pp.231-232.

[24] *Ibid.*

[25] URL:http://www.unep.org.

[26] Maurice Sunkin, (2004), "Modernising Environmental Justice: Regulation and the Role of an Environmental Tribunal", Journal of Environmental Law, 16:307, p.308.

modified organisms) and the application of the 'polluter-pays principle' provide a reasonable framework that could serve as foundation for a specialized IEC[27].

In practical terms, setting up of such IEC for environment disputes does not necessary mean dilution of sovereignty of the States. On the contrary it could be argued that such an institutionalized dispute settlement mechanism is an extension of larger quest of sovereign states to join platforms for international environment cooperation. As such a specialized dispute settlement structure like IEC becomes a prerequisite for protection of environment and conservation of natural resources[28]. If such a workable forum is not available to address environmental disputes among states, they could drift into perennial danger of resort to threat or use of force that has been proscribed under Article 2(4) of the UN Charter.

A major concern among those supporting IEC is that current courts and tribunals do not allow sufficient access and participation to non state entities. In general only sovereign States have direct access to these courts and tribunals. It is not necessary that concerns and interests of a citizen in ensuring enforcement and compliance with international environmental law could be different than that of his own State[29]. For instance, the Permanent Court of Arbitration (PCA) does provide standing to the non state entities. It, however, lacks compulsory jurisdiction. Apart from this, it is also contended that the existing structures dealing with international environmental disputes are inadequate (reasons are discussed in third chapter). These contentions cumulatively have provided a reasonable basis for a new and exclusive court to deal with international environmental disputes.

There are some genuine fears that the IEC could lead to further fragmentation of international law[30]. However, it is contended by proponents of IEC that proliferation of international tribunals can be seen as an evidence of an increased willingness on the part of States to settle their

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[27] Alfred Rest (1994), "Need for an International Court for the Environment? Understanding Legal Protection for the Individual in Transnational Litigation", *Environmental Policy and Law*, 24(4):173, pp.173-174.

[28] Amedeo ,Postiglione, (1993) "An International Environmental Court ?", *Environmental Policy and Law*, 23(2):73, p.74.

[29] *Supra* 23.

[30] Ellen, Hey, (2000), "Reflections on International Environmental Court", (*Kluwer Law International* : The Hague),p.9.

disputes peacefully through subjecting their behavior to the rule of international law. In the absence of it, the states (especially the powerful ones) could have the temptation to use force (like the practice of reprisals in the pre-UN Charter period) instead of peaceful means of resolution of their disputes. Specialized courts and tribunals such as ICC and the proposed IEC, could also serve the purpose of clarifying, expanding and complementing the principles of international law as elucidated by the ICJ[31]. The ICJ is limited in scope and function and many of today's disputes and conflicts could not be brought before it. As a result the specialized international courts and tribunals could serve to fill the gaps in the ambit as well as jurisprudence of the ICJ. In fact the lack of a strictly hierarchical system allows international courts and tribunals an opportunity to collectively contribute to the normative development of international law as well as facilitate in the evaluation of those ideas by the international community as a whole.

Furthermore, the proponents of specialized tribunals like IEC seem to take a view that is no reason to believe that specialized tribunals will fail to take account of the appropriate contours and principles of public international law. After all the members of these specialized tribunals belong to the invisible college of international lawyers and thus employ the same analytical framework as do the members of other tribunals[32]. Thus, according to this line of argument there is little reason to believe that members of these tribunals are unaware of the need to develop a consistent body of jurisprudence in order to preserve legitimacy of the system. Even when a litigant changes forums (forum shopping) there could still be uniformity in the application and interpretation of general principles of international law.

On the other hand, the critics of IEC put forward an argument that establishing IEC will lead to proliferation of international courts and tribunals. It need not necessarily be construed as a possible fragmentation. In fact they could be regarded as merely extension of institutionalized international environmental cooperation.

[31] J.I , Charney,(1998), "International Law and Multiple International Tribunals", *Recueil des Cours*, 271:115, p.126.

[32] Oscar Schachter, (1977), "The Invisible College of International Lawyers", *Northwestern University Law Review,* 72:217, 217.

RESEARCH QUESTIONS

In this work the following questions will be tried to be answered:

1. Are existing international forums for adjudication adequate to resolve international environmental disputes?

2. What are the provisions related to environment dispute settlement mechanisms under MEAs?

3. What is the genesis of the quest for the establishment of International Environment Court?

4. What are the merits of IEC?

5. What are the limitations of IEC ?

SCOPE OF STUDY

It is intended to examine the scope and merits for establishment of International Environmental Court in the light of working of existing mechanisms for the settlement of environmental disputes such as International Court of Justice, Permanent Court of Arbitration and WTOs Dispute Settlement Body and Multilateral Environmental Agreements (MEAs).

HYPOTHESIS

International environmental disputes are increasing due to global environment stress. States are reluctant to part with their sovereignty in submitting their environmental disputes to an international court or tribunal. In view of growing prospects for more environmental disputes, a specialized IEC could be potential forum as an extention the quest of sovereign states for institutionalized international environmental cooperation.

RESEARCH METHODOLOGY

The present study will be mainly analytical. It will be based upon both primary and secondary source will be taken. Descriptive, analytical and evaluative methods will be adopted to draw analogies. Reliance shall be placed on Draft convention on establishment of IEC and 1999 Draft treaty on IEC. Apart from these books, journals and relevant websites will also be looked into.

FRAMEWORK OF THE RESEARCH

Chapter I: INTRODUCTION

In this chapter issue of need for environment court at global level will be introduced. Further, global environment trends will also be studied in this chapter.

Chapter II: INTERNATIONAL ADJUDICATION: AN OVERVIEW

It provides a general overview about nature of international adjudication. States are generally reluctant in taking disputes to an international court for adjudication. It seeks to address some aspects of international adjudication.

Chapter III: EXISTING INTERNATIONAL MECHANISMS FOR ENVIRONMENTAL DISPUTES

It analysis role of various forums which are currently adjudicating environmental disputes. It covers forums such as ICJ, PCA,WTO as well as MEAs.

Chapter IV: NEED FOR AN INTERNATIONAL ENVIRONMENTAL COURT

It seeks to trace the genesis of the debate as well as case concerning constitution of international environmental court.

Chapter V: CONCLUSION

This chapter provides conclusions and suggestions.

CHAPTER II

INTERNATIONAL ADJUDICATION: AN OVERVIEW

INTRODUCTION

International Law governs relations among sovereign states. In fact the system of international law is based upon the consent of the States. The rules and principles of international law get crystallized as per the interests and needs of the member states. The system in general works without great problems. However, in view of hard headed interests that the states pursue that is likely to create situations wherein violations of rules and principles of international law in general and treaty obligations in particular could take place. Thus, system of international law needs to have a mechanism to resolve disputes among sovereign states.

The behaviour of States particularly in the vastly complex international relations of the modern world paradoxically indicates their belief in the idea of international law. The fact that States seems to break law more often than they respect it is less significant than the fact that States not only feel able to accuse other States of breaches of the law but also feel genuinely the need to obey the law so far as possible and think it necessary to justify their actions by arguing that they are within the law[1]. It is an aspiring consideration that under the impact of the dynamic approach of the so called "new States" and the important contribution of the United Nations international law will come to be an ever stronger and more complete system[2]. Moreover, that the states will create a court for the settlement of disputes between them is as old as the systematic study of international law itself.

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[1] Tom Ginsburg, Richard H.McAdams (2004), "Adjudicating in Anarchy: an Expressive Theory of International Dispute Resolution", *William and Mary Law Review*, 45:1229, p.1241.See, Anne Charlotte Martineau (2009), "The Normalizing of Adjudication in Complex International Governance Regimes: Patterns, Possibilities and Problems: The Politics of Normalization", *New York University Journal of International Law and Politics*, 41:823.

[2] Ernst Ulrich Petersmann (1999), "Constitutionalism and International Adjudication: How to Constitutionalize the U.N. Dispute Settlement System?", New *York University Journal of International Law and Politics*,31:753,pp.754-755.

International dispute resolution and international tribunals are all the rage. Understanding these institutions is important because they are important to the international legal system[3]. They are a useful tool for the peaceful settlement of disputes in those situations where the parties have consented to the jurisdiction of the tribunal[4]. Then their decisions clarify international law in important ways and, although usually not formally binding on states not party to a dispute, they establish a form of de facto international common law[5]. Furthermore, tribunals are politically salient because disputes are often played out in a (relatively) public context. The presence of a tribunal can raise the stakes for the political leaders of the states involved. Finally, an understanding of tribunals is critical to a more general understanding of international law both as it currently exists and as it will develop in the future[6].

In 1872 an international arbitral tribunal set up by treaty ruled that Great Britain had to pay $ 15.5 million to the United States for damages caused by a ship, the *Alabama*, built in Britain and sold to the Confederacy during the Civil War[7]. The panel had no means of enforcing its judgment but Great Britain duly complied launching the modern era of interstate dispute resolution. Almost a century later, the International Court of Justice (ICJ) decided a case that facilitated the delimitation of the continental shelf between Germany, Denmark and the Netherlands, ending a high stakes dispute and allowing those countries to proceed in developing gas and mineral resources[8].

In each of these cases and many more, international adjudication successfully resolved significant conflicts between nations. In general, the States have inclination to comply judicial

[3] Karen J.Alter (2004), "Do International Courts Enhance Compliance with International Law?", *Review of Asian and Pacific Studies*, 25:51,p.54.

[4] Andrew T. Guzman (2008), "International Tribunals: a Rational Choice Analysis",[online: web],Accessed on March 2010, URL:http://ssrn.com/abstract=1117613. See also, Stefan Mrozinski (2009), "Why do States Support International Criminal Courts and Tribunals? A Neoclassical Realist Approach", [online : web], Accessed on March 2010, URL:http://ssrn.com.

[5] *Ibid.*

[6] Posner, Yoo (2005), "Judicial Independence in International Tribunals", *California Law Review*, 93:1,p.48.See, Helfer and Slaughter (2005), "Why States Create International Tribunals: A Response to Professor Posner and Yoo", *California Law Review*,93:899.

[7] *Supra* 1.

[8] North Sea Continental Shelf Cases (F.R.G. v. Den, F.R.G. v. Neth), 1969 I.C.J.3(Feb 20).

decisions notwithstanding the absence of external sanctions for the purpose[9]. But at the same time one thing remains a fact that states are generally governed by self interest and takes any decision that suits their interests.

BACKGROUND

The first tentative steps toward settlement of disputes through international courts and tribunals were taken at the turn of nineteenth century[10]. The delegates to the Hague Conferences of 1899 and 1907 agreed to establish a permanent arbitral body, the Permanent Court of Arbitration (PCA). The PCA had a modest goal of encouraging states to use arbitration by providing set of procedures for choosing arbitrators from group of people[11]. The next step was the establishment of the Permanent Court of International Justice (PCIJ) which along with League of Nations was supposed to maintain international order after World War I[12]. Its failure set the stage for the International Court of Justice (ICJ), the judicial organ of United Nations, which continued in 1946 from where PCIJ left off[13].

At roughly same time that the ICJ began its operations, drafters were putting the finishing touches on GATT, a legal framework for international trade that eventually resulted in a relatively systematic form of arbitration. After several decades of operation, the GATT arbitration system gave way to the more court like dispute settlement mechanism (DSM) of the WTO in 1995. Unlike standard arbitration systems like GATT's, the DSM has compulsory

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9 Tom Ginsburg, Richard H.McAdams (2004), "Adjudicating in Anarchy: an Expressive Theory of International Dispute Resolution", *William and Mary Law Review*, 45:1229, p.1243.

10 Eric.A.Posner,John C.Yoo (2004), "A Theory of International Adjudication",[online: web],Accessed on March 2010, URL:http//papers.ssrn.com/sol3/papers.cfm/abstract=507003 . See also, David Zaring (2008), "Rulemaking and Adjudication in International Law", ",[online: web],Accessed on March 2010, URL:http//papers.ssrn.com/sol3/papers.cfm/abstract=1156930 .

11 Project on International Courts and Tribunals, [online: web], Accessed on March 2010, URL:http//www.pca-cpa.org.

12 See, Statute of the Permanent Court of International Justice, [online : web], Accessed on March 2010, URL:http//www.mfa.gov.tr/grupe/ed/eda/eda15e.htm.

13 See, Statute of International Court of Justice, [online : web], Accessed on March 2010, URL:http://wwwicj-cij.org.

jurisdiction and states, practically, would be unable to refuse consent to the creation of the tribunals and their adjudication of the disputes[14].

Around 1950s several regional courts were created. The European Court of Justice (ECJ) created in 1952 adjudicates disputes arising under European law. The European Court of Human Rights (ECHR) created in 1959 adjudicates disputes involving the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms[15]. The Inter-American Court of Human Rights created in 1979 hears cases involving the 1969 American Convention on Human Rights. Similar to these there are regional courts in other parts of the world generally dealing with human rights and commercial relationships[16].

Another important development was the creation of the International Tribunal for the Law of the Sea (ITLOS) in 1996[17], which has a jurisdiction over a range of maritime disputes governed by the United Nations Convention on the Law of Sea (UNCLOS). Another area of growth in international adjudication has been in the area of war crimes. The Nuremberg tribunal after World War II was followed after a long hiatus by the International Criminal Tribunal for Former Yugoslavia (1993) and the International Criminal Tribunal for Rwanda (1994)[18]. The drafters of Rome Statute of 1998[19] aspired to turn these episodic judicial interventions into a permanent court called as International Criminal Court (ICC).

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[14] Laurence.R.Helfer, Annie-Marie Slaughter (1997), "Toward Theory of Supranational Adjudication", *Yale Law Journal*,107:273,p.273,368. See, Laurence.R.Helfer, Annie-Marie Slaughter (2005), "Why States Create International Tribunal : A Response to Professor Posner and Yoo", *California Law Review*, 93:899.

[15] *Ibid.*

[16] See, Inter American Court of Human Rights, [online : web], Accessed on March 2010, URL:http//www.corteidh.or.cr.

[17] U.N. Convention on the Law of Sea concluded on December 10,1982, entered into force on November 16, 1994,21 I.L.M. 1261 (1982).

[18] See, Security Council Resolution on Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia, 32 ILM1203 (1993); UN Sec.Res.955, Establishing the International Tribunal for Rwanda, 33ILM 1598 (1994).

[19] Rome Statute of International Criminal Court, [online : web], Accessed on March 2010, URL:http//www.un.org/law/icc/statute/romefra.htm.

It can be noted from the above mentioned chronology in which these international tribunal were created that with time international tribunals have become more diverse and specialized. Moreover, it is seen that jurisdiction is parceled out to coequal institutions with no higher appellate authority to resolve jurisdictional conflicts[20]. Furthermore these developments raises questions like if there is no hierarchy how do international courts work? Why do states create them and yield jurisdiction to them? Why do states obey them, if they do? What explains their popularity and their fragmentation?

CONCERNS FOR STATE SOVEREIGNITY

The current system of international relations is state-centric. As such the states do try to safeguard their sovereignty to the fullest extent. One of the important aspects of state sovereignty is reluctance to engage a third party in the settlement of disputes. There are genuine fears regarding third party adjudication. This is especially so because of uncertainty about legal validity of the case as well as outcome in dispute settlement.

At the outset the States consider it as derogation of their sovereignty to look for a judicial forum to refer the relevant dispute. They consider it problematic first to give consent to refer the dispute to either a special or general body for adjudication of disputes[21]. Apart from these the State finds it hard to prepare and argue the case before such a forum. In most cases the states are highly reluctant to refer issues concerning dispute relating to sovereignty over certain areas[22] (such as islands, land border areas or maritime areas). Sometimes these issues could assume nationalistic fervor and create highly surcharged atmosphere (e.g. issues concerning Suez canal, Falkland Islands and Diego Garcia). In such an environment, even if states do not use force, they could be

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[20] Jonathan Charney (1998), "Is International Law Threatened by Multiple International Tribunals?", *Recuil Des Cours*, 271:101, p. 102. See, Michael Reisman (1996), "The Supervisory Jurisdiction of the International court of Justice : International Arbitration and International Adjudication", *Recuil Des Cours*, 258:9.

[21] Laurence Helfer, Anne Marie Slaughter, (1997), "Toward a Theory of Effective Supranational Adjudication", *Yale Law Journal*, 107:273,p.274.

[22] Cesare, Romano, (2006), "From the Consensual to the Compulsory Paradigm in International Adjudication: Elements for a Theory of Consent", http://ssrn.com/abstract=893889.

reluctant to refer such a dispute over sovereignty to an adjudicatory forum. In most such cases, the states could fear loss of case in adjudication[23].

There are however cases when the States could overcome these fears and possibly consider judicial settlement as a better option than use of force. There have been several such cases wherein the states have jettisoned reservations concerning sovereignty and decided to prefer contentious cases for international adjudication. Some of these cases include *Qatar v. Bahrain*[24], *Libya v. Malta*[25], etc.

Thus it seems the role of states sovereignty as a psychological barrier in international adjudication has gradually declined. This trend could grow if 'law habit' gets institutionalized among sovereign states.

FEARS ABOUT IMPARTIALITY

It is generally noted that States are reluctant to refer matters to third party for dispute resolution. The reasons for such kind of behavior of states could be fear of losing the case, difficulty in the collection of evidence, selection of judges, cost factor involved in referring matter to third party, etc[26]. It is pertinent to note that when states go before international court for the resolution of dispute between them there is continuous fear among states that in case of loss of case it will directly harm the reputation of the state in the international arena. Further implications connected with loss of case by the state in international forum are political fallout in the domestic sphere[27]. It is also found that when a matter is highly sensitive like concerning security of state, sovereignty over the territory, etc. There are genuine fears of loss of case and/or getting reasonable dispute resolution.

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[23] *Supra* 22, p.10.

[24] *Maritime Deliinitation und Territorial Questions between Qatar uncl Bahrain, Jurisdiction und Admissibility~, Judgment,I. C. J. Report. 1994.* p. 112.
[25] I.C.J. Report 1985

[26] David, Zaring, (2008), "Rulemaking and Adjudication in International Law", http://www.ssrn.com/link/SIEL-Inaugural-conference.html. See also, Patrick Kelly, (1989), "The Changing Process of International Law and the Role of the World Court", *Michigan Journal of International Law,* 11:129, p. 130.

[27] *Ibid.*

A clear example can be found in a *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States)*[28] wherein ICJ rejects the justification of collective self-defence maintained by the United States of America in connection with the military and paramilitary activities in and against Nicaragua. The Court further held that the United States of America by training, arming, equipping, financing and supplying the contra forces or otherwise encouraging, supporting and aiding military and paramilitary activities in and against Nicaragua, has acted, against the Republic of Nicaragua, in breach of its obligation under customary international law not to intervene in the affairs of another State[29]. Attacks by U.S. on Nicaraguan territory in 1983-84 which involve use of force is breach of its obligation under customary international law not to use force against another State. Decides that the United States of America is under a duty immediately to cease and to refrain from all such acts as may constitute breaches of the foregoing legal obligation. Further, decides that the United States of America is under an obligation to make reparation to the Republic of Nicaragua for all injury caused to Nicaragua by the breaches of obligations under customary international law. But even after getting a decision against United States court unable to enforce its judgment[30]. The U.S. not only refused to comply with the judgment but made withdrawal from compulsory jurisdiction and thereafter has not brought any case before the World Court. Nicaragua case is still remembered as black spot in the American history.

Similarly, U.S. refusal to ratify Rome Statute of International Criminal Court (1998) is another example. The Bush administration 'unsigned' in 2002 and Secretary of Defense, Donald Rumsfeld, summarized US's three prime objection to the ICC[31]:

[1] The lack of adequate checks and balances on powers of the ICC prosecutors
and judges;

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[28] *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States)* 1986 I.C.J. Rep.14.

[29] http://www.icj.org.

[30] *Ibid.*

[31] Gardner, (1986), "U.S. Termination of Compulsory Jurisdiction of the International Court of Justice", *Columbia Journal of Transnational Law,* 24:421, p.422. See Also, D'Amato, (1986), "The United Sates should Accept, by a new Declaration the General Compulsory Jurisdiction of World Court", *American Journal of International Law,* 80:331.

[2] The dilution of the UN Security Council's authority over international criminal prosecutions; and

[3] the lack of an effective mechanism to prevent politicized prosecutions of American service members and officials.

However, in the light of internal safeguards in the Rome Statute, these persistent objections remain a puzzle.

In *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*[32] in which main facts of case were in November 1979, during the Islamic Revolution of Iran, the United States Embassy in Tehran was occupied by a group of armed militants who took the personnel of the embassy hostage. In spite of repeated requests for assistance by the embassy staff and by the United States, the Government of Iran did not attempt to protect the embassy or even try to dissuade the militants from continuing the occupation[33]. In response, the United States instituted proceedings against the Government of Iran in the International Court of Justice. In its application, the United States requested that the Court "adjudge and declare" that Iran had violated its obligations towards the U.S. under several Conventions and Treaties and that Iran was obliged to release the embassy staff and other U.S. citizens who were held hostage by the militants[34]. Iran did not appear at the Court; instead, it stated its objection to the proceedings and asserted that the Court did not have jurisdiction to decide the case. The court assumed jurisdiction and decided against Iran.

Similarly, in *Case Concerning Certain Phosphate Lands in Nauru (Nauru v. Australia)*[35] The Republic of Nauru commenced proceedings against the Commonwealth of Australia in the International Court of Justice on May 19, 1989. Both Nauru and Australia had accepted the compulsory jurisdiction of the Court pursuant to Article 36, paragraph 2 of the Court's Statute.

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[32] *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)* , Order of Dec 15, 1979, 1979 ICJ Rep.7; Judgment of May 24,1980, 1980 ICJ Rep. 3. See also, www.icj.org.

[33] M.W.Janis, (1981), "The Role of International Court in the Hostages Crisis", *Connecticut Law Review,* 13:263, p.263. See also, Richard Falk, (1980), "The Iran Hostage Crisis: Easy Answers and Hard Questions", *The American Journal of International Law,* 74: 411.

[34] BVA Roling (1980), "Aspects of the Case Concerning United States Diplomatic and Consular staff in Tehran", *Netherlands Yearbook of International Law,* XI: 125, p.125.

[35]

Nauru was seeking a declaration from the Court that Australia was bound to make restitution or reparation to Nauru for the damage and prejudice it had suffered, primarily as a result of Australia's failure to remedy the environmental damage it had caused Nauru. Nauru alleged that Australia had incurred this responsibility in the course of its administration of Nauru, first, under the Mandate System of the League of Nations and, subsequently, under the United Nations Trusteeship System. Australia raised various preliminary objections, and asked the Court to adjudge and declare that Nauru's Application was inadmissible and that the Court lacked jurisdiction to hear Nauru's claims. The Court held that it had jurisdiction to hear the case and that Nauru's Application was admissible.

The above mentioned cases which went before World Court clearly suggests that states are highly skeptical about the impartiality of the court and have tried to bypass resolution of dispute by the court. As a result very few cases are referred to adjudication to ICJ.

PROBLEM OF JURISDICTION

It is pertinent to note that states are bit reluctant to consent to compulsory jurisdiction of a court. The reason may be that the declaration accepting compulsory jurisdiction would expose each nation to broad categories of disputes involving uncertain and contested principles of customary international law[36]. The acceptance of compulsory jurisdiction requires the surrender of an element of sovereignty, a sacrifice which at present is unacceptable to any of the major world powers. Only a few nations have submitted declarations accepting compulsory jurisdiction, and their number, as a percentage of members of the United Nations, has been declining over time. The majority of the declarations that have been submitted have been encumbered with conditions and reservations that severely restrict their use as a basis for jurisdiction[37]. While the United States withdrawal from the *Nicaragua v. United States*[38] proceeding may have been lamentable,

[36] Patrick Kelly (1987), "The International Court of Justice", *Yale Journal of International Law,* 12:342, p.342. See also, Eric. A. Posner and John Yoo (), "A Theory of International Adjudication", http://ssrn.com/abstract=507003.

[37] *Ibid,* p. 345,347.

[38] *Supra* 28.

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it was not surprising. Compulsory jurisdiction has been an illusory basis for international adjudication. The consent which states generally give is highly qualified.

It is common knowledge that sovereign States are unwilling to limit their sovereignty through participation in international adjudication. The inflexible, 'zero-sum nature'[39] of adjudication makes it an unattractive method of settling disputes between sovereign states. The adversarial practice followed by courts result in a winner and a loser. The Heads of State or government whether out of sense of national pride or an assessment of costs fear losing and the political cost involved. As most of the significant international disputes have political as well as legal aspects, most of the states prefer to take part in face-saving negotiations or to temporize[40]. As a result states can avoid legal defeat simply by not submitting to the Court's jurisdiction or by declining to appear or comply if the Court asserts jurisdiction[41] and decides the case. Moreover, there are fundamental disagreements among nations, across broad substantive areas, about the governing principles of international law and their appropriate application[42]. The States are reluctant to risk committing themselves to judgments based upon principles they regard as incorrect or even inconvenience.

One of the glaring examples of such blatant disobedience towards jurisdiction of the ICJ came when the United States (vide its declaration of April 6, 1984) attempted to modify its previous n acceptance of the compulsory jurisdiction in order to exclude disputes involving Central America for a period of two years[43]. In fact on January 18, 1985, the United States notified the Court that it would no longer participate in the *Nicaragua v. United States*[44] proceedings. Finally, and most

[39] A zero-sum game refers to a situation in which for every winner there must be a loser.

[40] Patrick Kelly (1987), "The International Court of Justice", *Yale Journal of International Law,* 12:342, p.344.

[41] *Ibid.*

[42] Andrew Guzman (2001), "International Law: A Compliance Based Theory", http://papers.ssrn.com/ paper.taf?abstract_id=260257.

[43] Gardner, (1986), "U.S. Termination of Compulsory Jurisdiction of the International Court of Justice", *Columbia Journal of Transnational Law,* 24:421, p.422.

[44] *Supra* 28.

significantly, on October 7, 1985, the United States terminated its acceptance of the Court's compulsory jurisdiction[45].

The USA is not alone in this contemptuous approach towards ICJ. The Soviet Union has never accepted the compulsory jurisdiction. China withdrew its declaration in 1972 shortly after the People's Republic of China replaced Republic of China (Taiwan) as a legal representative of the Chinese people at the United Nations[46]. France terminated its declaration in 1974 after it refused to appear before the court in the *Nuclear Test Cases*[47]. Even India has also invoked an exception under the rubric of 'commonwealth clause' whereby it explicitly decline jurisdiction to ICJ if a case is brought by any state member of the Commonwealth of Nations.

The States have also failed to appear or refused to comply in a number of cases in which the Court based its jurisdiction not on the optional clause, but rather on either a special agreement or a treaty provision. The pattern emerged in four cases in which jurisdiction were based on a treaty referring disputes to the Court. Iceland refused to appear in the *Fisheries Jurisdiction*[48] cases. Turkey failed to appear in the *Aegean Sea*[49] case, which was dismissed by the Court for lack of jurisdiction. In the *US Hostages in Tehran*[50] case, Iran refused to appear and later ignored the Court's order to release the hostages. Finally, the United States refused to appear on the merits in the *Nicaragua*[51] case, in which jurisdiction was based both on the optional clause and on the Friendship, Commerce, and Navigation Treaty in force between the two parties.

The trend away from submitting disputes to the Court has emerged not merely because the Court is viewed as dealing with non justifiable political rather than legal issues, but also participants

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[45] *Supra* 43.

[46] Patrick Kelly (1987), "The International Court of Justice", *Yale Journal of International Law,* 12:342, p.349.

[47] Nuclear Test Cases (Austl. v. Fr.), 1973 I.C.J. 99 (Interim Protection Order of June 22); (N.Z. v. Fr.), 1973 I.C.J. 135 (Interim Protection Order of June 22).

[48] Fisheries Jurisdiction (U.K. v. Ice.), 1972 I.C.J. 12 (Interim Protection Order of Aug.17); (W. Ger. v. Ice.), 1972 I.C.J. 30 (Interim Protection Order of Aug. 17).

[49] Aegan Sea Continental Shelf (Greece v. Turk.), 1978 I.C.J. 4 (Judgment of Dec. 19).

[50] *Supra* 32.

[51] *Supra* 28.

lack faith in adjudication as the appropriate means of resolving disputes and disagree on the applicable principles of international law. In the resulting confusion, few nations are willing to trust their fate to adjudication[52].

The underlying problem is a lack of will; the nations of the world are simply unwilling to commit themselves in advance to the process of international adjudication. In some circumstances, such as the *Gulf of Maine*[53] case and other boundary disputes, states find that it serves their interests to refer a matter to the Court through a special agreement. Such a decision, however, is made on a case-by-case basis with due regard for its legal and political ramifications. The vast majorities of states, especially the major world powers, have been and continue to be unwilling to limit their sovereignty by submitting to the Court's compulsory jurisdiction. Hence no procedural technique or well conceived suggestion will change the basic fact that the unwillingness of states to limit their sovereignty[54].

Giving international adjudication a central position in dispute resolution assumes a commitment to a body of accepted legal principles, which are lacking in the existing international legal order[55]. Measures to expand the compulsory jurisdiction of the Court or to enhance its adjudicatory role are unlikely to meet emerging needs. One method can be that compulsory jurisdiction should be eliminated[56]. Few states have submitted declarations, and these declarations are so limited by conditions and reservations that compulsory jurisdiction has almost become a mirage. The chasm between the hope of a world ruled by law and the reality of the current situation has led to confusion, disenchantment, and disrespect for the Court[57].

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[52] Duncan B. Hollis (2005), "Why state Consent still Matters-Non state actors, Treaties and Changing sources of International Law", *Berkeley Journal of International Law,* 23:1,p.1.

[53] Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. v. U.S.),1984 I.C.J. 18 (Judgment of Oct. 12).

[54] Patrick Kelly (1987), "The International Court of Justice", *Yale Journal of International Law,* 12:342, p.360. See Also, Jacob Katz Cogan (2008), "Competition and Control in International Adjudication", *Virginia Journal of International Law,* 48:412, p.412.

[55] Eric. A. Posner and John Yoo (2005), "A Theory of International Adjudication", http://ssrn.com/abstract=507003.

[56] *Supra* 54, p.373.

[57] *Ibid.*

It is generally expected that the Court should continue to provide a forum for interested parties under its other bases of jurisdiction like, special agreements and treaties referring disputes to the Court[58]. For example, in the *Gulf of Maine*[59] case, which reached the Court by way of a special agreement, and other recent boundary disputes show that the Court can perform a valuable function in the appropriate circumstances. Even the United States, after terminating its participation in the compulsory jurisdiction system, referred a dispute to the Court on the basis of a special agreement with Italy[60]. Further, an international dispute resolution should offer a wider choice of mechanisms to resolve disputes. Therefore, a result oriented dispute resolution mechanism could alleviate the problems of loss of face and uncertainty of legal principles that plague international adjudication today. The international legal order has created arbitration tribunals in a number of substantive areas to depoliticize disputes and resolve conflict.[61] In substantive areas where disputes are frequent and technical, more specialized tribunals such as IEC could be created.

ADJUDICATION IN PRESENT AGE

It has been often noticed that questions have arisen concerning the coherence of international law that is threatened by an increasing number of third party forums entrusted with deciding disputes in accordance with international law. It is randomly contended that a large number of such forums may create a "cacophony of views that would damage prestige of the ICJ and undermine effort to promote the effectiveness of international law"[62]. Nevertheless these other forums may not necessarily have a deleterious effect on the international legal system. Rather, they could help to expand the application of international law to disputes not likely to come

[58] *Ibid.*

[59] *Supra* 53.

[60] Statement on U.S.-Italy Submission of Raytheon/Machlett Dispute to World Court, 24 I.L.M. 1745 (1985).

[61] *Supra* 54, p. 374.

[62] Shane, Spelliscy, (2001), "The Proliferation of International Tribunals: A Chink in the Armor", *Columbia Journal of Transnational Law*, 40:143, p. 153. See Also, Michael Reisman, (1992), "Systems of Control in International Adjudication and Arbitration: Breakdown and Repair" (*Duke University Press*, Durham, NC), p.5-6.

before the ICJ. These forums may provide additional opportunities to develop the law without undermining its legitimacy[63].

The rapid upswing in the number of international tribunals can be understood in light of the increasingly complex relationships between States after the end of Cold War[64]. The need for specialized expertise in new and developing areas of international law may indeed have been the driving force behind creation of many new tribunals in the latter half of the twentieth century. In essence the proliferation of international tribunals is an attempt by States to maintain viability of international judicial system in light of the increased complexity of international relations[65]. The so-called moral dilemma is sought to be put to rest by Jonathan Charney as he emphasizes that there is "no alternative to having numerous international tribunals to interpret international law; an international system with only few judicial bodies is no longer feasible"[66].

POSITIVE EFFECTS OF MULTIPLE INTERNATIONAL TRIBUNALS

Many scholars have pointed out positive effects of coming of multiple international judicial forums even in the absence of a structural framework formally linking the bodies. It has been construed positively as "proliferation of international tribunals can be seen as evidence of an increased willingness on the part of States to settle their disputes peacefully through subjecting their behavior to the rule of international law"[67]. Encouraging states to bring their disputes to international tribunals for peaceful settlement should be the primary goal of the international

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63 J.I , Charney,(1998), "International Law and Multiple International Tribunals", *Recueil des Cours*, 271:115, p.126.

64 *Ibid.*

65 *Supra* 62.

66 Jonathan I. Charney, (1999), "The Impact on the International Legal System of the Growth of International Courts and Tribunals", *New York University Journal of International law and Politics* , 31:697, p.704.

67 J.I , Charney,(1998), "International Law and Multiple International Tribunals", *Recueil des Cours*, 271:115, p.126. See also, Jonathan I. Charney, (1996), "The Implications of Expanding International Dispute Settlement Systems: the 1982 Convention on the Law of Sea", *The American Journal of International Law,* 90:69, pp.73-74.

community and in this respect having a "multiplicity of tribunals even in the absence of formal relations serves to benefit the international community"[68].

In addition to bringing more disputes under the reign of international law multiplicity of tribunals also serves the purpose of clarifying, expanding and complementing the principles of international law as elucidated by the ICJ. As noted above, the ICJ is a court of very limited jurisdiction. As such many of today's disputes and conflicts could not be brought before it. As a result the expanded number of international tribunals can serve to fill the gaps in the jurisprudence of the ICJ[69].

By expanding the arena of international law, the proliferation of tribunals has enlarged the scope and justiciability of international disputes, enabling these tribunals to serve as testing grounds for new rules and ideas. As there has been expansion in the body of international law, it is generally argued that having various tribunals could help in interpretation and experimentation with new rules. It, in turn, contributes in the expansion as well as improvement in the body international law[70]. This argument is all the more plausible given the relative ease with which tribunals become aware of the decisions and reasoning of other tribunals in today's technologically interconnected world. In fact the technological revolution of the twentieth century has facilitated constant communication. The development of a judicial dialogue between tribunals may make for better and more considered decisions because the various tribunals are able to consider and compare judgments with other tribunals who have considered the issue[71].

NEGATIVE EFFECTS OF MULTIPLE INTERNATIONAL TRIBUNALS

Those who are critic of proliferation of multiple international tribunals contend that "the anarchic nature of the international judicial system can be correlated with the anarchic nature of the

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[68] *Ibid.*

[69] *Ibid.*

[70] *Supra* 66.

[71] Shane, Spelliscy, (2001), "The Proliferation of International Tribunals: A Chink in the Armor", *Columbia Journal of Transnational Law*, 40:143, p. 154.

international system in general. International law lacks any centralized structure and has thus approached the need for a system of control through the lens of contract (treaty) whereby States agree to be bound by the decisions of a particular tribunal"[72]. Further it is contended that the contact based system of ensuring effectiveness of judicial tribunals may work well in a system where there is an overall hierarchy of control just as in domestic systems where the State holds a monopoly on the legitimate use of force it is subject to abuse where as is the case in the international system relationships are based on coordination rather than subordination[73]. This makes the system of international law fragile and more susceptible to incoherence and loss of legitimacy.

With no central governing institutions in the international system to address problems of compliance and violations of international law, the viability of the international judicial system depends on whether the members of international community consider the system to be legitimate[74]. If they do not then they will not abide by its decisions and will not bring their disputes to it for resolution. The legitimacy of international judicial system depends in turn on whether it maintains a consistent and continuous body of law of certain core norms at a minimum which States can rely upon.

Thus, coherence is essential to maintaining the legitimacy of the international judicial system in the eyes of the States. While conflicting jurisprudence may allow tribunals the opportunity to develop international law, the key question is what happens during a period in which international law is uncertain. Inconsistency in case law could be disastrous for international law and many scholars seem to recognize that in the absence of any sort of structural relationship

[72] Michael Reisman, (1992), "Systems of Control in International Adjudication and Arbitration: Breakdown and Repair" (*Duke University Press*, Durham, NC), p.5-6.

[73] *Ibid.*

[74] Gerhard, Hafner, (2004), "Pros and Cons Ensuing From Fragmentation of International Law", *Michigan Journal of International Law*, 25:849, p.851.See also, Shane, Spelliscy, (2001), "The Proliferation of International Tribunals: A Chink in the Armor", *Columbia Journal of Transnational Law*, 40:143.

between tribunals charged with interpreting international law such as clashes of jurisprudence become possible and even more probable[75].

The probability of conflicts of jurisprudence is further increased by the nature of the constitutive instruments of international tribunals themselves. Each tribunal is created by a specific act and derives its legitimacy from this act without having to refer to activities or events external to the limited sphere that has been created for it. The absence of any formal structure between the tribunals may reinforce this perceived isolation and lead tribunals to the conclusion that they are completely autonomous sub systems, 'separate little empires'[76] which are not affected by the behavior and decisions of other sub systems.

Further reinforcing this perception is the fact that each of these tribunals is composed of experts in international law who often see no need to refer to views outside of their own to determine a question of international law. Indeed without structured relationships there is no reason to say to the panel of judges in the International Tribunal for the Law of Sea (ITLOS) that they should defer to principles of international law propounded by the ICJ, not only because judicial precedent in international law is explicitly non binding but also because both are panels composed of experts on international law and both have been endowed with equal responsibility to interpret that law[77].

Hence such diversity may be seen as contributing to the disintegration of international law because each organ is committed to applying its own views and resolving disputes within its own formally isolated system thereby thwarting the tendency toward homogeneity and increasing the uncertainty of the standards of behavior to which states are supposed to conform[78]. The increasing specialization of international law necessary to keep pace with the complexity of international relations makes uniformity more difficult because it pulls each system further within itself[79]. It is noted that conflict in case law was far greater because specialized courts

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[75] Geroges Abi-Saab, (1999), "Fragmentation or Unification: Some Concluding Remarks", *New York University Journal of International law and Politics*, 31:919.

[76] Tullio Treves, (1999), "Conflicts Between the International Tribunal for the Law of the Sea and the International Court of Justice", *New York University Journal of International law and Politics* ,31:809, p.809.

[77] *Supra* 67.

[78] Sir Robert Y. Jennings, (1995), "The Proliferation of Adjudicatory Bodies: Dangers and Possible Answers", *American Society of International Law*, 9:2, p.5.

[79] *Ibid.*

tends to favor their own disciplines and make their decisions with reference only to their individual systems rather than paying attention to the effect that conflicts might have on international law in general[80].

OPTIMISTIC APPROACH TO MULTIPLE INTERNATIONAL TRIBUNALS

It seems to be an article of faith among international lawyers and scholars that the growing number of tribunals advances the rule of law in international relations rather than threatens it. The preponderant view seems to be that non structured proliferation has not threatened the legitimacy of international judicial system and does not pose threat to the coherence of legal system[81].

Despite all the theoretical problems, most scholars up until now have held there is no reason to believe that specialized tribunals will fail to take account of the appropriate contours and principles of public international law. After all the members of these specialized tribunals belong to the invisible college of international lawyers and thus employ the same analytical framework as do the members of other tribunals[82]. Thus, according to this line of argument there is little reason to believe that members of these tribunals are unaware of the need to develop a consistent body of jurisprudence in order to preserve legitimacy of the system.

Furthermore, although there is reason to be concerned about the possibility of conflicts there is no reason to believe that such conflicts will occur in important areas or they will become so endemic to the system so as to threaten the legitimacy of the entire framework[83]. While none doubt that a hierarchical system would provide order and coherence to international law most scholars point out that such hierarchy in international law never existed in the past and yet the legitimacy of the system has been continually strengthened and not overwhelmed as can be seen by the increased willingness of states to create more tribunals. Given this understanding of the

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[80] *Ibid.*

[81] Shane, Spelliscy, (2001), "The Proliferation of International Tribunals: A Chink in the Armor", *Columbia Journal of Transnational Law*, 40:143, p. 158.

[82] Oscar Schachter, (1977), "The Invisible College of International Lawyers", *Northwestern University Law Review,* 72:217, 217.

[83] *Supra* 82.

international legal system, ex-President Schwebel of the ICJ was right when he stated that "the fabric of international law and life is resilient enough to sustain such occasional differences as may arise"[84].

Hence it can be said that in general a large degree of deference is paid to the decisions of the ICJ as the principal judicial organ of United Nations and also the oldest of the existing tribunals. Specialized bodies often look to the ICJ in interpreting the substance and scope of principles of international law.

CONCLUSION

The chapter can be summed up by making some concluding remarks on behavior of states as far as international adjudication is concerned. It is beyond doubt that international law is made not only by sovereign states but governs their acts too. The states are much guided by their self interest while making any decision and are unwilling to relinquish control over its essential national interests. So far as settlement of international disputes through judicial forums is concerned states are unwilling to limit their sovereignty through participation in international adjudication. Basically nature of international adjudication makes it as unattractive mode of settlement of disputes. It creates a situation in which one is winner and other is loser. Hence, the states are concerned about fear of losing a case at international level.

Further it involves wider implications such as loss of face for the loosing nation internationally and domestically. As a result states generally do not approach court for resolution of their disputes. Moreover, nations could avoid legal defeat simply by not submitting to court's jurisdiction or by declining to appear or comply even if court asserts jurisdiction. Further so called compulsory jurisdiction of the court is illusory as consent which states generally give is highly qualified. As most of declarations made by states accepting compulsory jurisdiction are hampered by conditions and reservations. It can be found that participants lack faith in adjudication as appropriate method of resolving disputes.

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[84] *Supra* 81, p. 157.

It can said that depoliticized, result oriented dispute resolution mechanisms could alleviate the problems of loss of face and uncertainty of legal principles that plague international adjudication today. There are however cases when the States could overcome these fears and possibly consider judicial settlement as a better option than use of force (*Libya v. Malta*[85]). Further, international courts should provide forum for interested parties under its other bases of jurisdiction rather than compulsory jurisdiction such as in *Gulf of Maine case*[86].

Furthermore the current trend of having specialized tribunals for technical matters and recent upswing in the number of such tribunals is also examined in this chapter. The issue is much debated among scholars. Speaking positively, scholars contend that trend of multiple international tribunals has become necessity of the time keeping in mind complexity of present international relations. The international law is also expanding and issues are becoming more technical which needs expertise which only ICJ cannot resolve. Hence expanded number of international tribunals can serve to fill gaps in the jurisprudence of the ICJ.

But on other hand side it is argued that multiple international tribunals will bring anarchy in the system of international law where there is lack of centralized judiciary, executive and legislature as compared to domestic system which has intact above elements. Hence the development of international tribunals in the absence of structured relationships has led to the characterization of international legal system as a cacophony. In other words disorderly proliferation of international tribunals may lead to fragmentation of international law.

Yet there is some kind of optimism among scholars and they seem to believe that sky is not falling. There is ardent faith among international lawyers and scholars that growing international tribunals rule of law in international relations rather than threatens it.

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[85] I.C.J. Report 1985.

[86] Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. v. U.S.),1984 I.C.J. 18 (Judgment of Oct. 12).

CHAPTER III

EXISTING FORUMS FOR ENVIRONMENTAL DISPUTES SETTLEMENT

INTRODUCTION

In a little over 30 years international environmental law has evolved from protean origins into an identifiable body of law regulating many dimensions of human/nature relations. Its genesis as a discipline can be traced to general rules of public international law adapted and applied to address environmental problems such as transboundary air pollution[1]. However, from the 1960s onwards a range of regional and sectoral regimes were developed to address specific environmental issues, principally those relating to marine and atmospheric pollution[2]. These initiatives were initially piecemeal and ad hoc and it was only in 1972, following the adoption of the Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration),that it became possible to speak of the emergence of a distinctive 'international environmental law'[3]. Although largely aspirational in character, the Stockholm Declaration was a landmark developmental step, articulating a set of basic principles to guide the progressive evolution of international environmental law, a process that intensified and accelerated following the Stockholm Conference as new conventions were concluded, soft-law instruments were endorsed, and the World Commission on Environment and Development completed its work[4]. These developments culminated in the 1992 United Nations Conference on Environment and Development (UNCED), which adopted the UN Declaration on Environment and Development (Rio Declaration), several multilateral environmental agreements, and Agenda 21, which set out a program of action to address global environmental challenges in the twenty-first century[5].

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[1] Philippe Sands (1999), " International Environmental Litigation and Its Future", *University of Richmond Law Review*, 32:1619, p.1619.

[2] P Birnie & A Boyle (2002) "International Law & the Environment", *Oxford University Press,* 139, 141.

[3] *Ibid.*

[4] Philippe Sands (2007), "Litigating Environmental Disputes: Courts, Tribunals and the Progressive Development of International Environmental Law", www.oecd.org/investment/gfi-7.

[5] *Ibid.*

Both the Stockholm Declaration and the Rio Declaration were important texts in the articulation of mainstream ideas about sustainable development. Indeed the soft- and hard-law instruments concluded at UNCED continue to provide the main legal and policy direction for international environmental law, which has since developed further principally through a range of multilateral agreements. These are characterized by an increasing sophistication, both in terms of the standards that are prescribed and the institutional structures established for monitoring implementation and promoting compliance.

It is found that in the past two decades, a series of considerations has modified the attitude towards international dispute settlement, particularly in the environmental sphere. Environmental factors have been increasingly acknowledged to be a relevant source of international tension and disputes and even of actual threats to international peace and security. Main considerations seem to justify heightened attention to the prevention and settlement of environmental disputes includes that there is the growing demand and need for access to natural resources, coupled with a limited or at least shrinking resource base[6].

Further, the nature and extent of international environmental obligations has enormously increased as states assume broader and deeper commitments. The thickening web of agreements and norms increases the likelihood that disputes might arise about how to interpret the scope of these obligations. Then, as these increasing international environmental obligations affect national interests, and impose on states large administrative, economic, and political burdens, states that do not comply with environmental obligations are perceived to gain an unfair competitive advantage. So as national economies are increasingly globalizing, states are more likely than ever to be dragged into international disputes caused by environmentally degrading activities of their nationals or in defence of nationals affected by activities elsewhere[7].

Hence it can be found that 'the environment' is increasingly featuring as a factor in disagreements between countries in various international forums and indeed number of available forums in which these disputes can

[6] Cesare P.R.Romano (2000) "The Peaceful Settlement of International Environmental Disputes : A Pragmatic Approach", *The Kluwer Law International, The Hague,* p.163.

[7] *Ibid.*

be heard is itself increasing[8]. Despite the existence of such courts and tribunals some concerns regarding their competency have arisen and centered around a perceived lack of expertise in environmental issues and unnecessary delay in resolution.

TRANSNATIONAL ENVIRONMENT DISPUTES

The resolution of dispute known as *Trail Smelter*[9] Arbitration became a landmark decision in international environmental law. The *Trail Smelter* Arbitration remains the "only decision of an international court or tribunal that deals specifically, and on the merits, with transfrontier pollution"[10]. In this case a specially appointed arbitral tribunal held Canada liable for property damage in the United States caused by the Trail smelter's release of sulfur dioxide from its tall smoke-stacks. In its now famous proclamation of the "no-harm principle," the Tribunal explained that[11]:

> *"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".*

The no-harm principle the Tribunal articulated reflected an "obligation of all states to protect within their territory the rights of other states, especially the rights to national integrity and inviolability during peace and war."[12]

It is argued by scholars that arbitral decision focused more on sovereignty and less on environment concerns. Basically, the dispute arose from the exercise of sovereign rights: Canada's right to carry out lawful activities in its own territory (to smelt ore), and the United States's right to determine what acts may

[8] Philippe Sands (1999), " International Environmental Litigation and Its Future", *University of Richmond Law Review*, 32:1619, p.1622.

[9] *Trail Smelter Arbitral Decision*, 33 AM. J. INT'L L. 182 (1939). See also, *Trail Smelter Arbitral Decision*, 35 AM. J. INT'L L. 684 (1941).

[10] *Ibid.*

[11] *Trail Smelter* (1941), p.741.

[12] Franz X. Perrez,(1996), " The Relationship Between 'Permanent Sovereignty' And The Obligation Not To Cause Transboundary Environmental Damage", *Environmental Law*,26: 1187,p. 1198 .

take place within its territory (to harvest apples without interference from Canadian smelter smoke). Notably absent from the *Trail Smelter* decisions was any suggestion that individuals have a right to be free from environmental harm. Equally missing was any suggestion that environmental preservation is an end onto itself. So it can be said that where a decision has huge environment implications the court has not focused on the 'environment element' and decided on sovereignty issues[13].

It can be said that at that time when decision came nations were only beginning to understand the necessity of limiting the exploitation of natural resources. There were few international organizations existed, let alone organizations with competence in environmental matters. What is surprising is that seventy years later, and after appreciable growth in the understanding of the dangers facing the international environment, permanent sovereignty continues to play a more important role in solving environmental challenges than a global consensus or a perceived moral obligation to protect and preserve the environment[14]. A good example of how permanent sovereignty, as opposed to environmental concerns drives international environmental law is found in the international law governing transboundary hazardous waste transport[15].

It is pertinent to note that from very beginning there is some kind of biasness as far as environmental disputes are concerned and there is need to have look at the existing international forums that deal with environmental disputes and make a study that whether they are adequate to resolve international environmental disputes?

EXISTING INTERNATIONAL JUDICIAL FORUMS

During the twentieth century, many international forums emerged as successful players in resolving global disputes. Third party dispute settlement fora had markedly increased not only internationally but regionally as well[16]. Such fora include the International Court of Justice (ICJ), Permanent Court of Arbitration (PCA), International Tribunal on Law of Sea (ITLOS), World Trade Organization (WTO), etc. The competence and jurisdiction of these courts vary greatly but all may consider environment disputes. In addition

[13] Austen L Parrish (2005), "Traces of Trail Smelter in the International Law Governing Hazardous Waste Transport", in Rebecca Bratspies & Russell Miller eds , *Transboundary Harms in International Law:Lessons from the TrailSmelter Arbitration.*
[14] Günther Handl (1975), "Territorial Sovereignty and the Problem of Transnational Pollution ", *American Journal of International Law,*69: 50,p. 51, 60-61 .
[15] *Ibid.*

[16] Cesare P.R.Romano (2000) "The Peaceful Settlement of International Environmental Disputes : A Pragmatic Approach", *The Kluwer Law International, The Hague,* p.163.

multilateral environment agreements (MEAs) established such as Montreal Protocol, United Nations Framework Convention on Climate Change (UNFCCC), Kyoto Protocol, etc have included dispute settlement mechanisms within their provisions. Yet, despite this confluence of alternatives each of these forums falls short of providing adequate forum for settlement of environmental disputes.

International Court of Justice (ICJ)

The International Court of Justice (ICJ) is the principal judicial organ of the United Nations, established in 1945, along with the UN itself, in continuation of its predecessor, the Permanent Court of International Justice. It is a standing court and Article 36.1 of its statute 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'[17].

All UN members undertake upon joining to comply with the decisions of the ICJ in any case to which they are a party – in other words, the Court's decisions are binding on the parties in the case in question. Article 94.2 provides that if a party fails to carry out the requirements imposed on it by the Court, the other party is entitled to refer the matter to the Security Council, which 'may, if it deems fit, make recommendations or decide upon measures to be taken to give effect to the judgment'[18]. Ultimate enforcement is therefore a political, rather than a legal matter – hardly surprisingly, given that the ICJ deals with relations between states. However, in addition to their legal standing, ICJ decisions have a very powerful moral and political impact, partly because of the high standing of its judges, and its long experience, and there are very few cases of sustained resistance to them. The Court's reach is far from universal, however: a state is only subject to its jurisdiction if it is subject to a multilateral agreement which stipulates it; if it appears before the Court without objecting to it exercising jurisdiction in the case in question; or if it makes a unilateral declaration recognizing its jurisdiction (to date about fifty states have done so, though several with reservations)[19]. The ICJ clearly has full competence over all aspects of international environmental law, and a number of MEAs specifically stipulate its jurisdiction.

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[17] Patrick Kelly (1987), "The International Court of Justice", *Yale Journal of International Law,* 12:342, p.342.

[18] M.W.Jannis (1987), "Somber Reflections on the Compulsory Jurisdiction of the International Court", *The American journal of International Law,* 81:144, p.144.

[19] *Supra* 17.

It is pertinent to note while ICJ may accept cases that are environmentally related, only States have standing. In this regard, State interests do not always coincide with that of its citizens. For instance, States themselves may commit or tolerate environmental degradation. Moreover, non state entities such as nongovernmental organizations (NGOs) which are ardent supporters of environmental interests or other entities directly affected by environmental standard such as private parties or TNCs do not have direct access to ICJ[20].

Illustrative of the trend to create special courts exclusively geared to the settlement of environmental disputes, the ICJ established within its structure a Chamber of the Court for Environmental Matters (CEM). Established in1993, the CEM is presently composed of seven judges elected for three years[21]. What is surprising, to date, no single state has submitted a dispute to the ICJ's environmental chamber. The reasons for this kind of attitude of states may be because State parties to a dispute have a little to gain in bringing a case to the CEM, rather than a full court of the ICJ[22]. Indeed under the ICJ's statute parties may always choose to form an ad hoc chamber. Such an option allows parties views to be considered in the composition of a chamber whereas under the CEM the composition of the chamber is already determined and allows no input from the parties to the dispute[23]. Further, scholars argue that members of the CEM do not have any greater expertise in environmental matters than their colleagues that are non members. So there appears to be little benefit for States to bring a dispute before CEM rather than the full court of the ICJ or an ad hoc chamber. Thus, while the ICJ has established a special chamber for environmental matters, its significance is negligible.

The ICJ itself has, however, dealt with a small number of environment-related disputes. In September1995, the *Nuclear Tests case*[24], despite declining on jurisdictional grounds to accede to New Zealand's request to

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[20] Peddy Rodgers Kalas (2001), "International Environmental Dispute Resolution and the Need for Access by Non-State Entities", *Colorado Journal of International Environmental Law and Policy*, 12:191, p.210, 219. See also, Alfred Rest, (1994), "Need for an International Court for the Environment? Understanding Legal Protection for the Individual in Transnational Litigation", *Environmental Policy and Law*, 24(4):173, p.173.

[21] Peddy Rodgers Kalas (2001), "International Environmental Dispute Resolution and the Need for Access by Non-State Entities", *Colorado Journal of International Environmental Law and Policy*, 12:191, p.210, 219. See also, http://www.icj.org

[22] *Ibid.*

[23] *Ibid.*

[24] Nuclear Test Cases (Austl. v. Fr.), 1973 I.C.J. 99 (Interim Protection Order of June 22); (N.Z. v. Fr.), 1973 I.C.J. 135 (Interim Protection Order of June 22).

consider the legality of the resumption by France of underground nuclear testing, the Court stated that its order was 'without prejudice to the obligations of States to respect and protect the natural environment' – a statement that was at least partly based on the 1972 Stockholm Declaration and the 1992 Rio Declaration. Similarly, in 1996, in *Legality of the Threat or Use of Nuclear Weapon*[25], delivering an advisory opinion in the question of the legality of the use of nuclear weapons, the ICJ observed that although international environmental law 'does not specifically prohibit the use of nuclear weapons, it indicates important environmental factors that are properly to be taken into account ...'. None of these decisions really develop the relevant concepts of environmental dispute resolution in any great detail. They do, however, underline, albeit in a rather hesitant manner, that the ICJ is available to handle environmental Disputes.

More significantly, role of court for settlement of international environment disputes can be clearly made out in its decision in 1997, in *Case Concerning the Gabcikovo-Nagymores Project*[26], main facts of the case are On 16 September 1977, the two socialist countries, Hungary and the CSSR, signed a bilateral treaty in which they agreed to build a cross-border system of dams between Gabcíkovo and Nagymaros on the Danube. According to the plans, the Danube was to have been diverted between river kilometre (rkm) 1842 and 1811 near Dunakiliti by a dam and a relief sluice from the original riverbed into an artificial canal on Czechoslovakian territory. Next to Gabcíkovo, a hydroelectric power plant with eight turbines and a capacity of 720 megawatts (MW) was to be erected. Beginning at the confluence of the canal into the original course of the Danube at rkm 1811 until rkm 1794, the riverbed was to have been deepened and its course regulated. Near Nagymaros (rkm 1696.25) the treaty prescribed a second, smaller power plant with an output of 158 MW, which was primarily to balance the fluctuation of the water line[27].

However, due to economic hardship, Hungary pressed for temporary abandonment of the barrage project in 1981. Simultaneously, Hungarian experts expressed their doubts about the project because they believed it might have detrimental effects on the environment. Growing waves of protest finally led the Hungarian government to suspend work at Nagymaros in 1989. Because bilateral negotiations did not lead to a solution between the two states, Czechoslovakia decided to implement a new arrangement which redirected the

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[25] *Legality of the Threat or Use of Nuclear Weapon,* 8th July, 1996 (judgment).

[26] *Gabcikovo-Nagymaros Project (Hungary v.Slovakia),* I. C. J. Reports 1997, p. 7. See also, Philippe Sands (1999), "International Environmental Litigation and Its Future", *University of Richmond Law Review*, 32:1619, p.1626.

[27] *Supra* 26.

Danube into a new canal towards Gabcíkovo ("Variant C") even ahead of Dunakiliti on Czechoslovakian territory near Cunovo. The work on this variant started in 1991. This in turn resulted in the fact that Hungary terminated the treaty of 1977 in May 1992. That same year in October, Slovakia started river diversion according to Variant C, thereby extracting 90 per cent of the water from the old riverbed. As a consequence, the water level dropped two metres below its all-time low precipitating a massive international conflict. Meanwhile, European Community (EC) intervened initially and later the parties agreed to submit the case to the International Court of Justice in The Hague (ICJ)[28].

The court had an opportunity to address a wide range of international legal issues including the law of treaties, the law of state responsibility, the law of environment and the relationships between these areas. Of course, the court had a golden opportunity to demonstrate its ability to master the legal and factual elements in a comprehensive and thoroughly modern manner. It was first time in the court history that court gone to the site of project in order to understand dispute. The court ruled that it found Hungary was not entitled in 1989 to suspend or terminate work on the joint project solely on environmental grounds. The court went on to find that Czechoslovakia and subsequently Slovakia was not entitled to a unilateral solution diverting the Danube beginning in October 1992 without the agreement of Hungary. The court ruled that the construction prior to operation was not lawful. Finally, the court held that Hungary was not entitled to terminate 1977 Treaty in May 1992. As to the future, the court indicated the basis for cooperation and agreement which it hoped the parties might pursue suggesting that the preservation of the status quo- one barrage not two, jointly operated, would be an appropriate solution[29].

It is noted that judgment fell short of detailed exposition especially relating environmental law. The court was plainly unpersuaded by the merits of Hungary's environmental concerns. Nevertheless the court accepted that there existed a principle of "ecological necessity"[30] whereby a state may seek to prelude responsibility of otherwise wrongful acts by invoking the law of state responsibility. The court also accepted that concerns for the natural environment represent an "essential interest" of the state, indicating that the test

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[28] *Ibid.*

[29] I. C. J. Reports 1997, p. 7. See also, Philippe Sands (1999), "International Environmental Litigation and Its Future", *University of Richmond Law Review*, 32:1619, p.1630.

[30] *Ibid.* see also, Kenneth F Mc Callion (2003) "International Environment Justice : Rights and Remedies" *Hastings International and Comparative Law Review*,26:427, p.432.

to be applied in determining whether a state of "ecological necessity" exists is that there must be proven a real, grave and imminent peril at time it is invoked and that measures taken are only possible response to avoid that peril.

The question arises as to whether the ICJ has missed an opportunity to indicate a real willingness to show its environmental credentials? Certainly court demonstrated an understanding of the unique difficulties presented by environmental issues, of the existence of various standards to be applied and of an indication as to how these could be applied to facts. And certainly above mentioned three decisions of ICJ have taken a step toward bringing environmental considerations into the mainstream international law. The decision, however, does not completely fill the gaps left by treaty negotiators and do not contribute to the much needed development of the environmental law by way of judicial insight[31].

Permanent Court of Arbitration (PCA)

The Permanent Court of Arbitration (PCA) was established at The Hague by intergovernmental agreement in 1899 and is the oldest institution dedicated to resolving international disputes. The PCA has a status of permanent observer to the United Nations[32]. The PCA administers dispute settlement through conciliation, mediation, good offices, commissions of inquiry and arbitration, based on the United Nations Commission on International Trade Law (UNICITRAL) Arbitration Rules or Conciliation Rules[33]. The PCA has jurisdiction over disputes when at least one party is a State (or an organization of States) and when both parties to the dispute expressly agree to submit their dispute to the PCA for resolution.

On June 19, 2001, the member states of the PCA adopted by consensus the Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or Environment. The Optional Rules do provide innovative features such as they permit greater flexibility in the nature and number of parties that may engage in arbitration. Firstly, it is widely acknowledged that granting NGOs direct access to dispute resolution

[31] Kenneth Mc Callion, and H.Rajan Sharma (2000) " Environment Justice without Borders : The Need for International Court for Environment to protect Fundamental Environmental Rights" *George Washington Journal of international Law and Economy*, 32:351, p.352.

[32] Peddy Rodgers Kalas, (2001), "International Environmental Dispute Resolution and the Need for Access by Non-State Entities", *Colorado Journal of International Environmental Law and Policy*, 12:191,p.232.

[33] See, http://www.pca-cpa.org/showpage.asp?pag_id=1061.

tribunals is indispensable to effective resolution of international environmental controversies[34]. The Rules allow NGOs and individuals can gain equal footing with states and multinational corporations in environmental controversies. Secondly, it is equally necessary to have a multilateral system that can bring in all of the interested parties to an environmental dispute. Because international environmental problems often affect many entities and involve multiple sources and cumulative causes, the existing two party adversarial system of international litigation is arguably incapable of dealing with such issues. The Rules are also open to business entities and other interest groups allowing environmental NGOs[35].

Another notable innovation of the Rules is that parties may choose to use two panels; one arbitrator panel and one expert panel[36]. The PCA rules allow the arbitrator panel to appoint one or more experts to form an expert panel that reports to the panel. Further, to assist parties in rapidly appointing arbitrators and gaining expert opinions, the PCA will provide a list of arbitrators with legal experience in environmental protection or natural resource conservation, as well as list of environmental scientists who are qualified and willing to provide expert assistance to the parties and arbitral tribunal. The rules also try to expedite the arbitration process through various innovative measures[37]. Time is essence in resolving environmental disputes because of the possibility of irreversible damage to the ecosystem.

However, the forum shares a common weakness with all other forums for international disputes; the lack of compulsory jurisdiction. States and private parties may choose not participate in the PCA's resolution process[38]. In addition, there is little transparency in the PCA's dispute resolution process because its decisions are not made available to public inspection. Moreover, the PCA cannot be a forum for disputes between two private entities, such as between victims of environmental hazards and TNCs since at least one party must be a state[39].

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[34] Charles Quiang (2002) " A Unified Forum? The New Arbitration Rules for Environmental Disputes under Permanent Court of Arbitration" *Chicago Journal of International Law*,3:263,p.265. See http://www.pca-cpa.org/upload/files/ ENV% 20 CONC pdf .

[35] *Ibid.*

[36] *Ibid.*

[37] Charles Quiang (2002) " A Unified Forum? The New Arbitration Rules for Environmental Disputes under Permanent Court of Arbitration" *Chicago Journal of International Law*,3:263,p.265. See http://www.pca-cpa.org/upload/files/ ENV% 20 CONC pdf.

[38] Peddy Rodgers Kalas, (2001), "International Environmental Dispute Resolution and the Need for Access by Non-State Entities", *Colorado Journal of International Environmental Law and Policy*, 12:191,p.232. See, http://www.pict-pcti.org/courts/PCA.html.

[39] *Ibid.*

The forum also needs the support of some other enforceable instruments to confer jurisdiction. Like in a multilateral treaty State may insert a clause requiring submission of disputes to arbitration at the PCA. But, since most treaties are agreements among nations, non state actors will still have to rely on some form of state sponsorship to participate[40]. In addition, the Rules may be inadequate to address certain new challenges insofar as they simple transplant the UNICITRAL Rules from commercial context to the environmental context[41]. For example[42], the Rules retain a provision similar to UNICITRAL Rules, granting the arbitral tribunal power to issue interim awards and interim orders. It is foreseeable that this power will be invoked much more frequently in the environmental context than in commercial context because environmental disputes usually involve irreparable harms. However, unlike final arbitral awards that are usually enforced by national courts pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards interim awards and interim orders are not specifically covered in that convention. The attitude of local courts varies from jurisdiction to jurisdiction.

Moreover, it is usually difficult to measure environmental risks in monetary terms and a damage award is arguably inadequate to compensate for environmental losses[43]. Therefore, the enforcement problem of interim orders may deter some disputants from choosing this forum. Hence despite numerous procedural innovations the Rules will probably not be as effective and unified. Since no case has been brought yet under the Rules, a full evaluation is yet to be made of actual performance and its impact on international community[44].

International Tribunal on Law of Sea (ITLOS)

The 1982 United Nations Convention on the Law of the Sea contains detailed provisions regarding the resolution of law of the sea disputes[45]. One of the great successes of the 1982 Convention is the inclusion of a comprehensive procedure for dispute settlement. The dispute settlement provisions of the 1982

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[40] *Supra* 37, p.267 .

[41] *Supra* 38, p.233.

[42] *IBID.*

[43] Charles Quiang (2002) " A Unified Forum? The New Arbitration Rules for Environmental Disputes under Permanent Court of Arbitration" *Chicago Journal of International Law*,3:263, p.265. See, , http://www.pict-pcti.org/courts/PCA.html.

[44] *Ibid,* p. 267.

[45] http://www.itlos.org/general_information/overview/itlos_en.shtml.

Convention are found in the text of the Convention itself, rather than in an optional protocol[46]. Part XV of the 1982 Convention establishes the dispute settlement system with respect to the interpretation and application of its provisions. Upon signing, ratifying or acceding to the convention, or at any time thereafter, a state may choose one of the following means of dispute settlement: the International Tribunal for the Law of the Sea; the International Court of Justice (ICJ); an arbitral tribunal constituted in accordance with Annex VII of the 1982 Convention; or a special arbitral tribunal constituted in accordance with Annex VIII of the 1982 Convention for one or more of the categories disputes specified therein[47]. There is also provision for Seabed Disputes Chamber of the Tribunal, which under Article 187 of the Convention shall have jurisdiction with regard to matters concerning the Deep Seabed and the International Seabed Authority. There is a general obligation under article 279 for states to settle disputes by peaceful means, but they are able to choose methods other than those specified in the Convention. Section 2 of Part XV of the 1982 Convention sets out the range of tribunals to be used under the compulsory settlement procedures that are commonly thought of as the essence of this dispute settlement scheme. However, it is important to recognize that those compulsory procedures are of secondary importance. As section 2 is subject to the application of Section 3 entitled 'Limitations and Exceptions to Applicability of Section 2'[48].

It is to be noted that practically all disputes arising out of the exercise of sovereign rights or jurisdiction by a state in the exclusive economic zone concerning marine scientific research and fisheries are excluded or exempted from the compulsory procedures[49]. Furthermore, a state may declare in writing that it does not accept any one or more of the compulsory procedure with regard to, among others, disputes concerning sea boundary limitations, disputes concerning military activities and disputes concerning law enforcement activities in regard to marine scientific research and fisheries in the exclusive economic zone, as well as disputes in respect of which the Security Council is exercising the functions assigned to it by the UN Charter. The fact that the range of disputes subject to the compulsory procedures entailing binding decisions

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[46] http://www.pict-pcti.org/courts/ITLOS.html.

[47] Alan E Boyle (1997), "Dispute Settlement and the Law of the sea Convention : Problems of Fragmentation and Jurisdiction", *International and Comparative Law Quarterly,* 46:37, p.38.

[48] http://www.itlos.org/general_information/overview/itlos_en.shtml. See, Alan E Boyle (1997), "Dispute Settlement and the Law of the sea Convention : Problems of Fragmentation and Jurisdiction", *International and Comparative Law Quarterly,* 46:37, p.38.

[49] John. E.Noyes (1998), "The International Tribunal for the Law of Sea", *Cornell International Law Journal,* 32:109, p.118. See also, J.I.Charney (1997), "Third Party Dispute Settlement and International Law", *Columbia Journal of Transnational law,* 36:65, p.69-70.

is extremely limited cannot be left of account when one is examining the 1982 UN Convention[50]. Further, as far as settlement of international environmental disputes is concerned it is noted that scope of the tribunal is limited. It deals with limited environmental problems such as fisheries disputes, marine environment disputes, etc. Ambit of the tribunal for resolution of international environmental disputes is narrow as now a day environmental disputes are of multiple dimensions.

In the *Southern Bluefin Tuna case*[51], Australia and New Zealand (ANZ) sought to prevent Japan from increasing its catch of southern bluefin tuna (SBT). ANZ and Japan had been working together for many years to manage their catches of SBT which had previously been over fished. In the 1980 they agreed to voluntarily reduce their catches by approximately 75%. In 1993 in compliance with the UNCLOS requirement that States cooperate in establishing regional fishing management arrangements, they entered into the Convention for the Conservation of Southern Bluefin Tuna (Tuna Treaty). This Treaty established a scientific and managerial structure that required unanimity in order to establish catch limits on a year by year basis[52].

By the mid 1990s however Japan had come to view the available evidence as indicating sufficient recovery in the SBT stock to permit an increase in catches. When ANZ demurred, Japan proposed that all three parties to the Tuna Treaty conduct Experimental Fishing Program (EFP) to augment available stock data. Japan conducted a pilot EFP in1998 and the parties almost reached agreement in the spring of 1999 on a three year EFP above and beyond their annual catches. However, Australia proposed a substantially different program that would take years to implement. Japan then proceeded unilaterally to continue the EFP and ANZ threatened litigation to prevent Japan actions. Parties went before ITLOS[53]. ITLOS granted provisional measures and asked for setting up of arbitral panel. The panel however first considered objections to its jurisdiction and concluded that it lacked jurisdiction and provisional measures are no longer

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[50] *Ibid.*

[51] Bluefin Tuna Case (N.Z. & Austl v. Japan) (Award on Jurisdiction and Admissibility), 39 I.L.M. 382. See, http://www.itlos.org /start2_en.html.

[52] Donald L. Morgan (2002) "Implications of the Proliferation of International Legal For a: The Example of the Southern Bluefin Tuna Cases", *Harvard International Law Journal*, 43:541, p.543.

[53] *Ibid*, p.544.

effective. ANZ and Japan resumed discussion under Tuna Treaty[54]. Hence it is noted that the tribunal jurisdiction is limited and it is not adequate to resolve international environmental disputes.

World Trade Organization (WTO)

The first attempt to govern international trade resulted in the General Agreement on Tariffs and Trade (GATT) in 1947[55]. Environmental issues had not yet emerged in the international context, and it was only in 1972 when Conference on the Human Environment introduced a new issue into multilateral trade negotiations[56]. Environmental issues slowly started to penetrate domestic and international policy during the mid-1970s. In 1991, the GATT contracting parties convened the Working Group on Environmental Measures, which formally established environmental issues within the multilateral trading system. The emphasis on the environment continued at Marrakesh with the formation of the World Trade Organization's (WTO) Committee on Trade and the Environment (CTE)[57]. However, environmental concerns sometimes conflict with the goals of multilateral trade, and these discrepancies have created a dispute regarding the relevance and importance of incorporating environmental issues into modern trade negotiations. In November 1999, the WTO convened in Seattle its third Ministerial Conference to plan "the Millennium Round." The WTO intended for the Millennium Round to "help . . . define the trade, environmental [and] development . . . agenda into the new century" [58]and to decide how the WTO should pursue the existing work on trade aspects of environmental protection, investment and competition. The Seattle talks were aimed at laying the foundation for the Millennium Round; instead, the Ministerial Conference was cut short when protestors rioted the city.

It was claimed that the WTO was not properly addressing issues concerning the environment, labor and other human rights issues, demonstrators marched through downtown Seattle to proclaim that the WTO, "in

[54] *Ibid.*

[55] See, http://www.wto.org/english/thewto_e/thewto_e.htm.

[56] Jeffrey L.Dunoff (1994), "Institutional Misfits : The GATT, The ICJ & Trade-Environment Disputes", *Michigan Journal of International Law,* 15:1043. See, John Jackson (1992), "GATT and the Future of International Trade Institutions", *Brook Journal of International Law,* 18:15.

[57] Richard Skeen (2004), "Will the WTO Turn Green? The Implications of Injecting Environmental Issues into the Multilateral Trading System", *Georgetown International Environmental Law Review,* 17:161, p.162.

[58] *Ibid,* p. 164.

the name of lowering trade barriers, actually undermines . . . environmental protections."[59] Consequently, the Millennium Round was put on hold. Environmental advocacy groups are concerned about the WTO's involvement for two reasons. Their principle anxiety is over the adverse effects of trade on the environment, e.g., increased waste and pollution from factories. They are also worried that measures favoring free trade will result in lower environmental standards, relegating environmental issues to a lower tier of importance.

Foundation for the WTO

In order to understand the WTO it is needed to look to the GATT upon which the current organization relies. The GATT was created during the Great Depression when, as far as trade policies were concerned, countries resorted to extreme protectionism, raised tariffs and other trade barriers to levels that choked off imports, and set up discriminatory arrangements that favored some countries and excluded others[60]. The GATT creators believed that (1) progress toward open markets and liberalized trade would lead to economic recovery and (2) trade would not grow unless traders themselves could count on a degree of stability and predictability in the system[61]. The GATT's modus operandi works four ways: (1) as a binding list of trade concessions, which generally take the form of maximum tariff rates, granted by each contracting party; (2) as a set of multilaterally-agreed upon standards providing the "rules of the road" for trade in goods; (3) as a forum for trade negotiations in which international trade is liberalized and made more predictable, either through the reduction of trade barriers in national markets or through the reinforcement and extension of GATT rules; and (4) as an international forum in which governments can resolve trade disputes with other GATT contracting parties[62].

The GATT does not specifically provide for environmental measures, yet Article XX[63] explicitly notes

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[59] *Ibid.*

[60] Jane I. Yoon (2001), "The World Trade Organization: Environmental Police?", *Cardozo Journal of International and Comparative Law,* 9:201, p.202.

[61] *Ibid.*

[62] *Ibid,* p.203.

[63] Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: .....

(b) necessary to protect human, animal or plant life or health;

allowable exceptions to its general principles. It is claimed by critics that the trade principles of the GATT are irreconcilable with environmentalists' goals despite the exceptions provided in Article XX. Generally, environmentalists see risks in liberalized trade[64]. Conversely, members of the trade community see threats to economic growth and integration if environmental concerns are allowed to influence trade barriers.

The contracting parties of the GATT undertook the Uruguay Round, a series of meetings, which lasted from 1986 to 1994, negotiating several agreements signed on April 15, 1994. The summits culminated in the formation of the World Trade Organization on January 1, 1995. The contracting parties drafted the Agreement to Form the WTO (WTO Agreement) and four annexes[65]: Annex 1 including Annex 1A, Multilateral Agreements on Trade in Goods; Annex 1B General Agreements on Trade in Services (GATS); Annex 1C, Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS); Annex 2, Understanding on the Rules and Procedures Governing the Settlement of Disputes; Annex 3, Trade Policy Review Mechanism (TRPM); and Annex 4, Plurilaterial Trade Agreements (PTA).

The organizational structure of the WTO requires that every member state comply with each of the aforementioned agreements and annexes. The entire text, including agreements, annexes, and subsequent negotiations ending in consensus, operates as one whole body of law, subject to the exception of Annex 4, which is optional. The WTO's objectives include[66]: (1) facilitating, implementing and administering WTO agreements, the Multilateral Trade Agreements and the Plurality Trade Agreements; (2) providing a forum for trade negotiation; (3) administering the Dispute Settlement Understanding; (4) administering the Trade Policy Review Mechanism; and (5) cooperating with the World Bank, International Monetary Fund, and other international organizations.

The WTO is organized in a hierarchy of conferences and councils. The Ministerial Conference, composed of all WTO members, is the upper echelon and must meet at least once every two years. The General

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(g)relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption

[64] Jane I. Yoon (2001), "The World Trade Organization: Environmental Police?", *Cardozo Journal of International and Comparative Law,* 9:201, p.203.

[65] http://www.wto.org/english/thewto_e/thewto_e.htm.

[66] Ryan L.Winter (2000), "Reconciling The GATT and WTO with the Multilateral Environmental Agreements: Can we have our Cake and Eat it Too?", *Colorado Journal of International Environmental Law and Policy,* 11:223, p.224.

Council is also composed of all members and meets between Ministerial Conference sessions to conduct any pressing administrative functions[67]. Furthermore, the General Council discharges the duties of the Trade Review Policy Body and also acts as the Dispute Settlement Body, which is composed of both the dispute settlement panel and the Appellate Body. The next level in the hierarchy consists of three separate councils that must report to the General Council. Each council covers one broad area of trade: (1) Goods Council; (2) Services Council; and (3) Trade Related Aspects of Intellectual Property Rights Council. The WTO Agreement gives each council the ability to create subdivisions, called committees, which deal with more specific aspects of the respective broad area of trade, and the committees may be further divided into working groups to address specialized issues[68].

The use of trade barriers for environmental purposes is another means of imposing domestic environmental policy upon other States. Discriminatory domestic legislation, claimed to be exempt from Articles I, III, or XI, must pass muster under Article XX[69]. The provisions of paragraphs (b) health exceptions and (g) of conservation exceptions of Article XX were addressed first in *United States -- Restrictions on Imports of Tuna (Tuna Dolphin I and II*[70]*)* cases and then refined in the Report of the Appellate Body, *United States -- Standards for Reformulated and Conventional Gasoline (United States -- Reformulated Gasoline*[71]*)* and the Report of the Appellate Body, *United States -- Import Prohibition of Certain Shrimp and Shrimp Products (Shrimp Turtle)*[72]. The multilateral trading system is governed by the rules established in the GATT. Members are allowed to enact domestic legislation protecting the environment and promoting conservation. However, the Dispute Settlement Body (DSB) has narrowly construed the exemption provisions.

In *Tuna Dolphin I*[73] case The United States imposed a unilateral ban in accordance with the Marine Mammal Protection Act (MMPA) upon the importation of yellowfin tuna products that killed an

[67] Wen-chen Shih (2009), "Conflicting Jurisdictions Over Disputes Arising from the Application of Trade related Environment Measures", *Richmond Journal of Global Law and Business,* 8:351, p.353.

[68] *Supra* 67.

[69] Jane I. Yoon (2001), "The World Trade Organization: Environmental Police?", *Cardozo Journal of International and Comparative Law,* 9:201, p.205.

[70] GATT Dispute Settlement Panel Report on United States Restrictions on Imports of Tuna, 30 I.L.M. 1594 (1991); GATT Dispute Settlement Panel Report on United States Restrictions on Imports of Tuna, 33 I.L.M. 839 (1994).

[71] 35 I.L.M. 603, p. 633 (May 20, 1996).

[72] 38 I.L.M. 121 (Oct 12, 1998).

[73] *Supra* 70.

unacceptable quantity of dolphins (determined by the number of dolphin kills, at the end of the harvesting season, by United States' vessels)[74]. Mexican fishermen were adversely affected by the import restrictions and in 1991; Mexico filed a grievance alleging violations of GATT Articles III, XI, and XIII. The United States countered the Article III attack by maintaining that the restrictive actions were justified under the national treatment clause because United States fishermen were subject to the same regulations as the Mexican fishermen. The GATT panel reasoned that the MMPA regulations did not apply to tuna products within the meaning of Article III (which applies only to the imported product itself and not the production process) and concluded that the MMPA regulations were mere limitations on tuna harvesting that had no effect on tuna as a product[75]. Furthermore, the panel noted that the MMPA regulations amounted to discriminatory trade measures because domestic and foreign vessels were subject to different regulatory schemes. Domestic vessels were given an arbitrary preset limit on dolphin kills, but the allowable dolphin kills for foreign vessels were based on a percentage of dolphin kills by domestic vessels for the present year[76].

The panel concluded that while Article XX does not expressly limit the exception to domestic action, the United States' regulation did not merit an Article XX exception because there were other multilateral options that remained as possible solutions that would be less abrasive to GATT. Subsequent to the adjudication of the first *Tuna Dolphin* case, the United States and Mexico entered into the Agreement for the Reductions of Dolphin Mortality in the Eastern Pacific Ocean in 1992 that establishes a declining per-vessel limit on dolphin kills and requires observers on the larger purse-seine vessels. *Tuna Dolphin I* demonstrates the importance of bilateral and multilateral environmental agreements[77].

In *Tuna Dolphin II*[78] case the panel subsequently revisited the dispute in 1994 when the European Economic Community (EEC) and the Netherlands challenged the validity of secondary embargoes on processors of tuna caught by vessels not complying with the MMPA rules. The challenge alleged that the secondary embargoes are contrary to Articles III and XI. The United States justified the regulations, termed

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[74] http://www.wto.org/english/tratop_E/envir_e/edis04_e.htm.

[75] *Supra* 74. See, Peddy Rodgers Kalas, (2001), "International Environmental Dispute Resolution and the Need for Access by Non-State Entities", *Colorado Journal of International Environmental Law and Policy*, 12:191,p.223.

[76] *Ibid.*

[77] http://www.wto.org/english/tratop_E/envir_e/edis04_e.htm.

[78] *Supra* 70.

"intermediary nation embargoes," under Article XX (b) and (g) exceptions. Again, the panel reiterated that Article III was not applicable because the regulations were directed at harvesting and not the product itself. The panel concluded that the ban on imports constituted a prohibition or restriction, which was inconsistent with Article XI[79].

In *United States -- Standards for Reformulated and Conventional Gasoline (United States -- Reformulated Gasoline)*[80] The Clean Air Act of 1990 established two regulation programs regarding the importation of foreign gasoline and domestic sale of gasoline in various areas based upon the areas' pollution levels. Brazil and Venezuela filed a complaint with the WTO Dispute Settlement Body (DSB) alleging that the regulations promulgated by the United States Environmental Protection Agency (EPA) pursuant to the Clean Air Act violated Article I and III of the GATT[81]. The complaint was based upon the disparity of treatment between foreign and domestic refiners regarding the availability of methods for computing an individual baseline, which determines allowable levels of pollutants contained in the gasoline. Domestic refiners were allowed three different methods of computation before they were required to use the statutory baseline, whereas foreign refiners were allowed to use only the first method and then forced to accept the statutory baseline developed by the EPA. Ultimately, the panel held in favor of Brazil and Venezuela, concluding that the EPA regulations were not consistent with Article III (4) and could not be justified under paragraphs (b), (d), or (g) of Article XX. The United States appealed the ruling to the Appellate Body, which affirmed the panel decision[82].

In *Shrimp Turtle*[83] case, the US Congress enacted Section 609 of Public Law 101-162, which called for restrictions on imports of shrimp and shrimp products from nations failing to take adequate steps to protect endangered sea turtle. After the United States sought to enforce the measure, several nations challenged it under substantive GATT rules, and a WTO panel convened and eventually rejected the measure under

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[79] Peddy Rodgers Kalas, (2001), "International Environmental Dispute Resolution and the Need for Access by Non-State Entities", *Colorado Journal of International Environmental Law and Policy*, 12:191,p.223.

[80] *Supra* 71.

[81] http://www.wto.org/english/tratop_e/envir_e/edis07_e.htm.

[82] *Ibid.*

[83] *Supra* 72.

Article XI of GATT[84]. In addition, the panel found that the measure, as enforced, did not meet requirements of Article XX's "chapeau." The United States appealed the panel's decision to the WTO Appellate Body. The Appellate Body's decision rejected the panel's "chapeau down" approach. Instead it first considered whether the trade measure fell within Article XX(g). The Appellate Body decided that the US trade measure met requirements of XX(g) because[85]: 1) Section 609 was a measure "relating to" conservation; 2) turtles, and indeed wildlife generally, are "exhaustible" resources under XX(g); and 3) Section 609 was made effective in conjunction with restrictions on domestic harvesting of shrimp. The Appellate Body held that Section 609's method of enforcement amounted to an "economic embargo" that required all exporting members to adopt policies identical to US domestic policy. Further, it ruled that Section 609's enforcement treated nations differently because the period of time to phase in turtle safeguards varied among nations[86].

It is critically observed by some scholars that the Appellate Body Report on Shrimp-Turtles is not the coup de grace to the old, anti-environmental GATT regime that optimists characterize it as. It is argued that the decision did little more than correct the panel below: "At the appellate level, WTO law was brought back to what it was prior to the [Shrimp-Turtles] panel's ruling."[87] Further that the decision does not explain how future MEAs should be drafted so as to comply with GATT/WTO rules. Furthermore, it is observed that although NGOs now have a right to submit amicus briefs and WTO panels have a right to consider such briefs, there is no guarantee that WTO panels will actually choose to exercise this right. Another argument which is somewhat optimistic is that the decision should ensure environmental protection concerns are at least considered, but concludes, "I am unconvinced that the [WTO Appellate Body] decision will have any practical effect;"[88] The Appellate Body did nothing to "lower the overall standards of Article XX."[89] Others are skeptical as to whether GATT/WTO jurisprudence can ever achieve a satisfactory resolution to the trade

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[84] Ryan L.Winter (2000), "Reconciling The GATT and WTO with the Multilateral Environmental Agreements: Can we have our Cake and Eat it Too?", *Colorado Journal of International Environmental Law and Policy,* 11:223, p.227.

[85] Sanford E. Gaines, (2003), "The Problem of Enforcing Environmental Norms in the WTO and What To Do About It", *Hastings International and Comparative Law Review,*26:321, p.323.

[86] *Ibid.*

[87] Kevin R.Gray (1999), "Internet Symposium: Issues in Modern Environmental Law, Response", *Colorado Journal of International Environmental Law & Policy,* 10:397.

[88] Todd Duplanty (1999), "Internet Symposium: Issues in Modern Environmental Law, Response", *Colorado Journal of International Environmental Law & Policy,* 10:397, p.403.

[89] *Ibid,* p.400.

and environment dispute. Environmental groups responded negatively to the WTO Appellate Body's ruling as well, labeling the WTO a secret body dedicated to ruining environmental protection measures .

The WTO's dispute resolution processes reinforce the tendency to subordinate environmental considerations to trade interests[90]. The above mentioned decisions illustrate that environmental problems of transboundary or global nature are better addressed by an international environmental court which promotes uniform environmental standards and a body of legal decisions. The underlying ideas behind the WTO as an environmental regulatory organization are impracticable given the polar objectives of trade and environment protection[91]. Although trade policies influence environmental ones and vice versa the polar political agendas of the two cannot be reconciled. Much rhetoric abounds defending the WTO but pro trade organization cannot objectively establish environment standards for a liberated international trading community[92].

Multilateral Environmental Agreements (MEAs)

Since 1972 United Nations Conference on the Human Environment (UNCHE), often referred to as the Stockholm Conference a wide range of environment and sustainable development issues has been addressed at the global level. International environmental law has gone from sectoral treaties on ocean dumping and endangered species, to framework agreements and related protocols, as well as recent agreements of a highly regulatory nature[93]. International agreements have been used as a basis to promote and establish management frameworks through which to structure practical international activity with respect to environmental protection and conservation.

MEAs are living instruments, featuring annual or biennial meetings of the Parties, intersessional meetings of technical and expert groups and intersessional written submissions. These various activities are intended to move the environmental agenda forward and keep pace with scientific developments. An MEA is considered to be a legally binding agreement between several States related to the environment. Various

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[90] Jeffrey L.Dunoff (1994), "Institutional Misfits : The GATT, The ICJ & Trade-Environment Disputes", *Michigan Journal of International Law,* 15:1043.

[91] Robert Housmann, Durwood Zaelke (1992), "Trade, Environment and Sustainable Development : a Primer", *Hastings International and Comparative Law Review,* 15:535.

[92] *Ibid.*

[93] Multilateral Environmental Agreements: Negotiators handbook (2007),University of Joensuu.

terms are used to designate treaties (agreement, convention, covenant, protocol, treaty)[94]. Multilateral environmental agreements (MEAs) are treaties whose geographic scope varies widely. While UN MEAs are generally open to all States to become Parties, other MEAs are regional. e.g. most of the UNECE MEAs) while yet others are sub regional. MEAs are subject to rules of international law that govern treaties. The rules that apply to written treaties between States are reflected in the Vienna Convention on Law of Treaties (VCLT) itself a treaty[95]. The signing of an MEA is largely symbolic, and does not necessarily mean that a State becomes a Party to it unless the MEA provides that signature creates binding obligations. To become Party to an MEA, a State must ratify it "accept" or "approve" or "accede" to it. Alternatively, as noted above, a State may make a 'definitive signature' which has the same effect as ratification or accession.

MEAs have emerged as "predominant legal methods for addressing environmental problems that cross national boundaries"[96]. The growth of these legal instruments has been rapid and is coming in large numbers. This proliferation reflects strong sense of multilateralism at work to address some of the common concerns that sovereign states consider necessary to regulate through these instruments. The below mentioned table reflects the growing trend of states entering into MEAs.

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94. *Ibid.*

95 *Supra 93.*

96 Bharat H. Desai (2006), "Creeping Institutionalization: Multilateral Environmental Agreements & Human Security", UNU-EHS,p.25.

Table 1: Comparative Status of Select Multilateral Environmental Agreements[97]

MEAs	Year	Entry Into Force	Parties Ratification	Host Institution	Seat	Decision-Making Organ	Issues Covered
Convention on Wetlands of International Importance	1971	21.12.1975	159	IUCN	Gland	COP	Conservation and Wise Use of Wetlands, Primarily as habitat for the Waterbird
Convention for the Protection Of World Cultural and Natural Heritage	1972	17.12.1975	186	UNESCO	Paris	General Assembly of States Parties	Protection and Conservation of Cultural and Natural Heritage
Convention for the Prevention of Marine Pollution by Dumping of Wastes	1972	30.08.1975	72	IMO	London	Consultative Meeting of The Parties	All Sources of Pollution of the Marine Environment Especially Dumping of Waste
Protocol to the Convention on The Prevention of Marine Pollution by Dumping of Wastes	1996	24.03.2006	96	IMO	London	Meetings of the Parties	All Sources of Pollution of the Marine Environment Especially Dumping of Waste
Convention on International Trade in Endangered Species	1973	1.07.1975	175	UNEP	Geneva	COP	International Trade in Endangered Species of Wild Fauna and Flora
Convention on Migratory Species of Wild Animals (CMS)	1979	1.11.1983	112	UNEP	Bonn	COP	Conservation & Management [wise use Of Migratory Species of Wild Animals And their

[97] *Ibid*, p.26-27.

MEAs	Year	Entry Into Force	Parties Ratification	Host Institution	Seat	Decision-Making Organ	Issues Covered
							Habitats
Agreement for the Conservation of Bats in Europe [EUROBATS]	1991	16.01.1994	32	UNEP Collocated With CMS	Bonn	MOP	Conservation of Bats, especially threats from Habitat Degradation, Disturbance of Roosting Sites and Certain Pesticides
Agreement for the Conservation Of Small Cetaceans of the Baltic and North Sea [ASCOBANS]	1992	29.03.1994	13	UNEP Collocated With CMS	Bonn	MOP	To Achieve and Maintain a Favorable Conservation Status for Small Cetaceans
Agreement on the Conservation Of African-Eurasian Migratory Water birds [AEWA]-	1995	1.11.1999	65	UNEP Collocated With CMS	Bonn	MOP	To Maintain Favorable Conservation Status for Migratory Waterbirds, Especially Endangered Species
Convention on Substances That Deplete the Ozone Layer [Vienna]	1985	22.09.1988	195	UNEP	Nairobi	COP	Atmospheric Ozone Layer above the Planetary Boundary Layer
Protocol on Substances That Deplete the Ozone Layer [Montreal]	1987	1.01.1989	195 London (192) Copen'gen (189) Montreal (175) Beijing (156)	UNEP	Nairobi	COP	Atmospheric Ozone Layer above The Planetary Boundary Layer

MEAs	Year	Entry Into Force	Parties Ratification	Host Institution	Seat	Decision-Making Organ	Issues Covered
Convention on Transboundary Movements of Hazardous Wastes And their Disposal [Basel]	1989	5.05.1992	172	UNEP	Geneva	COP	Transboundary Movements of Hazardous Wastes and their Disposal
Ban Amendment	1995	NOT IN FORCE	65				Prohibiting exports of hazardous wastes from countries listed in a proposed new annex to the Convention (that are members of the EU, OECD, Liechtenstein) to all other Parties to the Convention.
Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and their Disposal [Basel]	1999	NOT IN FORCE	09	UNEP	Geneva	MOP	Comprehensive Regime for Liability and for Adequate and Prompt Compensation for Damage
United Nations Framework Convention on Climate Change [UNFCCC]	1992	21.03.1994	192	UN	Bonn	COP	Changes in the Earth's Climate System due to Anthropogenic Interference
Protocol to the	1997	16.02.2005	187	UN	Bonn	MOP	Quantified Emission

MEAs	Year	Entry Into Force	Parties Ratification	Host Institution	Seat	Decision-Making Organ	Issues Covered
UNFCCC [Kyoto]							Limitation and Reduction Commitments for Annex I Parties
Convention on Biological Diversity [CBD]	1992	29.12.1993	191	UNEP	Montreal	COP	Biological Diversity and Biological Resources
Protocol on Biosafety To the CBD [Cartagena]	2000	11.09.2003	156	UNEP	Montreal	MOP	Transboundary Movement, Transit, Handling and Use of Living Modified Organisms
United Nations Convention To Combat Desertification	1994	26.12.1996	193	UN	Bonn	COP	Combating Desertification and Mitigate the Effects of Drought, particularly in Africa
Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade	**1998**	24 .02.2004	128	UNEP And FAO	Geneva & Rome	COP	Promote shared responsibility and cooperative Effort among the Parties in the international trade of certain hazardous chemicals, in order to protect human health and the environment from potential harm and to contribute to their environmentally sound use
Stockholm Convention on	2001	17.05.2004	164	UNEP	Geneva	COP	Protect human health and the environment

MEAs	Year	Entry Into Force	Parties Ratification	Host Institution	Seat	Decision-Making Organ	Issues Covered
Persistent Organic Pollutants							from persistent organic pollutants

Most MEAs will include provision for the settlement of disputes among Parties, based on standard clause used in other treaty contexts, with a process for compulsory, binding arbitration and conciliation, judicial settlement, etc. However, while the Parties are bound to follow the process, generally they are not bound to accept decision outcomes. Parties have seldom availed themselves of these provisions. Many, though not all, multilateral environmental agreements (MEAs) possess non-compliance mechanisms[98]. The below mentioned table provides detail account of compliance mechanisms of few selected MEAs. These are a set of procedures and institutions established to assess parties compliance with the obligations set out under the MEA and to recommend particular courses of action in cases of non-compliance. Normally a specific body is set up within the MEA to carry out these functions, and cases of non-compliance can be reported to it by the party in respect of itself, by any other party or by the MEA's secretariat. Almost invariably the last route has been followed in practice, emphasizing the multilateral natures of these regimes, and the desire of individual parties to avoid being seen as the regime's policeman.

[98] Peddy Rodgers Kalas, (2001), "International Environmental Dispute Resolution and the Need for Access by Non-State Entities", *Colorado Journal of International Environmental Law and Policy*, 12:191,p.219.

Table 3.2:Comparison of Compliance Mechanisms in Select Multilateral EnvironmentalAgreements[99]

MEA	Year	Provision	Character of the Compliance Mechanism	Institutional Mechanism	Procedures for Addressing Non-Compliance	Dispute settlement
1. Kyoto Protocol to the UNFCCC	1997	Article 10 Article 18 to address cases of non-compliance with the provisions of this Protocol,	The Conference of the Parties serving as the meeting of the Parties to this Protocol shall, at its first session, approve appropriate and effective procedures and mechanisms to determine and to address cases of non-compliance with the provisions of this Protocol, including through the development of an indicative list of consequences, taking into account the cause, type, degree and frequency of non-compliance. Any procedures and mechanisms under this Article entailing binding consequences shall be adopted by	Kyoto Compliance Committee primary functions: (1) giving advice and assistance to parties through its facilitative branch and (2) identifying, determining, and applying consequences in cases of non-compliance through its enforcement branch The Conference of the Parties serving as the meeting of the Parties to this Protocol with the assistance of the Subsidiary Body for Implementation and, as appropriate, the Subsidiary Body for Scientific and Technological Advice,	Each Party included in Annex I shall incorporate in its national communication, submitted under Article 12 of the Convention, the supplementary information necessary to demonstrate compliance with its commitments under this Protocol,	Article 19 The provisions of Article 14 of the Convention on settlement of disputes shall apply *mutatis mutandis* to this Protocol.

[99] Bharat Desai (2010), "Multilateral Environmental Agreements" (in file with the author).

			means of an amendment to this Protocol.			
2. Cartagena Protocol on Biosafety	2000	Article 33 monitoring and reporting Article 34 compliance	Non-compliance. procedures	Compliance Committee A Biosafety Clearing-House is hereby established as part of the clearing-house mechanism under Article 18, paragraph 3, of the Convention Each Party shall designate one national focal point to be responsible on its behalf for liaison with the Secretariat. Each Party shall also designate one or more competent national authorities, which shall be responsible for performing the administrative functions required by this Protocol and which shall be authorized to act on its behalf with respect to those functions. A Party may designate a single entity to fulfil the functions of both focal point and competent national authority.	The Conference of the Parties serving as the meeting of the Parties to this Protocol shall, at its first meeting, consider and approve cooperative procedures and institutional mechanisms to promote compliance with the provisions of this Protocol and to address cases of non-compliance. These procedures and mechanisms shall include provisions to offer advice or assistance, where appropriate.	---------------------

3. Montreal Protocol on Substances That Deplete the Ozone Layer	1987	Article 8: Article 7: Reporting of data	The non-compliance procedure (NCP) for the Montreal Protocol has been in place since 1992 and is regarded as a model for other MEAs	The Parties, at their first meeting, shall consider and approve procedures and institutional mechanisms for determining noncompliance with the provisions of this Protocol and for treatment of Parties found to be in non-compliance.	The Parties, at their first meeting, shall consider and approve procedures and institutional mechanisms for determining noncompliance with the provisions of this Protocol and for treatment of Parties found to be in non-compliance. Each Party shall provide to the Secretariat statistical data on its production, imports and exports of each of the controlled substances	----------------
4. Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade	1998	Article 17 of the PIC Convention requires parties to establish a non-compliance procedure	Non-compliance procedure	Designate one or more national authorities that shall be authorized to act on its behalf in the performance of the administrative functions required by this Convention. The Conference of the Parties shall, as soon as practicable, develop and approve procedures and	Each Party shall take such measures as may be necessary to establish and strengthen its national infrastructures and institutions for the effective implementation of this Convention. These measures may include, as required,	Article 20 Parties shall settle any dispute between them concerning the interpretation or application of this Convention through negotiation or other peaceful means of their own choice.

				institutional mechanisms for determining noncompliance with the provisions of this Convention and for treatment of Parties found to be in non-compliance.	the adoption or amendment of national legislative or administrative measures	
5. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal	1989	Article 5		Compliance Committee: Designation of Competent Authorities and Focal Point To facilitate the implementation of this Convention, the Parties shall: 1. Designate or establish one or more competent authorities and one focal point. One competent authority shall be designated to receive the notification in case of a State of transit.	The Parties shall inform each other, through the Secretariat, of: (a) Changes regarding the designation of competent authorities and/or focal points, pursuant to Article 5; (b) Changes in their national definition of hazardous wastes, pursuant to Article 3; and, as soon as possible, (c) Decisions made by them not to consent totally or partially to the import of hazardous wastes or other wastes for disposal	Article 20 In case of a dispute between Parties as to the interpretation or application of, or compliance with, this Convention or any protocol thereto, they shall seek a settlement of the dispute through negotiation or any other peaceful means of their own choice.

					within the area under their national jurisdiction; (d) Decisions taken by them to limit or ban the export of hazardous wastes or other wastes; (e) Any other information required pursuant to paragraph 4 of this Article.	
6. Stockholm Convention on Persistent Organic Pollutants	2001	Article 15 Article 17	Non-compliance procedures	The Conference of the Parties shall, at its first meeting, initiate the establishment of arrangements to provide itself with comparable monitoring data on the presence of the chemicals listed in Annexes A, B and C as well as their regional and global environmental transport. Establish a subsidiary body to be called the Persistent Organic Pollutants Review Committee Each Party shall report to the Conference of the Parties on the measures it has taken to implement the	requires its COP to develop and approve non-compliance procedures. Each Party shall report to the Conference of the Parties on the measures it has taken to implement the provisions of this Convention and on the effectiveness of such measures in meeting the objectives of the Convention.	Article 18 settle any dispute between them concerning the interpretation or application of this Convention through negotiation or other peaceful means of their own choice.

				provisions of this Convention and on the effectiveness of such measures in meeting the objectives of the Convention.		
7. CITES	1973	Article VIII		Management Authority of the State: Each Party shall designate for the purposes of the present Convention: (a) one or more Management Authorities competent to grant permits or certificates on behalf of that Party; and (b) one or more Scientific Authorities.	Each Party shall prepare periodic reports on its implementation of the present Convention and shall transmit to the Secretariat	Article XVIII Resolution of Disputes Any dispute which may arise between two or more Parties with respect to the interpretation or application of the provisions of the present Convention shall be subject to negotiation between the Parties involved in the dispute. 2. If the dispute can not be resolved in accordance with paragraph 1 of this Article, the Parties may, by mutual

						consent, submit the dispute to arbitration, in particular that of the Permanent Court of Arbitration at The Hague, and the Parties submitting the dispute shall be bound by the arbitral decision.
8. Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention)	1998	Article 15	Optional arrangements of a non-confrontational, non-judicial and consultative nature for reviewing compliance	Optional arrangements	These arrangements shall allow for appropriate public involvement and may include the option of considering communications from members of the public on matters	Article 16 seek a solution by negotiation or by any other means of dispute settlement acceptable to the parties to the dispute.

But MEAs cannot solely ensure an effective international environmental legal system. As the treaty ratification is voluntary. The reservations to specific environmental principles are major road blocks in effective implementation. In addition, inconsistent interpretation of treaty provisions as there is no agreement as to what laws are applicable, particularly in the realm of international environmental law where principles are still evolving. MEAs do not provide effective environmental dispute resolution as most of MEAs are negotiated, ratified and binding only among nations and disallow standing for non State actors or private entities[100].

Further, enforcement provisions, which are necessary element to ensure compliance with international environmental obligations, are used infrequently and inconsistently. This is partly because if stringent provisions were included fewer nations would ratify these treaties. The need for consensus among nations often results in a weaker instrument with ill defined provisions[101]. Ambiguous language also makes enforcement problematic because of difficulty in determining whether nation has met its obligations. Moreover, dispute settlement procedures under the auspices of MEAs require nations to relinquish sovereignty and submit to an external dispute resolution authority which many nations are hesitant to do.

CONCLUSION

A survey of the existing structures for the settlement of disputes shows interesting pattern network. These courts and tribunals came up at different time in history and where propelled by different concrete considerations at the time of their constitution. It seems none of these existing structures carry the specialized requirement for the settlement of international environmental disputes. They do possess some strength, however, there weaknesses outweigh their strength. As a result the existing structures are not been made use of (e.g. Permanent Court of Arbitration), rarely resorted to (e.g. International Court of Justice), referred to specific consideration (e.g. WTO Dispute Settlement Body, International Tribunal on Law of Sea) or have almost been neglected or remain non starter (e.g. MEAs dispute settlement provisions). It seems these considerations have cumulatively provided a ground for as well as justification for a current quest for specialized International Environmental Court (IEC).

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[100] *Supra* 98.

[101] *Ibid.*

CHAPTER IV

NEED FOR AN INTERNATIONAL ENVIRONMENT COURT

INTRODUCTION

As seen in previous chapter the existing structures of international courts and tribunals have been found to be inadequate and/or ill equipped to address the growing concerns and calls for appropriate special forum for international environmental dispute settlement. In this context the quest for an International Environment Court (IEC) has been doing the rounds for almost two decades. It appears to be the product of need based response technique that international community has been pursuing from time to time in various area of international law. It is reminiscent of a similar quest for adjudication of criminal matters through a specialized International Criminal Court (ICC). Therefore, it seems pertinent to have a glimpse into and test the rationale for a similar special court for international environmental disputes.

GLOBAL EFFORTS FOR SPECIALIZED IEC

The proposal for a new specialized court was made as early as in The Hague Declaration (1989)[1]. The concrete steps for the establishment of International Environment Court (IEC) were in the form of a Draft Convention and a Draft Treaty. In 2002 UNEP Global Judges Symposium[2] also examined the need for an independent credible judicial forum that can help resolve environmental disputes.

Hague Declaration on the Environment 1989

The idea to have an independent specialized court for the resolution of environmental disputes was mooted way back in 1989 The Hague Declaration on the Environment where twenty four nations representative signed the declaration[3]. The main principles[4] of the Declaration provided that:

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[1] www.nls.ac.in.

[2] www.unep.org.

[3] See http:// www.nls.ac.in /CEERA /ceerafeb04 /html/documents/ lib_int_c1s2_hag_230300.htm; (accessed on January 2010)

(i) The principle of developing, within the framework of the United Nations, new institutional authority, either by strengthening existing institutions or by creating a new institution which, in the context of the preservation of the earth's atmosphere, shall be responsible for combating any further global warming of the atmosphere and shall involve such decision making procedures as may be effective even if, on occasion, unanimous agreement has not been achieved[5].

(ii) The principle that this institutional authority undertake or commission the necessary studies, be logical information - including facilitation of access to the technology needed - develop instruments and define standards to enhance or guarantee the protection of the atmosphere and monitor compliance herewith[6].

(iii) The principle of appropriate measures to promote the effective implementation of and compliance with the decisions of the new institutional authority, decisions which will be subject to control by the International Court of Justice[7].

(iv) The principle that countries to which decisions taken to protect the atmosphere shall prove to be an abnormal or special burden, in view, inter-alia of the level of their development and actual responsibility for the deterioration of the atmosphere, shall receive fair and equitable assistance to compensate them for bearing such burden. To this end mechanisms will have to be developed[8].

(v) The negotiation of the necessary legal instruments to provide an effective and coherent foundation, institutionally and financially, for the aforementioned principles[9].

The Hague Declaration appears to be radical departure in decision making procedures even in the absence of 'consent'. Its call for a "new institutional authority" within United Nations system for protection of the Earth's atmosphere could be broadly construed as including a special dispute settlement mechanism. The indication has been as regards changing the mandate or focus of the existing mechanisms or, if required, constitution of a new forum to address global environment.

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[4] See http://wrmin.nic.in /index3.asp ?subsublinkid=292 & langid=1&sslid=375 ; (accessed on January 2010)

[5] *Supra* 1&2.

[6] *Ibid.*

[7] *Ibid.*

[8] *Ibid.*

[9] *Ibid.*

As a logical corollary, any such radical reformation can not be oblivious to the need for settlement of environmental disputes among the sovereign states. It remains a moot question, whether hint of binding decisions without consent of concerned states could include compulsory jurisdiction before an adjudicatory forum. The reference to ICJ in third paragraph can be construed as its role as an appellate forum.

Draft Convention for the Establishment of an International Court for the Environment 1992(Draft Convention)

The most detailed proposal for the establishment of an environmental court first emerged at the 1989 Conference entitled *Congress on a More Efficient International Law on the Environment and Setting up an International Court for the Environment within United Nations* convened at the National Academy of Lincei in Rome[10]. In it final recommendation, the Conference called for:

(i) The drafting of a universal international convention on environmental rights[11];

(ii) The creation of an international environmental body/commission within U.N. system to oversee international environmental agreements and to hear nations' complaints about violations[12];

(iii) The appointment of a United Nations High Commissioner for the Environment who would head the commission, hear complaints and issue reports on violations[13];

(iv) The establishment of an International Court for the Environment which would be accessible to States, United Nations organs and private citizens[14].

[10] Amedeo Postiglione, (1990), "A More Efficient International Law on the Environment and Setting up an International Court for the Environment within United Nations", *Environmental Law*, 20:321, pp.327-328.

[11] *Ibid.*

[12] *Ibid.*

[13] *Ibid.*

[14] *Ibid.*

In 1992, Italian Judge Amedeo Postiglione presented a *Draft Convention for the Establishment of an International Court for the Environment* to a third conference in Rome. Interestingly, under this Draft Convention, the States have been held to be:

> (L)egally responsible to the entire international community for the acts that cause substantial damage to the environment in their own territory, in that of other States or in areas beyond the limits of national jurisdiction and shall adopt all measures to prevent such damage.

As per this contention, the States could be held responsible for severe environmental damage, even within their own boundaries. It seeks provide standing to individuals, NGOs or other States. Among other requirements, it is argued that the ratifying states would also be required to prohibit all activities that may cause irreversible damage to ecosystems, prevent a military action that procures irreversible environmental damage and adopt environmental standards that have been recommended at an international level[15].

The *Draft Convention* was quite extensive in its provision of environmental rights accorded to individuals, as well as in the underlying responsibilities of the ratifying States. Some of the individual rights set forth in the Draft convention include[16]:

(i) The fundamental right to environment;

(ii) The right to access to environmental information, along with duty to provide such information;

(iii) The right to participate in procedures involving the environment; and

(iv) The right of the private sector (citizens or NGOs) to take legal action in order to prevent activities that are harmful to the environment and to seek compensation for any environmental damage.

The Draft Convention also includes corresponding duties of States[17]:

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[15] *Supra* 13.

[16] Susan M Hinde,(2004),"'The International Environment Court : Its Broad Jurisdiction As Possible Fatal Law" *Hofstra Law Review*,32:1,pp.7-8. See also, Peddy Rodgers Kalas, (2001), "International Environmental Dispute Resolution and the Need for Access by Non-State Entities", *Colorado Journal of International Environmental Law and Policy*, 12:191,pp.231-232.

(i) To treat natural resources with care, especially with respect to reduction and consumption of waste;

(ii) To be "held responsible for severe environmental damage – even within their own boundaries";

(iii) To prohibit all activities that may cause irreversible damage to ecosystem ;

(iv) To prevent military action that procures irreversible environmental damage; and

(v) To adopt environmental standards those have been recommended at an international level.

It seems the proposed draft convention has been quite ambitious and some what impractical in view of strong sensitivities on the issue of sovereignty as well as oblivious of the ground realities concerning several items proposed in the individual rights and duties.

Draft Treaty for the Establishment of an International Court for the Environment 1999 (Draft Treaty)

It was precisely with the realization that States would not ratify such a broad based *draft convention* that the drafters sought to separate the *draft treaty* from other aspects that are related to the convention establishing an individual's right to the environment and the establishment of an international environmental agency[18].

A conference was convened (April 1999) in Washington D.C. by International Court for the Environment Foundation (ICEF). ICEF has emerged as one of the main proponents for the establishment of an environment court. It has sought to pursue two separate agendas that are not necessarily inconsistent[19]. The first relates to the continued call for the establishment of an international environment court. The second track, which gathered a good deal of momentum and support at the ICEF conference, is the recommendation that the Permanent Court for Arbitration (PCA) be designated as the existing forum for international environmental disputes[20].

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[17] *Ibid.*

[18] *Supra* 13, pp.232—233.

[19] [Online : Web], accessed on November 2009, URL:http://www.icef-court.org/

[20] Peddy Rodgers Kalas, (2001), "International Environmental Dispute Resolution and the Need for Access by Non-State Entities", Colorado Journal of International Environmental Law and Policy, 12:191,p.232.

The 1999 *draft treaty* for an International Environment Court contained following important elements:

Composition and Functions[21]

The 1999 *draft treaty* proposed that the IEC be established either as a U.N. affiliate, an adjunct to some other international body (such as PCA) or as an independent entity. The proposed IEC could comprise 15 independent judges, elected by the U.N. General Assembly, from a list submitted by the Secretary General. Judges would serve for period of 7 years and be eligible for re-election[22]. The IEC would have the power to resolve environmental disputes by "mediation, arbitration and/or judicial decision" and would be complementary to national judicial systems (just like the complementary jurisdiction of ICC). The functions of the IEC were proposed to include[23]:

(i) Adjudicating significant environmental disputes involving the responsibility of members of the international community;

(ii) Adjudicating disputes between private and public parties with an appreciable magnitude (at the discretion of the President of Court);

(iii) Ordering emergency, injunctive and preventative measures as necessary; Mediating and arbitrating environmental disputes; and

(iv) Instituting investigations, when necessary, to address environmental problems of international significance.

Standing and Jurisdiction

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[21] Kenneth F, Mc Callion, (2003) "International Environment Justice : Rights and Remedies" *Hastings International and Comparative Law Review*,26:427,p.434.

[22] Article II, Draft Treaty for the Establishment of an International Court of the Environment, presented at The George Washington University Law School Conference on International Environmental Dispute Resolutions (April 15-17,1999) [hereinafter 1999 Draft Treaty],See also, Kenneth F, Mc Callion, (2003) "International Environment Justice : Rights and Remedies" *Hastings International and Comparative Law Review*,26:427,p.434.

[23] Article VI, Draft Treaty for the Establishment of an International Court of the Environment, presented at The George Washington University Law School Conference on International Environmental Dispute Resolutions (April 15-17,1999) [hereinafter 1999 Draft Treaty].

It was proposed in the *draft treaty* that the standing before the IEC would be broad and allow for the participation of private entities (individuals and corporations), NGOs, States, regional, provincial and local authorities (such as the European Union), the U.N. and other international public organizations and agencies.

According to 1999 *draft treaty*, the IEC would have jurisdiction over environmental crimes, defined as the "intentional infliction of widespread, long-term and severe damage to the natural environment."[24] The IEC was proposed to have jurisdiction over any civil disputes relating to transnational and international environmental disputes submitted to it. The Court's jurisdiction would extend over individuals, corporations and the State parties. In addition, jurisdiction would only extend to crimes committed after the date of the Statute's entry into force, or with respect to civil matters occurring within four years of date of Statute's entry into force[25].

It was proposed that where the claimant is a state Party, the court would exercise jurisdiction. However, where the claimant is a non state party (i.e. an individual, or NGO), the *daft treaty* calls for a full investigation by the Court's Office of General Counsel[26]. Upon a determination by the Presiding Judge that reasonable cause exists the Court would proceed to hear the charge[27].

Applicable Law

[24] Article 8.1, Draft Treaty for the Establishment of an International Court of the Environment, presented at The George Washington University Law School Conference on International Environmental Dispute Resolutions (April 15-17,1999) [hereinafter 1999 Draft Treaty].See also, Peddy Rodgers Kalas, (2001), "International Environmental Dispute Resolution and the Need for Access by Non-State Entities", Colorado Journal of International Environmental Law and Policy, 12:191,p.234.

[25] Article VII, Draft Treaty for the Establishment of an International Court of the Environment, presented at The George Washington University Law School Conference on International Environmental Dispute Resolutions (April 15-17,1999) [hereinafter 1999 Draft Treaty].

[26] Article 6.1 (e), Draft Treaty for the Establishment of an International Court of the Environment, presented at The George Washington University Law School Conference on International Environmental Dispute Resolutions (April 15-17,1999) [hereinafter 1999 Draft Treaty].

[27] Article7.2(b), Draft Treaty for the Establishment of an International Court of the Environment, presented at The George Washington University Law School Conference on International Environmental Dispute Resolutions (April 15-17,1999) [hereinafter 1999 Draft Treaty].

It was proposed in the *draft treaty* that in its review of a disputed matter, the International Environmental Court would apply[28]:

(i) Its Statute and its Rules of Procedure and Evidence;

(ii) Applicable treaties and the principles and rules of general international law;

(iii) The national laws from legal systems throughout the world; to the extent they are consistent with the objectives and purposes of the Statute establishing the Court.

Financing

The 1999 *draft treaty* also suggested that financing for the Court could be the same as that for the ICJ, where expenses for the court are provided by the U.N. in accordance with the terms laid out by the General Assembly. Interestingly, it has been proposed that the countries and corporate and industrial groups summoned to appear before the Court would provide any expenses incurred. However, individuals bringing suit before the Court could request a waiver of expenses[29].

So the *draft treaty* of 1999 provided broad outlines about the nature and powers of the proposed IEC. It provided the framework so that consensus among States to ratify the treaty could emerge. Even if no the ideal, the *draft treaty* has refreshingly laid the basis for possible consideration of such an environmental dispute settlement forum by the sovereign states in future.

UNEP Global Judges Symposium

In August 2002, UNEP convened the *Global Judges Symposium on Sustainable Development and the Role of Law* on the sidelines of the World Summit on Sustainable Development (Johannesburg). The symposium was hosted and chaired by Chief Justice Arthur Chaskalson of

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[28] Article XIV, Draft Treaty for the Establishment of an International Court of the Environment, presented at The George Washington University Law School Conference on International Environmental Dispute Resolutions (April 15-17,1999) [hereinafter 1999 Draft Treaty].

[29] Peddy Rodgers Kalas, (2001), "International Environmental Dispute Resolution and the Need for Access by Non-State Entities", Colorado Journal of International Environmental Law and Policy, 12:191,p.236.

South Africa, brought together more than 120 Chief Justices and senior judges from over 60 countries including several judges from international courts and tribunals[30].

The event was unprecedented as never before so many Chief Justices and other senior judges from national and international courts of both developed and developing countries met to discuss the role of law. The unique gathering itself was, therefore, glowing testimony to their conviction that the judiciary need to be well equipped to keep pace with the rapidly expanding boundaries of environmental law as well as be sensitive to its role and responsibilities in promoting the rule of law in regard to environmentally friendly development[31].

The outcome of the symposium was a unanimous recognition by these senior judges representing the various legal systems of the world, of the crucial role that the judiciary plays in enhancing environmental governance and the role of law, through interpretation, development, implementation and enforcement of environmental law in the new context of sustainable development.

They also crafted what was called as *The Johannesburg Principles on the Role of Law and Sustainable Development*[32]. The principles, in essence, underscored that:

(i) An independent judiciary and judicial process is vital for the implementation, development and enforcement of environmental law;

(ii) The fragile state of the global environment requires judiciary as the guardian of the rule of law, boldly and fearlessly to implement and enforce applicable international and national laws, which will assist in alleviating poverty, while also ensuring that the inherent rights and interests of succeeding generations are not compromised;

(iii) The people most affected by environmental degradation are the poor and that, therefore, there is an urgent need to strengthen the capacity of the poor and their representatives to defend environmental rights, so as to ensure that the weaker sections of society are not prejudiced by

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[30] United Nations Environment Programme, *UNEP Global Judges Programme* (UNEP, 2005), pp.vi-vii. Also see, www.unep.org (accessed on December 2009).

[31] *Supra* 29.

[32] *Supra* 29.pp.3-4.

environmental degradation and are enabled to enjoy their right to live in a social and physical environment that respects and promotes their dignity;

(iv) The judiciary plays a critical role in the enhancement of public interest in a healthy and secure environment;

(v) The rapid evolution of multilateral environmental agreements, national constitutions and statutes concerning the protection of the environment increasingly requires the courts to interpret and apply new legal instruments in keeping with the principles of sustainable development; and

(vi) The deficiency in the knowledge, relevant skills and information in regard to environmental law is one of the principal causes that contribute to the lack of effective implementation, development and enforcement of environmental law.

The *Johannesburg Principles* did take cognizance of the simmering global environmental crisis as well as ways and means of protecting the environment and potential role of the judiciary in the process. It sought to convey the message loud and clear that the judiciary will need to rise to the occasion as a part of its larger mandate of upholding the rule of law. In recognizing various special facets of the environmental issues, the Principles did not go as far as to proclaim the need for specialized set of international as well as national environment courts. However, as the current trend at work in different legal systems for 'green courts or tribunals', the Principles could also be extrapolated to deduce the need for a specialized international environment court.

As seen elsewhere, there appears to be enough churning taking place in academic circles as well as in international institutions (e.g. UNEP) directly or indirectly concerning international environmental dispute settlement. The calls issued by and concerted actions put into place by nongovernmental organizations such as International Court for an Environment Foundation (ICEF) and ICE Coalition have just added to this quest for the establishment of IEC.

Scholarly Debate on the establishment IEC

The calls for the establishment of an International Environmental Court (IEC) do persist at the global level. Several arguments have been advanced to justify the establishment of an IEC. These

arguments include the many pressing environmental problems that humans are facing and the need for specialized adjudicatory bench comprising experts in international environmental law to consider these problems, the need for international organizations to be able to be parties to disputes related to the protection of environment, the need for individuals and groups to have access to environmental justice at the international level and need for dispute settlement procedures that enable the common interest in the environment to be addressed[33]. It appears each of these arguments has merit.

On the other side, arguments have been made against the establishment of an international environmental court. These arguments include proliferation of international courts and tribunals would result in the fragmentation of international law, existing courts and tribunals are or can be well equipped to consider cases involving environmental issues and disputes involving international environmental law also involve other aspects of international law[34].

Keep Legal Issues

(A) Environmental law demand specialized treatment

It is argued that environmental law raises issues which are distinctive and demand specialized treatment. Most important is that environment law has following special features[35]:

(i) Technical/scientific complexity;

(ii) The challenging and rapidly developing legislative and policy base;

(iii) The overlapping remedies and interests involved;

(iv) The substantial body of international environmental treaties;

(v) The increasing body of EC legislation;

(vi) The development of fundamental principles such as precautionary approach;

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[33] Ellen, Hey, (2000), "Reflections on International Environmental Court" (*Kluwer Law International* : The Hague),p.3.

[34] *Ibid.*

[35] Maurice Sunkin, (2004), "Modernising Environmental Justice: Regulation and the Role of an Environmental Tribunal", Journal of Environmental Law, 16:307, p.308.

(vii) The principles concerning third party access to environmental justice; and

(viii) The emergence of the overarching principle of sustainable development.

It is argued that the combined effect of these factors underscores the need for a specialized jurisdiction. Furthermore, the evolution of the concept of international environmental crime, the widening of liability law for environmental damage and the application of the 'polluter-pays principle' could make a constitution of a special international environment court necessary[36].

(B) Dispute Characterization

It is contended that a dispute that has an environmental aspect also involves other aspects of international law and vice versa. So question that arises is how to make out whether it is environmental dispute or trade related dispute or human right violation and so on[37]. The scope and nature of jurisdiction that the proposed IEC could have still remains problematic. Interestingly, most of the contemporary multilateral environmental agreements (MEAs) aim at fostering sustainable development. They, thereby, explicitly incorporate several facets of international development law into the respective MEA. The operative provisions or additional protocols of MEAs often provide for trade related instruments to be implemented or for the interests or rights of particular groups, such as indigenous peoples to be given special consideration[38]. This could raise pertinent question whether these provisions make the agreements into instruments of international trade law or international human rights law? Moreover, how can it be guaranteed that an international environmental court would have the expertise required to consider such trade or human rights aspects? Further, many of the potential disputes that may arise under a treaty that focuses primarily on the protection of environment also can be defined in terms of a dispute under other treaties[39]. In this context relevant examples could be the United Nations Convention on the Law of the Sea (LOS Convention) and different treaties annexed to the Agreement Establishing the World Trade Organization.

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[36] Alfred, Rest, (1994), "Need for an International Court for the Environment? Understanding Legal Protection for the Individual in Transnational Litigation", *Environmental Policy and Law*, 24(4):173, pp.173-174.
[37] *Supra* 32, p.4.
[38] *Ibid*, p.5.
[39] *Ibid.*

The cases dealt with by international courts and tribunals illustrate the difficulties involved in defining an international environmental dispute. While these cases can all be defined in terms of environmental law and thus potentially could have been brought before an international environmental court, if it had existed, they have another common element. The cases in question also can and have been defined in terms of several other areas of international law[40]. As it was seen in the *Gabcikovo-Nagymores case*[41], apart from involving international environmental law the court had to deal with international water law, the law of state succession and law of treaties. Similarly, in *Fisheries Jurisdiction Case (Spain v. Canada)*[42] where a dispute involved international natural resource law, international fisheries law, international environmental law or international law related to conservation of biological diversity.

In view of this perception it is argued by some that the special character of environmental disputes and the expertise required on the bench to consider such cases may not convincingly argue in favor of the establishment of an international environmental court[43]. However, such an erroneous interpretation is misplaced due to the fact that every environment related case could have other peripheral issues too. As a result what needs to be looked for is the predominant aspect of the case need to be environment. The rationale for this and justification for such a constructive interpretation could be found in the oft repeated contention as and when the advisory jurisdiction of the ICJ is sought to be invoked. In such cases it is often argued that the concerned matter contains political issues in addition to the legal ones. However, the ICJ has consistently taken the position that while dealing with such advisory matters it will not seek to 'segregate' the legal issues from the political ones as every case will have such an admixture. As such the guiding principle could be the 'predominant' nature of the case being environmental.

(C) Territorial Sovereignty Principle

It appears that the States are unwilling to discuss the principle of territorial sovereignty. However, it is argued that the environment is a completely different issue from those that can be

[40] *Ibid,* p.6.
[41] GabCikovo-Nagymaros Project (HungarylSlovakia), I. C. J. Reports 1997, p. 7.
[42] I.C.J. Reports, 4 December,1998.
[43] Ellen, Hey, (2000), "Reflections on International Environmental Court", (*Kluwer Law International* : The Hague),p.9.

solved within well defined sectoral space of the bureaucratic boundaries of actual nations[44]. It is precisely the territory of States that is being discussed as far as the basic quality of their natural and human resources are concerned. Therefore, the principle of territorial sovereignty is not refuted but could be adapted to new demands otherwise it will be left without any true meaning[45]. Lester Brown, of the World Watch Institute maintains that "some people argue that an international tribunal dealing with the environmental issues would be threat to State sovereignty but, in his opinion, the States have already lost their sovereignty in the field of ecology as no single state is able any longer to defend its territory or its atmosphere on its own."[46] So it can be said that the fear that by creating a court states will be unwilling to relinquish their sovereignty seems to be a misplaced notion as far as resolution of international environmental disputes are concerned.

(D) *Problems with Accessibility in Current Forums*

A major concern among those supporting IEC is that current courts and tribunals do not allow sufficient access and participation to non-state entities. It has been contended that:

> As international organizations, environmental associations, NGO's and potentially affected individuals are not granted direct access to the ICJ, nowadays the question is discussed, whether the jurisdiction of the ICJ is still a suitable instrument to deal with urgent environmental problems or whether a new International Environmental Court should be established."[47]

It is generally argued that States alone have direct access to the ICJ and not the individuals who are increasingly no less victims of environmental destruction. The interests of a State may be even contrary to those of its citizens. As such the States often refuse to support their individuals who have been victims of environmental harm by means of diplomatic protection[48]. While it is commonly known that States themselves may commit or tolerate environmental crimes, it could be realistic to work towards strengthening international judicial system which guarantees

[44] Amedeo Postiglione (1993) "An International Environmental Court?", *Environmental Policy and Law*, 23(2):73, p.74.
[45] *Ibid.*
[46] *Ibid.*
[47] Alfred Rest (1994), "Need for an International Court for the Environment? Understanding Legal Protection for the Individual in Transnational Litigation", *Environmental Policy and Law*, 24(4):173, p.173.
[48] *Ibid.*

protecting effectively the rights of the individuals to a healthy and undisturbed environment[49]. On the other hand, PCA lacks compulsory jurisdiction so states and private parties may choose not to participate in the PCA's resolution process. As far as MEAs are concerned they are negotiated, ratified and are binding only among the contracting state parties. They do not have scope for standing for non state or private entities except as observers in multilateral environmental conferences[50].

In view of this concern, the proponents of IEC included in the 1999 *draft treaty* specific provision that sought to allow participation of private entities (individuals and corporations), NGOs, States, regional, provincial and local authorities (e.g. EU), the UN and other international public organizations and agencies[51]. Its aim was to make the accessibility to the court quite broad based. This special gesture seems to keep in tune with the current multilateral environmental negotiations wherein these nongovernmental organizations and civil society groups are most ardent supporter of environmental protection.

(E) Limitations of Existing Structures to deal with Environmental Disputes

It is contended by the proponents of IEC that existing forums that deal with international environmental dispute resolution are fraught with limitations. In case of ICJ's Chamber of the Court for Environmental Matters (CEM) it has never been used by States as composition of chamber is predetermined and allows no input from the parties to the dispute[52]. In fact many scholars argue that members of the CEM do not have any greater expertise in environmental matters than their colleagues that are non members. So there appears to be little benefit for States to bring a dispute before CEM rather than the full court of the ICJ or an ad hoc chamber[53]. Thus, while the ICJ has established a special chamber for environmental matters, its practical utility is

[49] Amedeo ,Postiglione, (1993) "An International Environmental Court ?", *Environmental Policy and Law*, 23(2):73, p.74-75.
[50] Peddy Rodgers Kalas, (2001), "International Environmental Dispute Resolution and the Need for Access by Non-State Entities", *Colorado Journal of International Environmental Law and Policy*, 12:191, p.210, 219.
[51] Kenneth F, Mc Callion, (2003) "International Environment Justice: Rights and Remedies" *Hastings International and Comparative Law Review*, 26:427, p.434.
[52] Peddy Rodgers Kalas, (2001), "International Environmental Dispute Resolution and the Need for Access by Non-State Entities", *Colorado Journal of International Environmental Law and Policy*, 12:191, p.194-195. See Also, Sean D, Murphy, (2000), "Does the World Need a New International Environment Court?" *George Washington Journal of international Law and Economy*,32:333, p.333,334.
[53] Alfred Rest, (2001), "Peaceful Settlement of Tansnational Environmental Conflicts. Why not by an International Court for the Environment?" , Working Paper for the Conference of Bio Politics International Organization, Athens, p. 4-6.

negligible. Moreover, some of the major decisions of the court involving environmental issues like *Gabcikovo-Nagymores case*[54] reflect the uneasiness of the ICJ in resolving environmental disputes. This apparently seems to be due to its highly technical nature of such cases. It was testifies when for first time in the history of international adjudication the entire court went to the site to judge the facts of case. It is unfortunate that final judgment fell short of detailed exposition concerning core international environmental law issues.

The PCA adopted by consensus the *Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or Environment.* The Rules may, however, be inadequate to address certain new challenges insofar as they simple transplant the UNICITRAL Rules from commercial context to the environmental context[55]. The forum shares a common weakness with all other forums for international disputes in terms of lack of *compulsory* jurisdiction. In addition, there is little transparency in the PCA's dispute resolution process because its decisions are not made available to public inspection[56]. Moreover, no case has been brought yet under the Rules; a full evaluation is yet to be made of actual performance and its impact on international community[57].

In the case of ITLOS it has compulsory jurisdiction. It seems to be illusory as consent of the States is highly qualified. A state may declare in writing that it does not accept any one or more of the compulsory procedure with regard to, among others, disputes concerning maritime boundary limitations, disputes concerning military activities and disputes concerning law enforcement activities in regard to marine scientific research and fisheries in the exclusive economic zone, as well as disputes in respect of which the Security Council is exercising the functions assigned to it by the UN Charter[58]. The fact that the range of disputes subject to the compulsory procedures entailing binding decisions is extremely limited cannot be left of account when one is examining the 1982 UN Convention on Law of the Sea (UNCLOS). The scope for the tribunal to address international environmental disputes is very narrow as nowadays environmental disputes are of multiple dimensions. It deals with limited environmental problems

[54] *GabCikovo-Nagymaros Project (Hungary v. Slovakia),* I. C. J. Reports 1997, p. 7.
[55] Charles, Quiang, (2002) " A Unified Forum? The New Arbitration Rules for Environmental Disputes under Permanent Court of Arbitration" , *Chicago Journal of International Law,* 3:263, p.266.
[56] Peddy Rodgers Kalas, (2001), "International Environmental Dispute Resolution and the Need for Access by Non-State Entities", *Colorado Journal of International Environmental Law and Policy,* 12:191, p.194-195.
[57] *Supra* 54.p. 270.
[58] See Chapter VI, Charter of the United Nations; available at www.un.org

such as fisheries disputes, marine environment disputes, etc. The ITLOS proceedings in *Southern Bluefin Tuna case*[59] underscored that the tribunal's jurisdiction is limited and it will not be in a position to resolve international environmental disputes.

As far as WTO is concerned the track record of its dispute settlement panel in decisions such as *United States -- Restrictions on Imports of Tuna (Tuna Dolphin I and II)* cases[60], *United States -- Standards for Reformulated and Conventional Gasoline (United States -- Reformulated Gasoline*[61]*), United States -- Import Prohibition of Certain Shrimp and Shrimp Products (Shrimp Turtle*[62]*)* leave much to be desired. It not only showed brazenness to impose the trade predominant agenda but also reflected lack of perception to comprehend the basic motto and rationale for multilateral environmental regulatory process. It did raise the question as regards suitability of a trade focused organization for disputes concerning the use of trade measures to realize basic objectives of MEAs. These decisions cumulatively illustrate that environmental problems of a transboundary or global nature are better addressed by a specialized international environment court that promotes uniform environmental standards and a corpus of legal decisions.

MEAs contain standard clause for the settlement of disputes among the parties as used in other treaty contexts with a process for compulsory, binding arbitration and conciliation, judicial settlement, etc. However, while the Parties are bound to follow the process, they need not necessarily accept decision outcomes[63]. The parties have seldom availed themselves of these provisions. MEAs cannot solely ensure an effective international environmental legal system especially since the treaty ratification is voluntary. Moreover, each MEA deals with specific issue and is narrow sectoral in nature.

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[59] Southern Bluefin Tuna Case (N.Z. & Austl v. Japan) (Award on Jurisdiction and Admissibility), 39 I.L.M. 382. See Also, URL:http://www.itlos.org.

[60] GATT Dispute Settlement Panel Report on United States Restrictions on Imports of Tuna, 30 I.L.M. 1594 (1991); GATT Dispute Settlement Panel Report on United States Restrictions on Imports of Tuna, 33 I.L.M. 839 (1994).

[61]35 I.L.M. 603, p. 633 (May 20, 1996).

[62] WTO Report of the Appellate Body, United States – Import Prohibitions of Certain Shrimp and Shrimp Products, 38 I.L.M. 121 (October 12, 1998).

[63] Bharat H.Desai, (2006), "Creeping Institutuionalization: Multilateral Environmental Agreements & Human Security", UNU Institute for Environment and Human Security (UNU-EHS), No.4/2006, p.25.

The enforcement authority of MEAs appears to be weak as much depends upon voluntary compliance[64]. MEAs secretariats' enforcement authority is almost negligible as they are significantly constrained by lack of funding, institutional capacity and international jurisdiction in which to enforce decisions of their Conference of the Parties (COP). The usage of calculated ambiguity also makes enforcement problematic because of difficulty in determining whether state party has met its respective obligations. Moreover, dispute settlement procedures under the auspices of MEAs require nations to relinquish sovereignty and submit to an external dispute resolution authority which many nations are hesitant to do[65].

(F) Fragmentation of International Law

There is also an argument advanced that creation of International Environment Court (IEC) will lead to fragmentation of International Law. The ongoing trend of multiple judicial tribunals will lead to anarchic nature of international judicial system[66]. It is contended that international law lacks centralized structure and there is no hierarchy among international courts and tribunals. The possible result could be inconsistent interpretation of international law and thereby increasing chances of fragmentation. The conflicting jurisprudence will place obstacles in attaining the very coherence which is essential for maintaining the legitimacy of the international judicial system in the eyes of States[67]. Interestingly, Judge Shahabuddeen (ICJ) has pertinently observed that "the absence of hierarchical authority to impose order is a prescription for conflicting precepts."[68]

It is argued that the probability of conflicts of jurisprudence generally contributed by the nature of the constitutive instruments of specialized international tribunals. Each tribunal is created by a specific act and derives its legitimacy from this act without having to refer to activities or events

[64] Peddy Rodgers Kalas, (2001), "International Environmental Dispute Resolution and the Need for Access by Non-State Entities", *Colorado Journal of International Environmental Law and Policy*, 12:191, p.194-195.
[65] *Ibid.*
[66] Shane, Spelliscy, (2001), "The Proliferation of International Tribunals: A Chink in the Armor", *Columbia Journal of Transnational Law*, 40:143, p. 153. See Also, Michael Reisman, (1992), "Systems of Control in International Adjudication and Arbitration: Breakdown and Repair" (*Duke University Press*, Durham, NC), p.5-6.
[67] Gerhard, Hafner, (2004), "Pros and Cons Ensuing From Fragmentation of International Law", *Michigan Journal of International Law*, 25:849, p.851. See Also, Geroges Abi-Saab, (1999), "Fragmentation or Unification: Some Concluding Remarks", *New York University Journal of International law and Politics* ,31:919.
[68] Sir Robert Y. Jennings, (1995), "The Proliferation of Adjudicatory Bodies: Dangers and Possible Answers", *American Society of International Law,* 9:2, p.5.

external to the limited sphere that has been created for it. The absence of any formal structure between the tribunals may reinforce this perceived isolation and lead tribunals to the conclusion that they are completely autonomous sub systems – separate little empires – which are not affected by the behavior and decisions of other sub systems[69].

There also seems to be the perception that each of these tribunals comprises experts in international law who often see no need to refer to views outside of their own to determine a question of international law[70]. It is noted that conflict in case law was far greater because specialized courts tends to favor their own disciplines and make their decisions with reference only to their individual systems rather than paying attention to the effect that conflicts might have on international law in general.[71]

The skeptics do vociferously contend that the advent of a new specialized court for resolution of the environmental disputes could be in a way an addition to already fragmenting character of international law. This seems to be far fetched especially in view of lack 'appropriate' forum for environmental dispute settlement. On the other hand, the proponents of IEC and supporters of multiple international courts and tribunals contend that the so-called proliferation of international tribunals can be seen as evidence of an increased willingness on the part of States to settle their disputes peacefully through subjecting their behavior to the rule of international law.[72] It also serves the purpose of clarifying, expanding and complementing the principles of international law as elucidated by the ICJ.

Apart from this the argument that very little volume of environmental cases are brought by the states before international courts and tribunals also can not provide a ground to rule out case for a new specialized environment court. One could in fact argue on the very fact that a specialized

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[69] Tullio Treves, (1999), "Conflicts Between the International Tribunal for the Law of the Sea and the International Court of Justice", *New York University Journal of International law and Politics* ,31:809, p.809.
[70] Sang Wook Daniel Han, (2006), "Decentralized Proliferation of International Judicial Bodies", *Journal of Transnational Law & Policy,* 16:101, p. 110.
[71] Geroges Abi-Saab, (1999), "Fragmentation or Unification: Some Concluding Remarks", *New York University Journal of International law and Politics* ,31:919.
[72] J.I. Charney (1998), "International Law and Multiple International Tribunals", *Recueil des Cours*, 271:115, p.126. See also, Jonathan I. Charney, (1996), "The Implications of Expanding International Dispute Settlement Systems: the 1982 UN Convention on the Law of Sea", *The American Journal of International Law,* 90:69, pp.73-74.

environmental dispute settlement court is in existence, it provides a forum for peaceful resolution of disputes. If the number of cases are used as a criteria, critics could easily argue for winding up of ICJ since for many years in its early life the Court have had no cases in its docket. The measurement for the existence of proposed IEC could include a viable peaceful settlement of dispute, deterrence to potential violators and even goading the contesting states to resolve their disputes amicably.

ICJ's jurisdiction is limited in scope and function. As a result, many of existing and potential disputes could not be brought before it. As such the bringing into existence of a new specialized environment court could serve to fill the gaps in the jurisprudence of the ICJ[73]. It is argued that having various tribunals able to interpret it and experiment with new rules will expand and improves international law[74]. Furthermore, the lack of a strictly hierarchical system allows international tribunals an opportunity to collectively contribute ideas to international law and facilitates the evaluation of those ideas[75]. An overtly strict hierarchical structure for international decisions could place undesirable constraints on the development of general international law and specialized law for specific areas.

Throughout history of international law a variety of international dispute settlement forums have operated concurrently. This neither changed during the existence of the PCIJ nor since the ICJ became principal judicial organ of the UN. While these other forums sometimes interpret international law differently, the variations do not loom so large that they could possibly undermine the legitimacy of international law or the importance of an international court itself[76]. Notwithstanding the determinations made by the specialized tribunals, the decisions of the ICJ are most significant when they address general international law in a well reasoned judgment or advisory opinion. Since the international tribunals and the participating attorneys usually are well aware of the views of ICJ and other tribunals these decisions are persuasive to the forum before which the same issue arises. Thus, there is significant amount of 'cross fertilization' among the

[73] Jonathan I. Charney, (1999), "The Impact on the International Legal System of the Growth of International Courts and Tribunals", *New York University Journal of International law and Politics* , 31:697, p.704.
[74] *Ibid.*
[75] *Supra* 71.
[76] J.I. Charney, (1993), "Universal International Law", *American Journal of International Law,* 87:529.

tribunals[77]. This cross fertilization is encouraged by the fact that the judges, arbitrators and attorneys are predominantly members of the community of international lawyers who hold common conceptions of the nature, role, and importance of international law[78].

It is also often argued that inconsistent interpretation of international law that it is correct at times these tribunals have diverged on matters of international law. This has not reached troubling levels for several reasons. International law tolerates a certain degree of variation in relations among individual States and group of States. Thus, other than *jus cogens* norms, States parties to treaties are permitted to adopt rules applicable in their relations inter se that vary from general international law[79]. Furthermore, international law permits the development of special regional international law and within limits, allow States parties to modify treaty rights and duties among subgroups. Consequently, variations among tribunals are inherent in the international legal system. The system is designed to permit a certain degree of flexibility in this regard[80].

So from the above arguments it can be said that setting up of IEC would not lead to fragmentation of international law while it may help in improvement and expansion of international law.

(G) Problem of Forum Shopping

It is said that since so many of the international courts and tribunals are able to rule on environmental issues and there is not a superior authority to which the other courts must yield, forum shopping may be a concern. Very often environmental law is interrelated with issues of sovereignty, human rights and especially trade. When a court makes an environmental decision it is often forced to make a decision that has ramifications in other fields[81]. Forum shopping in its

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[77] J.I , Charney,(1998), "International Law and Multiple International Tribunals", *Recueil des Cours*, 271:115, p.130. See Also, A.M.Slaughter, (1994), "A Typology of Transjudicial Communication", *Richmond Law Review,* 29:99.
[78] *Ibid.*

[79] *Supra* n. 75.
[80] Supra 76, p. 356.
[81] Ellen, Hey, (2000), "Reflections on International Environmental Court", (*Kluwer Law International* : The Hague),p.12.

broadest sense is the "exercise of the plaintiff's option to bring a lawsuit in one of several different courts."[82]

Forum shopping can also be defined as the attempt "to have an action tries in a particular court or jurisdiction where one feels one will receive the most favorable judgment or verdict."[83] This favorable judgment or verdict can be result of choosing the most sympathetic substantive law or set of procedural rules. Additionally, when a litigant receives an unfavorable judgment from one court, one case could be adjudicated numerous ways: in the interest of trade by the WTO, in the interest of human rights by the human right tribunals or in the interest of the environment by the proposed IEC. Forums begin competing for cases to advance their subject matter interests[84]. The addition of an IEC to the international adjudicatory arena will add to what has already been termed a 'proliferation' of international courts and tribunals, which may encourage forum shopping.

The supporters of specialized tribunals like IEC seem to take a view that is no reason to believe that specialized tribunals will fail to take account of the appropriate contours and principles of public international law. After all the members of these specialized tribunals belong to the invisible college of international lawyers and thus employ the same analytical framework as do the members of other tribunals[85]. Thus, according to this line of argument there is little reason to believe that members of these tribunals are unaware of the need to develop a consistent body of jurisprudence in order to preserve legitimacy of the system. So even when a litigant changes forums there will be uniformity in the application of general principles of international law. Specialized bodies often look to the ICJ in interpreting the substance and scope of principles of international law. Hence it appears that final judgment will be more or less same in every forum. Further as already mentioned above, strict hierarchy in international law never existed in the past

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[82] Susan M, Hinde,(2004), "The International Environment Court : Its Broad Jurisdiction As Possible Fatal Law" *Hofstra Law Review*,32:1, p.36-37. See Also, Friedrich K.Juenger, (1989), "Forum Shopping, Domestic and International", *Tulane Law Review,* 63:533, p.564.

[83] *Ibid.*

[84] Phillipe Sands, (1999), "International Environmental Litigation and Its Future", *University of Richmond Law Review,* 32:1619, p.1624.

[85] Oscar Schachter, (1977), "The Invisible College of International Lawyers", *Northwestern University Law Review,* 72:217, 217.

and yet the legitimacy of the system has been continually strengthened and not overwhelmed as can be seen by the increased willingness of states to create more tribunals[86].

(H) Potential Advantages of the IEC

The proponents of IEC argue that having such a court is necessary in present global environmental crisis was well it has merits. Advocates of such a court cite the "need for a single international regime that can coordinate uniformity among [domestic and international] environmental laws, provide access to environmental information from a global perspective and provide a forum for non State actors as well as State entities."[87] The potential advantages which the Court can offer include[88]:

(i) IEC will provide a centralized adjudicatory system that is accessible to a range of actors;

(ii) It will usher in era of single integrated judiciary for the resolution of international environmental disputes;

(iii) It will help in establishing a body of law regarding international environmental issues;

(iv) Help in providing consistency in judicial resolution of international environmental disputes;

(v) IEC would not merely be repressive but also preventive and declaratory. As senior Senator pointed out in the motion supporting the creation of an IEC which he and other Senators from all political parties put before the Italian Parliament, "such a body (the Court) shall also perform the task of ascertaining and declaring situations of grave environmental danger, with powers to take preventive actions in the presence of grave natural risks." [89]

(vi) Help in removing deficiencies in environmental expertise, awareness and resources. It is asserted that existing tribunals are not adequately perceptive of international environmental law to make decisions sensitive to global environmental needs. A certain level of expertise of

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[86] J.I , Charney,(1998), "International Law and Multiple International Tribunals", *Recueil des Cours*, 271:115, p.126. See Also, Jonathan I. Charney, (1999), "The Impact on the International Legal System of the Growth of International Courts and Tribunals", *New York University Journal of International law and Politics* , 31:697, p.704.

[87] Peddy Rodgers Kalas, (2001), "International Environmental Dispute Resolution and the Need for Access by Non-State Entities", *Colorado Journal of International Environmental Law and Policy*, 12:191, p.194-195.

[88] *Ibid.* See Also, Susan M, Hinde,(2004), "The International Environment Court : Its Broad Jurisdiction As Possible Fatal Law" *Hofstra Law Review*,32:1, p.17-18.

[89] Amedeo ,Postiglione, (1993) "An International Environmental Court ?", *Environmental Policy and Law*, 23(2):74.

international environmental law is required among judges to be able to make environmentally satisfying decisions. So IEC can be apt step in this direction;

(vii) Expeditious resolution of disputes. In fact "the view is commonly voiced that the existing international organizations are too cumbersome, that they need to become leaner and to have more efficient procedures." Supporters of IEC contend that it can expeditiously resolve transnational environmental disputes;

(viii) The educational role is, also, not to be underestimated because although this is not the direct task of such an institution but as the educational side effects of existing supra national courts have proved in practice to be efficacious in fostering global understanding and awareness in the issues involved in matters before them for adjudication[90];

(ix) Reduction of legal costs;

(x) Global environmental standards of care; and

(xi) Facilitation and enforcement of international environmental treaties[91].

Conclusion

It appears that an IEC would substantially advance the cause of international environmental enforcement and increase the availability of effective global judicial mechanisms. In fact the idea of an IEC is innovative as it results from a mixture of foresight and rationality. What is required is that the institutions begin to move as quickly as the environment itself is moving by filling existing gaps (huge areas of jurisdictional deficiencies in present State system) and by creating defences (by closing the system) at the point where environment damage is at its worst. Though there are many bottlenecks for setting up IEC such as problem in defining international environmental disputes, issue of fragmentation and forum shopping, etc. Nevertheless, many concrete steps have taken in the direction of setting up IEC in form of Draft Convention and Draft Treaty for the establishment of IEC. The idea of having IEC should be supported by scholars, politicians, nongovernmental organizations and civil society groups.

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[90] *Ibid*,p.75.

[91] *Supra* 81.p. 17.

CHAPTER V

CONCLUSION

The question of peaceful settlement of international disputes is an important facet of international law and international relations. In the absence of a credible forum for the purpose, the sovereign states could stray into the troublesome zone of usage of 'force' as an instrument of interstate conduct. As such since the beginning of the last century concerted efforts have attained concrete form to constitute international courts and tribunals that could address the need for dispute resolution among the sovereign states. This question has now drawn attention in the field of environment in view of worsening global environmental crisis as well as growth in the environment related conflicts.

In this work an effort has been made to examine the various international forums that are entrusted with responsibility for resolution of transnational environmental disputes. These international courts and tribunals dealing with environment related matters came into existence a different time in the past more than a century as dictated by prevailing situation at that time. In view of the rapidly changing global scenario and nature of the ecological crisis, a stock-taking seems necessary to examine the relevance and adequacy of the existing structures for the settlement of environmental disputes. As a corollary, the study has also sought to look into the sporadic calls made by scholars as well as some institutions for the establishment of a specialized international court dedicated to the resolution of environmental disputes.

There has been institutionalized global conferencing technique at work. It has been duly conducted by the UN General Assembly for almost past four decades under the calibrated assumption that global problems need global solutions. These conferences (such as 1972 Stockholm Conference, 1992 Rio Earth Summit and 2002 Johannesburg Summit) have brought about a sea change in the awareness and understanding about the nature of the environmental crisis at work as well as put into place a law-making approach that sought to provide a normative framework to grapple with the simmering crisis.

The central issue at stake in the process of global environmental challenges has been the transboundary nature of environmental harm that could form a basis of most of the

environmental disputes. Therefore, any credible international environmental dispute settlement forum could be in a position to address this specific character of origin of cause in one state and its effect in another state. The rapid growth in global environmental problems has contributed in thickening the web of international environmental law (especially through treaty-making). It has, in turn, also contributed in the institutionalization of domestic law. Even as an unprecedented number of sovereign states participate in the international environmental law-making process, they are still genuinely possessive about their cherished sovereignty.

In general, states are guided by their narrow national interest. As such it is a part of a traditional reluctance to allow a third party to adjudicate upon a matter that is regarded as a sovereign prerogative. Unless mandated by a treaty obligation, states could be unwilling to have a recourse to a formal mechanism for settlement of international disputes. This is especially so since a large number of sovereign states consider right to development as an inherent right. As a result the dispute settlement forums generally are forced to examine the 'threshold' arrived at through consensual method of multilateral negotiations. Thus the peculiar nature of environmental disputes (in terms of law-making process, balancing of state interests and the consensual threshold) make them stand apart from other areas of disputes in the field of international law.

In view of the persistent quest of the states for economic development (though exploitation of resources within national jurisdiction) as well as concerns of sovereignty, make it difficult to have recourse of international adjudication forums. In fact the traditional dispute settlement forums could find themselves in an unenviable position to resolve environment related disputes that do not fit into traditional notion of inter-state disputes. The traditional mode of international adjudication in a way becomes an unattractive option for the settlement of disputes especially since it creates a situation in which one is winner and other is loser. Hence, the states could be concerned about fear of losing a case before and international adjudication forum. Further it involves wider implications such as loss of face for the state losing the case. As a result states generally could be unwilling to approach a formal process for resolution of their environment related disputes. Often the stakes could be quite high in terms of legal, political, social and even psychological terms.

The question of so-called compulsory jurisdiction for settlement of environmental disputes still remains primary obstacle since requisite consent proves illusive. In the traditional dispute settlement forums, most of the states prescribe qualifications while accepting 'compulsory' jurisdiction. It can be found that the sovereign states largely remain vary of the formal adjudication processes for resolving environmental disputes.

Nevertheless, it appears, that result oriented dispute resolution mechanisms could alleviate the problems of loss of face and uncertainty of legal principles that plague international adjudication today. There are, however, cases when the States could overcome these fears and possibly consider judicial settlement as a better option than use of force (*Libya v. Malta*). Further, international courts could provide forum for interested parties under through alternative methods to attain jurisdiction rather than so-called compulsory jurisdiction as it was experimented in *Gulf of Maine case.*

At the international level, there are several courts and tribunals that offer forums for adjudication of international environmental disputes. Interestingly, none of the forums were established specifically for resolution of environmental disputes. In fact they (e.g. ICJ) could deal with any dispute within the ambit of public international law. It is a fact that these existing dispute settlement forums came into existence for some historical reasons. The International Court of Justice (ICJ) during its long history (including its predecessor PCIJ) has come across cases involving environmental elements such as *Nuclear Tests case (1974), Legality of the Threat or Use of Nuclear Weapon (1996)* and importantly *Case Concerning the Gabcikovo-Nagymores Project (1997).* These cases were adjudicated upon by the court like any normal dispute in the field of international law. Since environment remained a peripheral concern, the courts approach was not different then other cases in its docket. The fragility and difficulty in resolving a proper environment related dispute came to the fore in the *Gabcikovo-Nagymores* case. As a testimony to the practical limitations of a general court dealing with environmental issue was revealed when for the first time the entire court decided to visit the disputed project site. It did underscore limitations of ICJ to grapple with an environmental dispute.
The ICJ judgment in the said case appears to have fallen short of detailed exposition especially relating to environmental law (not merely concerning breach of a treaty obligation). The court

did demonstrate an understanding of the unique difficulties presented by environmental issues, of the existence of various standards to be applied and of an indication as to how these could be applied to facts. Thus, the above mentioned three decisions of ICJ have taken a step toward bringing environmental considerations into the mainstream international law. The decisions, however, do not seem to fill the gaps left by treaty negotiators and do not contribute to the much needed development of the environmental law by way of judicial insight.

Permanent Court of Arbitration (PCA) is the oldest institution dedicated to resolving international disputes. The PCA administers dispute settlement through conciliation, mediation, good offices, commissions of inquiry and arbitration, based on the United Nations Commission on International Trade Law (UNICITRAL) Arbitration Rules or Conciliation Rules. The PCA has jurisdiction over disputes when at least one party is a State (or an organization of States) and when both parties to the dispute expressly agree to submit their dispute to the PCA for resolution. In an interesting development concerning protection of environment, the PCA adopted by consensus the Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or Environment (2001). These Optional Rules seek to provide innovative features such as they permit greater flexibility in the nature and number of parties that may engage in arbitration. However, the Rules may be inadequate to address certain new challenges insofar as they simple transplant the UNICITRAL Rules from commercial context to the environmental context. Moreover, the forum shares a common weakness with all other forums for international disputes; the lack of compulsory jurisdiction. States and private parties may choose not participate in the PCA's resolution process.

The International Tribunal on Law of Sea (ITLOS) provides for compulsory jurisdiction but it is highly qualified. As a state may declare in writing that it does not accept any one or more of the compulsory procedure with regard to, among others, disputes concerning sea boundary limitations, disputes concerning military activities and disputes concerning law enforcement activities in regard to marine scientific research and fisheries in the exclusive economic zone, as well as disputes in respect of which the Security Council is exercising the functions assigned to it by the UN Charter. However, the range of disputes subject to the compulsory procedures entailing binding decisions is extremely limited. As far as settlement of environment related

disputes is concerned, the scope of the tribunal competence is limited. It deals with limited environmental problems such as fisheries disputes, marine environment disputes, etc. while these days' environmental disputes are not only transnational but also multidimensional. It became quite evident in the ITLOS's decision in *Southern Bluefin Tuna case* where it felt compelled to admit lack of jurisdiction.

The World Trade Organization (WTO) has also emerged as a forum that seems to deal with environment related matters especially due to hard-headed trade considerations. It by no means could be said to be guided by environmental decisions. As a result, the decisions by WTO dispute settlement forum, however, raise the question whether a trade focused organization is the appropriate forum for disputes concerning environment. Its handling of environmental issues in *United States -- Restrictions on Imports of Tuna (Tuna Dolphin I and II)* cases, *United States -- Standards for Reformulated and Conventional Gasoline (United States -- Reformulated Gasoline)* and *United States -- Import Prohibition of Certain Shrimp and Shrimp Products (Shrimp Turtle* etc. cases could at best be regarded as an aberration. WTO's dispute resolution in above mentioned cases reinforces the tendency to subordinate environmental considerations to trade interests. The above mentioned decisions illustrate that environmental problems of transboundary or global nature are better addressed by an international environmental organization and related court that could promote uniform environmental standards and a body of legal decisions. The underlying ideas behind the WTO as an environmental regulatory organization are impracticable given the polar objectives of trade and environment protection. Although trade policies influence environmental ones and vice versa the polar political agendas of the two cannot be reconciled.

Multilateral Environment Agreements (MEAs) are considered to be legally binding agreement between sovereign States related to the environment. MEAs have emerged as "predominant legal methods for addressing environmental problems that cross national boundaries". Most MEAs will include provision for the settlement of disputes among the Parties, based on standard clause used in other treaty contexts, with a process for compulsory, binding arbitration and conciliation, judicial settlement, etc. However these provisions have remained on paper only and there is no mechanism to implement the same. As most of MEAs are negotiated, ratified and binding only

among nations and disallow standing for non State actors or private entities. The reservations and/or declarations to specific environmental principles are other major road blocks in effective implementation. With no centralized regulatory body to enforce MEAs the effectiveness of international agreements depends to a great extent on voluntary compliance. So compliance with a particular commitment that is contrary to a nation's interests (economic or sociopolitical reason) is less likely to be enforced by that nation. Moreover, dispute settlement procedures under the auspices of MEAs require nations to relinquish sovereignty and submit to an external dispute resolution authority which many nations are hesitant to do.

Thus, it seems, none of the existing formal dispute settlement structures carry the specialized arrangement for the settlement of international environmental disputes. Though they do possess some strength, however, their weaknesses outweigh the strength. As a result the cumulative effect has been aversion on the part of the sovereign states not to make use of the existing structure (e.g. Permanent Court of Arbitration), rarely resorted to (e.g. International Court of Justice), referred to for specific consideration (e.g. WTO Dispute Settlement Body; International Tribunal on Law of the Sea) or have almost been neglected or remain a non starter (e.g. MEAs dispute settlement provisions). It seems these considerations have do, in turn, provide strong justification and rationale for a concerted quest for having a specialized International Environmental Court (IEC).

This quest for IEC has been doing the rounds for almost two decades. It appears to be the product of need based responses technique that international community has been pursuing from time to time in various area of international law. It is reminiscent of a similar quest for adjudication of criminal matters through International Criminal Court (ICC). The proposal for a new independent and specialized court was made as early as in 1989 in Hague Declaration. The concrete steps for the establishment of International Environmental Court (IEC) were in the form of Draft Convention and Draft Treaty. In 2002 UNEP Global Judges Symposium also discussed need for an independent judiciary which can fearlessly provide environmental justice. The Draft Treaty provides in detail provisions regarding composition and functions of the Court, Standing and jurisdiction, applicable law, financing etc.

The issue of establishing International Environmental Court (IEC) is globally debated among the scholars and practioners. The proponents of the IEC have marshaled the arguments that include: many pressing environmental problems that humans are facing; the need for a bench consisting of experts in international environmental law to consider these problems; the need for international organizations to be able to be parties to disputes related to the protection of environment; the need for individuals and groups to have access to environmental justice at the international level and need for dispute settlement procedures that enable the common interest in the environment to be addressed justify setting up of IEC. Prima facie these arguments seem to have strong merit.

On the other hand side it is argued that IEC will lead to fragmentation of international law. It is contended that international law lacks centralized structure and there is no hierarchy among international courts and tribunals. The result would be inconsistent interpretation of international law and thereby increasing chances of fragmentation. This phenomenon, however, is seen more with respect to specialized tribunals. The each specialized tribunal is created by a specific act and derives its legitimacy from this act without having to refer to activities or events external to the limited sphere that has been created for it. The absence of any formal structure between the tribunals may reinforce this perceived isolation and lead tribunals to the conclusion that they are completely autonomous sub-systems such as 'separate little empires' which are not affected by the behavior and decisions of other sub systems.

It appears that in the existing maze of courts and tribunals, environment related cases are left almost orphaned. This is cumulative result of the not only crisis of perception but also limitations as regards environmental issues remaining mere peripheral concerns. Hence, if the sovereign states are to take the global environmental crisis seriously as well as prepare themselves for specialized forum for resolution of international environmental disputes, they will need to take cognizance of the quest for an international environmental court. In this context, the concerns as regards so-called fragmentation are misplaced. Advent of such a specialized IEC will be merely an extension of the institutionalized international environmental cooperation that the sovereign states are already practicing.

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ANNEXURES

STATUTE
OF THE
INTERNATIONAL COURT OF JUSTICE

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Article 1

The International Court of Justice established by the Charter of the United Nations as the principal judicial organ of the United Nations shall be constituted and shall function in accordance with the provisions of the present Statute.

CHAPTER I - ORGANIZATION OF THE COURT

Article 2

The Court shall be composed of a body of independent judges, elected regardless of their nationality from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law.

Article 3

1. The Court shall consist of fifteen members, no two of whom may be nationals of the same state.

2. A person who for the purposes of membership in the Court could be regarded as a national of more than one state shall be deemed to be a national of the one in which he ordinarily exercises civil and political rights.

Article 4

1. The members of the Court shall be elected by the General Assembly and by the Security Council from a list of persons nominated by the national groups in the Permanent Court of Arbitration, in accordance with the following provisions.

2. In the case of Members of the United Nations not represented in the Permanent Court of Arbitration, candidates shall be nominated by national groups appointed for this purpose by their governments under the same conditions as those prescribed for members of the Permanent Court of Arbitration by Article 44 of the Convention of The Hague of 1907 for the pacific settlement of international disputes.

3. The conditions under which a state which is a party to the present Statute but is not a Member of the United Nations may participate in electing the members of the Court shall, in the absence of a special agreement, be laid down by the General Assembly upon recommendation of the Security Council.

Article 5

1. At least three months before the date of the election, the Secretary-General of the United Nations shall address a written request to the members of the Permanent Court of Arbitration belonging to the states which are parties to the present Statute, and to the members of the national groups appointed under Article 4, paragraph 2, inviting them to undertake, within a given time, by national groups, the nomination of persons in a position to accept the duties of a member of the Court.

2. No group may nominate more than four persons, not more than two of whom shall be of their own nationality. In no case may the number of candidates nominated by a group be more than double the number of seats to be filled.

Article 6

Before making these nominations, each national group is recommended to consult its highest court of justice, its legal faculties and schools of law, and its national academies and national sections of international academies devoted to the study of law.

Article 7

1. The Secretary-General shall prepare a list in alphabetical order of all the persons thus nominated. Save as provided in Article 12, paragraph 2, these shall be the only persons eligible.

2. The Secretary-General shall submit this list to the General Assembly and to the Security Council.

Article 8

The General Assembly and the Security Council shall proceed independently of one another to elect the members of the Court.

Article 9

At every election, the electors shall bear in mind not only that the persons to be elected should individually possess the qualifications required, but also that in the body as a whole the representation of the main forms of civilization and of the principal legal systems of the world should be assured.

Article 10

1. Those candidates who obtain an absolute majority of votes in the General Assembly and in the Security Council shall be considered as elected.

2. Any vote of the Security Council, whether for the election of judges or for the appointment of members of the conference envisaged in Article 12, shall be taken without any distinction between permanent and non-permanent members of the Security Council.

3. In the event of more than one national of the same state obtaining an absolute majority of the votes both of the General Assembly and of the Security Council, the eldest of these only shall be considered as elected.

Article 11

If, after the first meeting held for the purpose of the election, one or more seats remain to be filled, a second and, if necessary, a third meeting shall take place.

Article 12

1. If, after the third meeting, one or more seats still remain unfilled, a joint conference consisting of six members, three appointed by the General Assembly and three by the Security Council, may be formed at any time at the request of either the General Assembly or the Security Council, for the purpose of choosing by the vote of an absolute majority one name for each seat still vacant, to submit to the General Assembly and the Security Council for their respective acceptance.

2. If the joint conference is unanimously agreed upon any person who fulfills the required conditions, he may be included in its list, even though he was not included in the list of nominations referred to in Article 7.

3. If the joint conference is satisfied that it will not be successful in procuring an election, those members of the Court who have already been elected shall, within a period to be fixed by the Security Council, proceed to fill the vacant seats by selection from among those candidates who have obtained votes either in the General Assembly or in the Security Council.

4. In the event of an equality of votes among the judges, the eldest judge shall have a casting vote.

Article 13

1. The members of the Court shall be elected for nine years and may be re-elected; provided, however, that of the judges elected at the first election, the terms of five judges shall expire at the end of three years and the terms of five more judges shall expire at the end of six years.

2. The judges whose terms are to expire at the end of the above-mentioned initial periods of three and six years shall be chosen by lot to be drawn by the Secretary-General immediately after the first election has been completed.

3. The members of the Court shall continue to discharge their duties until their places have been filled. Though replaced, they shall finish any cases which they may have begun.

4. In the case of the resignation of a member of the Court, the resignation shall be addressed to the President of the Court for transmission to the Secretary-General. This last notification makes the place vacant.

Article 14

Vacancies shall be filled by the same method as that laid down for the first election, subject to the following provision: the Secretary-General shall, within one month of the occurrence of the vacancy, proceed to issue the invitations provided for in Article 5, and the date of the election shall be fixed by the Security Council.

Article 15

A member of the Court elected to replace a member whose term of office has not expired shall hold office for the remainder of his predecessor's term.

Article 16

1. No member of the Court may exercise any political or administrative function, or engage in any other occupation of a professional nature.

2. Any doubt on this point shall be settled by the decision of the Court.

Article 17

1. No member of the Court may act as agent, counsel, or advocate in any case.

2. No member may participate in the decision of any case in which he has previously taken part as agent, counsel, or advocate for one of the parties, or as a member of a national or international court, or of a commission of enquiry, or in any other capacity.

3. Any doubt on this point shall be settled by the decision of the Court.

Article 18

1. No member of the Court can be dismissed unless, in the unanimous opinion of the other members, he has ceased to fulfill the required conditions.

2. Formal notification thereof shall be made to the Secretary-General by the Registrar.

3. This notification makes the place vacant.

Article 19

The members of the Court, when engaged on the business of the Court, shall enjoy diplomatic privileges and immunities.

Article 20

Every member of the Court shall, before taking up his duties, make a solemn declaration in open court that he will exercise his powers impartially and conscientiously.

Article 21

1. The Court shall elect its President and Vice-President for three years; they may be re-elected.

2. The Court shall appoint its Registrar and may provide for the appointment of such other officers as may be necessary.

Article 22

1. The seat of the Court shall be established at The Hague. This, however, shall not prevent the Court from sitting and exercising its functions elsewhere whenever the Court considers it desirable.

2. The President and the Registrar shall reside at the seat of the Court.

Article 23

1. The Court shall remain permanently in session, except during the judicial vacations, the dates and duration of which shall be fixed by the Court.

2. Members of the Court are entitled to periodic leave, the dates and duration of which shall be fixed by the Court, having in mind the distance between The Hague and the home of each judge.

3. Members of the Court shall be bound, unless they are on leave or prevented from attending by illness or other serious reasons duly explained to the President, to hold themselves permanently at the disposal of the Court.

Article 24

1. If, for some special reason, a member of the Court considers that he should not take part in the decision of a particular case, he shall so inform the President.

2. If the President considers that for some special reason one of the members of the Court should not sit in a particular case, he shall give him notice accordingly.

3. If in any such case the member Court and the President disagree, the matter shall be settled by the decision of the Court.

Article 25

1. The full Court shall sit except when it is expressly provided otherwise in the present Statute.

2. Subject to the condition that the number of judges available to constitute the Court is not thereby reduced below eleven, the Rules of the Court may provide for allowing one or more judges, according to circumstances and in rotation, to be dispensed from sitting.

3. A quorum of nine judges shall suffice to constitute the Court.

Article 26

1. The Court may from time to time form one or more chambers, composed of three or more judges as the Court may determine, for dealing with particular categories of cases; for example, labour cases and cases relating to transit and communications.

2. The Court may at any time form a chamber for dealing with a particular case. The number of judges to constitute such a chamber shall be determined by the Court with the approval of the parties.

3. Cases shall be heard and determined by the chambers provided for in this article if the parties so request.

Article 27

A judgment given by any of the chambers provided for in Articles 26 and 29 shall be considered as rendered by the Court.

Article 28

The chambers provided for in Articles 26 and 29 may, with the consent of the parties, sit and exercise their functions elsewhere than at The Hague.

Article 29

With a view to the speedy dispatch of business, the Court shall form annually a chamber composed of five judges which, at the request of the parties, may hear and determine cases by summary procedure. In addition, two judges shall be selected for the purpose of replacing judges who find it impossible to sit.

Article 30

1. The Court shall frame rules for carrying out its functions. In particular, it shall lay down rules of procedure.

2. The Rules of the Court may provide for assessors to sit with the Court or with any of its chambers, without the right to vote.

Article 31

1. Judges of the nationality of each of the parties shall retain their right to sit in the case before the Court.

2. If the Court includes upon the Bench a judge of the nationality of one of the parties, any other party may choose a person to sit as judge. Such person shall be chosen preferably from among those persons who have been nominated as candidates as provided in Articles 4 and 5.

3. If the Court includes upon the Bench no judge of the nationality of the parties, each of these parties may proceed to choose a judge as provided in paragraph 2 of this Article.

4. The provisions of this Article shall apply to the case of Articles 26 and 29. In such cases, the President shall request one or, if necessary, two of the members of the Court forming the chamber to give place to the members of the Court of the nationality of the parties concerned, and, failing such, or if they are unable to be present, to the judges specially chosen by the parties.

5. Should there be several parties in the same interest, they shall, for the purpose of the preceding provisions, be reckoned as one party only. Any doubt upon this point shall be settled by the decision of the Court.

6. Judges chosen as laid down in paragraphs 2, 3, and 4 of this Article shall fulfill the conditions required by Articles 2, 17 (paragraph 2), 20, and 24 of the present Statute. They shall take part in the decision on terms of complete equality with their colleagues.

Article 32

1. Each member of the Court shall receive an annual salary.

2. The President shall receive a special annual allowance.

3. The Vice-President shall receive a special allowance for every day on which he acts as President.

4. The judges chosen under Article 31, other than members of the Court, shall receive compensation for each day on which they exercise their functions.

5. These salaries, allowances, and compensation shall be fixed by the General Assembly. They may not be decreased during the term of office.

6. The salary of the Registrar shall be fixed by the General Assembly on the proposal of the Court.

7. Regulations made by the General Assembly shall fix the conditions under which retirement pensions may be given to members of the Court and to the Registrar, and the conditions under which members of the Court and the Registrar shall have their travelling expenses refunded.

8. The above salaries, allowances, and compensation shall be free of all taxation.

Article 33

The expenses of the Court shall be borne by the United Nations in such a manner as shall be decided by the General Assembly.

CHAPTER II - COMPETENCE OF THE COURT

Article 34

1. Only states may be parties in cases before the Court.

2. The Court, subject to and in conformity with its Rules, may request of public international organizations information relevant to cases before it, and shall receive such information presented by such organizations on their own initiative.

3. Whenever the construction of the constituent instrument of a public international organization or of an international convention adopted thereunder is in question in a case before the Court, the Registrar shall so notify the public international organization concerned and shall communicate to it copies of all the written proceedings.

Article 35

1. The Court shall be open to the states parties to the present Statute.

2. The conditions under which the Court shall be open to other states shall, subject to the special provisions contained in treaties in force, be laid down by the Security Council, but in no case shall such conditions place the parties in a position of inequality before the Court.

3. When a state which is not a Member of the United Nations is a party to a case, the Court shall fix the amount which that party is to contribute towards the expenses of the Court. This provision shall not apply if such state is bearing a share of the expenses of the Court

Article 36

1. The jurisdiction of the Court 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.

2. The states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:

a. the interpretation of a treaty;

b. any question of international law;

c. the existence of any fact which, if established, would constitute a breach of an international obligation;

d. the nature or extent of the reparation to be made for the breach of an international obligation.

3. The declarations referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain states, or for a certain time.

4. Such declarations shall be deposited with the Secretary-General of the United Nations, who shall transmit copies thereof to the parties to the Statute and to the Registrar of the Court.

5. Declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed, as between the parties to the present Statute, to be acceptances of the compulsory jurisdiction of the International Court of Justice for the period which they still have to run and in accordance with their terms.

6. In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.

Article 37

Whenever a treaty or convention in force provides for reference of a matter to a tribunal to have been instituted by the League of Nations, or to the Permanent Court of International Justice, the matter shall, as between the parties to the present Statute, be referred to the International Court of Justice.

Article 38

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

b. international custom, as evidence of a general practice accepted as law;

c. the general principles of law recognized by civilized nations;

d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

CHAPTER III - PROCEDURE

Article 39

1. The official languages of the Court shall be French and English. If the parties agree that the case shall be conducted in French, the judgment shall be delivered in French. If the parties agree that the case shall be conducted in English, the judgment shall be delivered in English.

2. In the absence of an agreement as to which language shall be employed, each party may, in the pleadings, use the language which it prefers; the decision of the Court shall be given in French and English. In this case the Court shall at the same time determine which of the two texts shall be considered as authoritative.

3. The Court shall, at the request of any party, authorize a language other than French or English to be used by that party.

Article 40

1. Cases are brought before the Court, as the case may be, either by the notification of the special agreement or by a written application addressed to the Registrar. In either case the subject of the dispute and the parties shall be indicated.

2. The Registrar shall forthwith communicate the application to all concerned.

3. He shall also notify the Members of the United Nations through the Secretary-General, and also any other states entitled to appear before the Court.

Article 41

1. The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party.

2. Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and to the Security Council.

Article 42

1. The parties shall be represented by agents.

2. They may have the assistance of counsel or advocates before the Court.

3. The agents, counsel, and advocates of parties before the Court shall enjoy the privileges and immunities necessary to the independent exercise of their duties.

Article 43

1. The procedure shall consist of two parts: written and oral.

2. The written proceedings shall consist of the communication to the Court and to the parties of memorials, counter-memorials and, if necessary, replies; also all papers and documents in support.

3. These communications shall be made through the Registrar, in the order and within the time fixed by the Court.

4. A certified copy of every document produced by one party shall be communicated to the other party.

5. The oral proceedings shall consist of the hearing by the Court of witnesses, experts, agents, counsel, and advocates.

Article 44

1. For the service of all notices upon persons other than the agents, counsel, and advocates, the Court shall apply direct to the government of the state upon whose territory the notice has to be served.

2. The same provision shall apply whenever steps are to be taken to procure evidence on the spot.

Article 45

The hearing shall be under the control of the President or, if he is unable to preside, of the Vice-President; if neither is able to preside, the senior judge present shall preside.

Article 46

The hearing in Court shall be public, unless the Court shall decide otherwise, or unless the parties demand that the public be not admitted .

Article 47

1. Minutes shall be made at each hearing and signed by the Registrar and the President.

2. These minutes alone shall be authentic.

Article 48

The Court shall make orders for the conduct of the case, shall decide the form and time in which each party must conclude its arguments, and make all arrangements connected with the taking of evidence.

Article 49

The Court may, even before the hearing begins, call upon the agents to produce any document or to supply any explanations. Formal note shall be taken of any refusal.

Article 50

The Court may, at any time, entrust any individual, body, bureau, commission, or other organization that it may select, with the task of carrying out an enquiry or giving an expert opinion.

Article 51

During the hearing any relevant questions are to be put to the witnesses and experts under the conditions laid down by the Court in the rules of procedure referred to in Article 30.

Article 52

After the Court has received the proofs and evidence within the time specified for the purpose, it may refuse to accept any further oral or written evidence that one party may desire to present unless the other side consents.

Article 53

1. Whenever one of the parties does not appear before the Court, or fails to defend its case, the other party may call upon the Court to decide in favour of its claim.

2. The Court must, before doing so, satisfy itself, not only that it has jurisdiction in accordance with Articles 36 and 37, but also that the claim is well founded in fact and law.

Article 54

1. When, subject to the control of the Court, the agents, counsel, and advocates have completed their presentation of the case, the President shall declare the hearing closed.

2. The Court shall withdraw to consider the judgment.

3. The deliberations of the Court shall take place in private and remain secret.

Article 55

1. All questions shall be decided by a majority of the judges present.

2. In the event of an equality of votes, the President or the judge who acts in his place shall have a casting vote.

Article 56

1. The judgment shall state the reasons on which it is based.

2. It shall contain the names of the judges who have taken part in the decision.

Article 57

If the judgment does not represent in whole or in part the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion.

Article 58

The judgment shall be signed by the President and by the Registrar. It shall be read in open court, due notice having been given to the agents.

Article 59

The decision of the Court has no binding force except between the parties and in respect of that particular case.

Article 60

The judgment is final and without appeal. In the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party.

Article 61

1. An application for revision of a judgment may be made only when it is based upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Court and also to the party claiming revision, always provided that such ignorance was not due to negligence.

2. The proceedings for revision shall be opened by a judgment of the Court expressly recording the existence of the new fact, recognizing that it has such a character as to lay the case open to revision, and declaring the application admissible on this ground.

3. The Court may require previous compliance with the terms of the judgment before it admits proceedings in revision.

4. The application for revision must be made at latest within six months of the discovery of the new fact.

5. No application for revision may be made after the lapse of ten years from the date of the judgment.

Article 62

I. Should a state consider that it has an interest of a legal nature which may be affected by the decision in the case, it may submit a request to the Court to be permitted to intervene.

2 It shall be for the Court to decide upon this request.

Article 63

1. Whenever the construction of a convention to which states other than those concerned in the case are parties is in question, the Registrar shall notify all such states forthwith.

2. Every state so notified has the right to intervene in the proceedings; but if it uses this right, the construction given by the judgment will be equally binding upon it.

Article 64

Unless otherwise decided by the Court, each party shall bear its own costs.

CHAPTER IV - ADVISORY OPINIONS

Article 65

1. The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request.

2. Questions upon which the advisory opinion of the Court is asked shall be laid before the Court by means of a written request containing an exact statement of the question upon which an opinion is required, and accompanied by all documents likely to throw light upon the question.

Article 66

1. The Registrar shall forthwith give notice of the request for an advisory opinion to all states entitled to appear before the Court.

2. The Registrar shall also, by means of a special and direct communication, notify any state entitled to appear before the Court or international organization considered by the Court, or, should it not be sitting, by the President, as likely to be able to furnish information on the question, that the Court will be prepared to receive, within a time-limit to be fixed by the President, written statements, or to hear, at a public sitting to be held for the purpose, oral statements relating to the question.

3. Should any such state entitled to appear before the Court have failed to receive the special communication referred to in paragraph 2 of this Article, such state may express a desire to submit a written statement or to be heard; and the Court will decide.

4. States and organizations having presented written or oral statements or both shall be permitted to comment on the statements made by other states or organizations in the form, to the extent, and within the time-limits which the Court, or, should it not be sitting, the President, shall decide in each particular case. Accordingly, the Registrar shall in due time communicate any such written statements to states and organizations having submitted similar statements.

Article 67

The Court shall deliver its advisory opinions in open court, notice having been given to the Secretary-General and to the representatives of Members of the United Nations, of other states and of international organizations immediately concerned.

Article 68

In the exercise of its advisory functions the Court shall further be guided by the provisions of the present Statute which apply in contentious cases to the extent to which it recognizes them to be applicable.

CHAPTER V - AMENDMENT

Article 69

Amendments to the present Statute shall be effected by the same procedure as is provided by the Charter of the United Nations for amendments to that Charter, subject however to any provisions which the General Assembly upon recommendation of the Security Council may adopt concerning the participation of states which are parties to the present Statute but are not Members of the United Nations.

Article 70

The Court shall have power to propose such amendments to the present Statute as it may deem necessary, through written communications to the Secretary-General, for consideration in conformity with the provisions of Article 69.

PERMANENT COURT OF ARBITRATION

OPTIONAL RULES FOR CONCILIATION OF DISPUTES RELATING TO NATURAL RESOURCES AND/OR THE ENVIRONMENT

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INTRODUCTION

The Rules are based primarily on the PCA Conciliation Rules and UNCITRAL Conciliation Rules[1] with changes in order to:

(i) reflect the public international law element which pertains to disputes which may involve States, utilization of natural resources and environmental protection issues, and international practice appropriate to such disputes;

(ii) reflect the particular characteristics of disputes having a natural resources conservation or environmental protection component;

(iii) indicate the role of the Secretary-General and the International Bureau of the Permanent Court of Arbitration (PCA) at The Hague; and

(iv) provide freedom for the parties to choose to have a conciliation commission of one, three, or five persons.

The Rules are optional and emphasize flexibility and party autonomy. For example:

(i) The Rules, and the services of the Secretary-General and the International Bureau of the PCA, are available for use by private parties, other entities existing under national or international law, international organizations, and States;

(ii) The Rules may be used in relation to disputes between two or more States parties to a multilateral agreement relating to access to and utilization of natural resources concerning the interpretation or application of that agreement;

(iii) The parties are free to choose conciliators from the PCA Panel of Arbitrators constituted under the PCA Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment, or Members of the PCA;

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[1] Other procedures consulted were the WIPO Mediation Rules, the ICSID Conciliation Rules, conciliation procedures in the United Nations Convention on the Law of the Sea, the United Nations Convention on Biological Diversity, and the Rotterdam Convention. The PCA Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment also provided guidance for the development of these rules. See the Introduction to the PCA Optional Conciliation Rules at pages 151-153, for additional general information on the use of conciliation procedures.

(iv) The parties are free to choose expert witnesses from the PCA Panel of Scientific and Technical Experts constituted under the PCA Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment;

(v) The choice of conciliators or experts is not limited to PCA Panels;

(vi) The parties have complete freedom to agree upon any individual or institution to make appointments. In order to provide a failsafe mechanism to prevent frustration or delay of the conciliation, the Rules provide that the Secretary-General will make appointments if the parties do not agree upon such a person or institution, or if that person or institution chosen does not act.

Mindful of the possibility of multiparty involvement in disputes having a conservation or environmental component, these Rules provide specifically for multiparty choice of conciliators and sharing of costs. In the case of multiparty conciliation, all other articles should be interpreted in an analogous fashion. The framers of existing and future agreements may need to determine the relationship between these Rules and such agreements, and may modify them as necessary. Modifications to these Rules or such agreements as to jurisdiction *ratione personae* may be especially necessary to allow for the participation of non-state actors.

In some places these Rules refer to an 'obligation to conciliate.' This reference was intended to ensure harmony between these Rules and existing agreements that might require compulsory conciliation, or court decisions requiring parties to conciliate.

Consideration should be given to the method of implementing and enforcing a settlement agreement. UNCITRAL has recently considered various methods in the Report of the Working Group on Arbitration on the work of its thirty-fifth session (A/CN.9/506 2001). One method is that the settlement agreement could be stipulated to be binding and enforceable as a contract. Another is for an arbitral tribunal to be appointed to record the settlement agreement in the form of an arbitral award on agreed terms. Parties could also adapt the present rules to stipulate that the settlement agreement be binding and final as an arbitral award, however consideration must first be given to possible legislative changes necessary to render settlement agreements final and binding as arbitral awards.

Parties may choose to include a clause allowing for the option of referring the dispute being conciliated to arbitration; a model clause for this purpose is set forth at page 243.

PERMANENT COURT OF ARBITRATION OPTIONAL RULES FOR CONCILIATION OF DISPUTES RELATING TO NATURAL RESOURCES AND/OR THE ENVIRONMENT

Effective April 16, 2002

Scope of Application

Article 1

1. These Rules apply to conciliation of disputes relating to natural resources and/or the environment. For the purposes of these Rules, 'conciliation' means a process whereby parties request a third person, or a panel of persons, to assist them in their attempt to reach an amicable settlement of their dispute relating to natural resources and/or the environment. The characterization of the dispute as relating to the environment or natural resources is not necessary for application of these Rules, where all the parties have agreed to settle a specific dispute under these Rules.

2. Such disputes shall be conciliated in accordance with these Rules subject to such modification as the parties may, at any time, expressly agree upon in writing, unless such modification is excluded by the agreement under which the dispute arises or the agreement to conciliate. The expression 'agree upon in writing' includes provisions in agreements, contracts, conventions, treaties, the constituent instrument of an international organization or agency or reference upon consent of the parties by a court. For the purposes of this and all following articles, 'writing' may include electronic methods of communication in accordance with accepted international practice.

Commencement of Conciliation Proceedings

Article 2

1. The party[2] initiating conciliation shall send to the other party, with a copy thereof to the International Bureau of the Permanent Court of Arbitration (the 'International Bureau') a written invitation to conciliate under these Rules, including as appropriate:

(a) the names, addresses and telephone, or other communication references of the parties to the dispute and of the representative of the party filing the invitation;

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[2] Words used in the singular include the plural and vice-versa as the context may require.

(b) a reference to the agreement under which this invitation arose;

(c) a reference to any rule, decision, agreement, contract, convention, treaty, or instrument of an organization or agency, under which the dispute arises;

(d) a reference to the general nature of the dispute which led to the invitation.

2. (a) Conciliation proceedings commence when the other party accepts the invitation to conciliate, or when the invitation reaches the other party in the event there is an obligation to conciliate.

(b) If the party initiating conciliation does not receive a reply within thirty days from the date on which it sends the invitation, or within such longer period of time as specified in the invitation, it may elect to treat this as a rejection of the invitation to conciliation. The initiating party shall inform the other party of any such decision.

3. The International Bureau shall take charge of the archives of the conciliation commission (as meant in article 4) unless the parties otherwise agree. In addition, upon written request of the parties or the conciliation commission, the International Bureau shall act as a channel of communication between the parties and the conciliation commission, provide administrative and secretariat services, and/or serve as Registry.

Number of Conciliators[3]

Article 3

There shall be one conciliator unless the parties agree on three or five conciliators. As a general rule, where there is more than one conciliator, they ought to act jointly.

Appointment of Conciliators

Article 4

1. (a) In conciliation proceedings with one conciliator, the parties shall endeavour to reach agreement on the name of a sole conciliator within sixty days after commencement of the conciliation proceedings;

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[3] In this and all following articles, the term 'conciliator' applies to a sole conciliator or all conciliators where more than one are appointed, and the term 'conciliation commission' means a sole conciliator or all conciliators where more than one are appointed.

(b) In conciliation proceedings with three conciliators, each party appoints one conciliator within sixty days after commencement of conciliation proceedings, communicating the name of the conciliator to the other party and the International Bureau, and within thirty days thereafter, the two conciliators thus appointed shall choose a third conciliator to act as president of the conciliation commission;

(c) In conciliation proceedings with five conciliators, each party appoints two conciliators within sixty days after commencement of conciliation proceedings, communicating the names of the conciliators to the other party and the International Bureau, and within thirty days thereafter, the four conciliators thus appointed shall choose a fifth conciliator to act as president of the conciliation commission;

(d) If after sixty days, as set out in sub-paragraphs (a), (b) and (c) above, the parties have not agreed on a sole conciliator, or a party has not appointed its conciliator, the Secretary-General of the Permanent Court of Arbitration (the 'Secretary-General') shall notify the parties and make such appointment within thirty days;

(e) In addition, if after thirty days, as set out in sub-paragraphs (b) and (c) above, the party-appointed conciliators have not chosen a president, the Secretary-General shall notify the parties and make such appointment within thirty days.

2. Parties may enlist the assistance of an appropriate institution or person in connection with the appointment of conciliators. In particular,

(a) A party may request such an institution or person to recommend the names of suitable individuals to act as conciliator; or

(b) The parties may agree that the appointment of one or more conciliators be made directly by such an institution or person.

(c) If the person or institution enlisted in this article refuses to act or fails to appoint the conciliator within sixty days of a party's request therefor, the parties shall endeavour to reach agreement on the name of a conciliator within thirty days.

(d) If, after thirty days, as set out in sub-paragraph (c) above, the parties have not agreed on a sole conciliator, or a party has not appointed its conciliator, the Secretary-General shall make such appointment within thirty days.

3. Parties may also enlist the assistance of the Secretary-General in connection with the appointment of conciliators. In particular:

(a) A party may request the Secretary-General to designate an institution or person to perform the function set forth in paragraph 2(a) of this article;

(b) The parties may request the Secretary-General to designate an institution or person to perform the function set forth in paragraph 2(b) of this article; or

(c) The Secretary-General may be the 'person' performing the functions set forth in paragraphs 2(a) and (b) of this article, pursuant to a request or agreement.

(d) When designated as appointing authority, the Secretary-General will make appointments within thirty days after such designation.

4. For the purpose of assisting the parties and the person or institution performing the functions set out in paragraphs 2(a) and (b) of this article, the Secretary-General will make available a list of persons considered to have expertise in the subject-matter of the dispute at hand.

5. (a) In disputes between more than two parties, parties having the same interest shall appoint their conciliator to the commission jointly by agreement pursuant to this article.

(b) Where two or more parties cannot reach agreement on the appointment of a conciliator or conciliators within a period of sixty days after commencement of conciliation, the conciliator shall then be appointed within thirty days by the Secretary-General.

6. In recommending or appointing individuals to act as conciliator, the institution or person making such appointments shall have regard to such considerations as are likely to secure the appointment of an independent and impartial conciliator and, with respect to a sole, third, or fifth conciliator, shall take into account the need of appointing a conciliator of a nationality other than the nationalities of the parties. The parties may request that the conciliator sign an impartiality declaration indicating any past or present professional, business, or other relationships with the parties.

Submission of Statements to Conciliator

Article 5

1. The conciliator, upon appointment, shall request each party to submit a brief written statement describing the general nature of the dispute and the points at issue. Each party shall send a copy of its statement to the other party and the International Bureau.

2. The conciliator may request each party to submit a further written statement of its position and the facts and grounds in support thereof, supplemented by any documents and other evidence that such party deems appropriate. The party shall send a copy of its statement to the other party and the International Bureau.

3. At any stage of the conciliation proceedings the conciliator may request that a party submit additional information.

Representation and Assistance

Article 6

The parties may be represented or assisted by persons of their choice. The names and addresses of such persons are to be communicated in writing to the other party, the conciliator, and to the International Bureau; such communication is to specify whether the appointment is made for purposes of representation or of assistance.

Role of Conciliator

Article 7

1. The conciliator assists the parties in an independent and impartial manner in their attempt to reach an amicable settlement of their dispute.

2. The conciliator will be guided by principles of objectivity, fairness and justice, giving consideration to, among other things, the rights and obligations of the parties and the circumstances surrounding the dispute, including any previous practices between the parties. The conciliator will make proposals to preserve the respective rights of the parties, and to prevent and/or mitigate serious harm to the environment falling within the subject-matter of the dispute.

3. The conciliator may conduct the conciliation proceedings in such a manner as the conciliator considers appropriate, taking into account the relevant law and circumstances of the case, the wishes the parties may express, including any request by a party that the conciliator hear oral statements, and any special need for a speedy settlement of the dispute.

4. The conciliator may propose the appointment of one or more experts to report on specific issues, after having obtained the views of the parties. The conciliator may enlist the services of the Secretary-General who will provide an indicative list of persons considered to have expertise in the scientific or technical matters in respect of which these Rules might be relied upon.

5. The conciliator may, at any stage of the conciliation proceedings, make proposals for a settlement of the dispute. Such proposals need not be in writing and need not be accompanied by a statement of the reasons therefor.

Communication Between Conciliator and Parties

Article 8

1. The conciliator may meet with the parties, or may communicate with them orally or in writing. The conciliator may communicate with the parties together or with each of them separately, subject to prior notification of the intention to meet separately with the other party.

2. The conciliator shall fix the location of any meetings after consulting with the parties. The conciliator may request the International Bureau to arrange for the place where such meetings will be held.

Disclosure of Information

Article 9

When the conciliator receives information concerning the dispute from a party, the conciliator *may* disclose the substance of that information to the other party in order that the other party may present an explanation. However, when a party gives any information to the conciliator subject to a specific condition that it be kept confidential, the conciliator shall not disclose that information to the other party.

Co-operation of Parties with Conciliator

Article 10

The parties shall in good faith co-operate with the conciliator and, in particular, shall endeavour to comply with requests by the conciliator to submit written materials, provide information and attend meetings.

Suggestions by Parties for Settlement of Dispute

Article 11

Each party may, on its own initiative or at the invitation of the conciliator, submit to the conciliator suggestions for the settlement of the dispute.

Settlement Agreement

Article 12

1. When it appears to the conciliator that elements of a settlement exist which would be acceptable to the parties, the conciliator will formulate the terms of a possible settlement and submit them to the parties for their observations. After receiving the observations of the parties, the conciliator may reformulate the terms of a possible settlement in the light of such observations.

2. If the parties reach agreement on a settlement of the dispute, they draw up and sign a written settlement agreement. If requested by the parties, the conciliator draws up, or assists the parties in drawing up, the settlement agreement.

3. The parties by signing the settlement agreement put an end to the dispute and are bound by the agreement.

4. The conciliator may propose the establishment of an implementation committee upon written agreement of the parties to the settlement agreement, to assist the parties in implementing the settlement agreement. If the parties agree on the establishment of an implementation committee, the parties may request the assistance of the conciliator in any aspect of its establishment. The implementation committee may:

(a) request the parties to provide periodic reports on implementation to the committee and parties to the settlement agreement;

(b) review reports provided by the parties and communicate results of the review to other parties to the settlement agreement;

(c) monitor implementation of the settlement agreement according to procedures to be determined by the parties;

(d) determine a list of indicative measures meant to facilitate implementation and propose such measures to a party determined not to be meeting its obligations under the terms of the settlement agreement.

Confidentiality

Article 13

Unless the parties agree otherwise, or disclosure is required by a court or tribunal of competent jurisdiction, the conciliator, the parties and all other persons involved in the conciliation shall respect the confidentiality of the conciliation and may not use or disclose to any outside party any information concerning, or obtained in the course of, the

conciliation. 'Information' for the purpose of this article includes, but is not limited to, views expressed, suggestions, arguments and admissions made, and positions taken by the parties or the conciliator during the conciliation. Each such person shall sign an appropriate confidentiality agreement and shall keep confidential all matters relating to the conciliation proceedings. Confidentiality extends also to the settlement agreement, except where its disclosure is necessary for purposes of implementation and enforcement.

Termination of Conciliation Proceedings

Article 14

The conciliation proceedings are terminated:

(a) by the signing of the settlement agreement by the parties, on the date of the agreement; or

(b) by a written declaration of the conciliator, after consultation with the parties, to the effect that further efforts at conciliation are no longer justified, on the date of the declaration; or

(c) by a written declaration of the parties addressed to the conciliator to the effect that the conciliation proceedings are terminated, on the date of the declaration; or

(d) by a written declaration of a party to the other party and the conciliator, if appointed, to the effect that the conciliation proceedings are terminated, on the date of the declaration, unless there is an obligation to conciliate, in which case the procedure of the underlying agreement will prevail.

Resort to Arbitral or Judicial Proceedings

Article 15

The parties undertake not to initiate, during the conciliation proceedings, any arbitral or judicial proceedings in respect of a dispute that is the subject of the conciliation proceedings, except that a party may initiate arbitral or judicial proceedings where, in its opinion, such proceedings are necessary for the preservation of and/or the interim protection of its rights.

Competence of the Conciliation Commission

Article 16

Where there is an obligation to conciliate, a disagreement as to whether the conciliation commission has competence shall be decided by the conciliation commission. Any objection that the conciliation commission has no competence shall be raised as early as possible, and in any case not later than the date of the submission of the written statement mentioned in article 5, paragraph 1.

Costs

Article 17

1. Upon termination of the conciliation proceedings, the conciliator fixes the costs of the conciliation and gives written notice thereof to the parties. All costs related to the conciliation proceedings should be reasonable in amount. The term 'costs' includes only:

(a) the fee of the conciliator;

(b) the travel and other expenses of the conciliator;

(c) the travel and other expenses of witnesses requested by the conciliator with the consent of the parties;

(d) the costs of any expert advice requested by the conciliator with the consent of the parties;

(e) the cost of any assistance provided pursuant to article 2, paragraph 3 and article 4, paragraphs 2 and 3 of these Rules;

(f) the costs of any services of the Secretary-General and the International Bureau of the Permanent Court of Arbitration.

2. The costs, as defined above, are borne equally by the parties unless the settlement agreement provides for a different apportionment. All other expenses incurred by a party are borne by that party.

Deposits

Article 18

1. The conciliator, upon appointment, may request each party to deposit an equal amount as an advance for the costs referred to in article 17, paragraph 1, which are expected to be incurred.

2. During the course of the conciliation proceedings the conciliator may request supplementary deposits in an equal amount from each party. Before agreeing to provide initial or supplementary deposits, the parties may request an estimate of the costs including items listed in article 17, paragraph 1(a) to (f).

3. If the required deposits under paragraphs 1 and 2 of this article are not paid in full by both parties within thirty days, the conciliator may suspend the proceedings or may make a written declaration of termination to the parties, effective on the date of that declaration.

4. Upon termination of the conciliation proceedings, the conciliator renders an accounting to the parties of the deposits received and returns any unexpended balance to the parties.

5. The conciliator may request the International Bureau to perform the functions set out in paragraphs 1 to 4 of this article.

Role of Conciliator in Other Proceedings

Article 19

The parties and the conciliator undertake that, unless the parties agree otherwise, the conciliator will not act as an arbitrator or as a representative or counsel of a party or other person involved in the conciliation, in any arbitral or judicial proceedings in respect of a dispute that is the subject of the conciliation proceedings. The parties also undertake that they will not present the conciliator as a witness in any such proceedings.

Admissibility of Evidence in Other Proceedings

Article 20

Subject to the general provisions of article 13, the parties undertake not to rely on or introduce as evidence in arbitral or judicial proceedings, whether or not such proceedings relate to the dispute that is the subject of the conciliation proceedings:

(a) views expressed or suggestions made by the other party in respect of a possible settlement of the dispute;

(b) admissions made by the other party in the course of the conciliation proceedings;

(c) proposals made by the conciliator;

(d) the fact that the other party had indicated its willingness to accept a proposal for settlement made by the conciliator.

STATUTE OF THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

Article 1
General provisions

1. The International Tribunal for the Law of the Sea is constituted and shall function in accordance with the provisions of this Convention and this Statute.
2. The seat of the Tribunal shall be in the Free and Hanseatic City of Hamburg in the Federal Republic of Germany.
3. The Tribunal may sit and exercise its functions elsewhere whenever it considers this desirable.
4. A reference of a dispute to the Tribunal shall be governed by the provisions of Parts XI and XV.

SECTION 1. ORGANIZATION OF THE TRIBUNAL

Article 2
Composition

1. The Tribunal shall be composed of a body of 21 independent members, elected from among persons enjoying the highest reputation for fairness and integrity and of recognized competence in the field of the law of the sea.
2. In the Tribunal as a whole the representation of the principal legal systems of the world and equitable geographical distribution shall be assured.

Article 3
Membership

1. No two members of the Tribunal may be nationals of the same State. A person who for the purposes of membership in the Tribunal could be regarded as a national of more than one State shall be deemed to be a national of the one in which he ordinarily exercises civil and political rights.
2. There shall be no fewer than three members from each geographical group as established by the General Assembly of the United Nations.

Article 4
Nominations and elections

1. Each State Party may nominate not more than two persons having the qualifications prescribed in article 2 of this Annex. The members of the Tribunal shall be elected from the list of persons thus nominated.
2. At least three months before the date of the election, the Secretary-General of the United Nations in the case of the first election and the Registrar of the Tribunal in the case of subsequent elections shall address a written invitation to the States Parties to submit their nominations for members of the Tribunal within two months. He shall prepare a list in alphabetical order of all the persons thus nominated, with an indication of the States Parties which have nominated them, and shall submit it to the States Parties before the seventh day of the last month before the date of each election.
3. The first election shall be held within six months of the date of entry into force of this Convention.

4. The members of the Tribunal shall be elected by secret ballot. Elections shall be held at a meeting of the States Parties convened by the Secretary-General of the United Nations in the case of the first election and by a procedure agreed to by the States Parties in the case of subsequent elections. Two thirds of the States Parties shall constitute a quorum at that meeting. The persons elected to the Tribunal shall be those nominees who obtain the largest number of votes and a two-thirds majority of the States Parties present and voting, provided that such majority includes a majority of the States Parties.

Article 5
Term of office

1. The members of the Tribunal shall be elected for nine years and may be re-elected; provided, however, that of the members elected at the first election, the terms of seven members shall expire at the end of three years and the terms of seven more members shall expire at the end of six years.
2. The members of the Tribunal whose terms are to expire at the end of the above-mentioned initial periods of three and six years shall be chosen by lot to be drawn by the Secretary-General of the United Nations immediately after the first election.
3. The members of the Tribunal shall continue to discharge their duties until their places have been filled. Though replaced, they shall finish any proceedings which they may have begun before the date of their replacement.
4. In the case of the resignation of a member of the Tribunal, the letter of resignation shall be addressed to the President of the Tribunal. The place becomes vacant on the receipt of that letter.

Article 6
Vacancies

1. Vacancies shall be filled by the same method as that laid down for the first election, subject to the following provision: the Registrar shall, within one month of the occurrence of the vacancy, proceed to issue the invitations provided for in article 4 of this Annex, and the date of the election shall be fixed by the President of the Tribunal after consultation with the States Parties.
2. A member of the Tribunal elected to replace a member whose term of office has not expired shall hold office for the remainder of his predecessor's term.

Article 7
Incompatible activities

1. No member of the Tribunal may exercise any political or administrative function, or associate actively with or be financially interested in any of the operations of any enterprise concerned with the exploration for or exploitation of the resources of the sea or the seabed or other commercial use of the sea or the seabed.
2. No member of the Tribunal may act as agent, counsel or advocate in any case.
3. Any doubt on these points shall be resolved by decision of the majority of the other members of the Tribunal present.

Article 8
Conditions relating to participation of members in a particular case

1. No member of the Tribunal may participate in the decision of any case in which he has previously taken part as agent, counsel or advocate for one of the parties, or as a member of a national or international court or tribunal, or in any other capacity.
2. If, for some special reason, a member of the Tribunal considers that he should not take part in the decision of a particular case, he shall so inform the President of the Tribunal.
3. If the President considers that for some special reason one of the members of the Tribunal should not sit in a particular case, he shall give him notice accordingly.
4. Any doubt on these points shall be resolved by decision of the majority of the other members of the Tribunal present.

Article 9
Consequence of ceasing to fulfil required conditions

If, in the unanimous opinion of the other members of the Tribunal, a member has ceased to fulfil the required conditions, the President of the Tribunal shall declare the seat vacant.

Article 10
Privileges and immunities

The members of the Tribunal, when engaged on the business of the Tribunal, shall enjoy diplomatic privileges and immunities.

Article 11
Solemn declaration by members

Every member of the Tribunal shall, before taking up his duties, make a solemn declaration in open session that he will exercise his powers impartially and conscientiously.

Article 12
President, Vice-President and Registrar

1. The Tribunal shall elect its President and Vice-President for three years; they may be re-elected.
2. The Tribunal shall appoint its Registrar and may provide for the appointment of such other officers as may be necessary.
3. The President and the Registrar shall reside at the seat of the Tribunal.

Article 13
Quorum

1. All available members of the Tribunal shall sit; a quorum of 11 elected members shall be required to constitute the Tribunal.
2. Subject to article 17 of this Annex, the Tribunal shall determine which members are available to constitute the Tribunal for the consideration of a particular dispute, having regard to the effective functioning of the chambers as provided for in articles 14 and 15 of this Annex.

3. All disputes and applications submitted to the Tribunal shall be heard and determined by the Tribunal, unless article 14 of this Annex applies, or the parties request that it shall be dealt with in accordance with article 15 of this Annex.

Article 14
Seabed Disputes Chamber

A Seabed Disputes Chamber shall be established in accordance with the provisions of section 4 of this Annex. Its jurisdiction, powers and functions shall be as provided for in Part XI, section 5.

Article 15
Special chambers

1. The Tribunal may form such chambers, composed of three or more of its elected members, as it considers necessary for dealing with particular categories of disputes.
2. The Tribunal shall form a chamber for dealing with a particular dispute submitted to it if the parties so request. The composition of such a chamber shall be determined by the Tribunal with the approval of the parties.
3. With a view to the speedy dispatch of business, the Tribunal shall form annually a chamber composed of five of its elected members which may hear and determine disputes by summary procedure. Two alternative members shall be selected for the purpose of replacing members who are unable to participate in a particular proceeding.
4. Disputes shall be heard and determined by the chambers provided for in this article if the parties so request.
5. A judgment given by any of the chambers provided for in this article and in article 14 of this Annex shall be considered as rendered by the Tribunal.

Article 16
Rules of the Tribunal

The Tribunal shall frame rules for carrying out its functions. In particular it shall lay down rules of procedure.

Article 17
Nationality of members

1. Members of the Tribunal of the nationality of any of the parties to a dispute shall retain their right to participate as members of the Tribunal.
2. If the Tribunal, when hearing a dispute, includes upon the bench a member of the nationality of one of the parties, any other party may choose a person to participate as a member of the Tribunal.
3. If the Tribunal, when hearing a dispute, does not include upon the bench a member of the nationality of the parties, each of those parties may choose a person to participate as a member of the Tribunal.
4. This article applies to the chambers referred to in articles 14 and 15 of this Annex. In such cases, the President, in consultation with the parties, shall request specified members of the Tribunal forming the chamber, as many as necessary, to give place to the members of the Tribunal of the nationality of the parties concerned, and, failing such, or if they are unable to be present, to the members specially chosen by the parties.

5. Should there be several parties in the same interest, they shall, for the purpose of the preceding provisions, be considered as one party only. Any doubt on this point shall be settled by the decision of the Tribunal.

6. Members chosen in accordance with paragraphs 2, 3 and 4 shall fulfil the conditions required by articles 2, 8 and 11 of this Annex. They shall participate in the decision on terms of complete equality with their colleagues.

Article 18
Remuneration of members

1. Each elected member of the Tribunal shall receive an annual allowance and, for each day on which he exercises his functions, a special allowance, provided that in any year the total sum payable to any member as special allowance shall not exceed the amount of the annual allowance.

2. The President shall receive a special annual allowance.

3. The Vice-President shall receive a special allowance for each day on which he acts as President.

4. The members chosen under article 17 of this Annex, other than elected members of the Tribunal, shall receive compensation for each day on which they exercise their functions.

5. The salaries, allowances and compensation shall be determined from time to time at meetings of the States Parties, taking into account the workload of the Tribunal. They may not be decreased during the term of office.

6. The salary of the Registrar shall be determined at meetings of the States Parties, on the proposal of the Tribunal.

7. Regulations adopted at meetings of the States Parties shall determine the conditions under which retirement pensions may be given to members of the Tribunal and to the Registrar, and the conditions under which members of the Tribunal and Registrar shall have their travelling expenses refunded.

8. The salaries, allowances, and compensation shall be free of all taxation.

Article 19
Expenses of the Tribunal

1. The expenses of the Tribunal shall be borne by the States Parties and by the Authority on such terms and in such a manner as shall be decided at meetings of the States Parties.

2. When an entity other than a State Party or the Authority is a party to a case submitted to it, the Tribunal shall fix the amount which that party is to contribute towards the expenses of the Tribunal.

SECTION 2. COMPETENCE

Article 20
Access to the Tribunal

1. The Tribunal shall be open to States Parties.

2. The Tribunal shall be open to entities other than States Parties in any case expressly provided for in Part XI or in any case submitted pursuant to any other agreement conferring jurisdiction on the Tribunal which is accepted by all the parties to that case.

Article 21
Jurisdiction

The jurisdiction of the Tribunal comprises all disputes and all applications submitted to it in accordance with this Convention and all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal.

Article 22
Reference of disputes subject to other agreements

If all the parties to a treaty or convention already in force and concerning the subject-matter covered by this Convention so agree, any disputes concerning the interpretation or application of such treaty or convention may, in accordance with such agreement, be submitted to the Tribunal.

Article 23
Applicable law

The Tribunal shall decide all disputes and applications in accordance with article 293.

SECTION 3. PROCEDURE

Article 24
Institution of proceedings

1. Disputes are submitted to the Tribunal, as the case may be, either by notification of a special agreement or by written application, addressed to the Registrar. In either case, the subject of the dispute and the parties shall be indicated.
2. The Registrar shall forthwith notify the special agreement or the application to all concerned.
3. The Registrar shall also notify all States Parties.

Article 25
Provisional measures

1. In accordance with article 290, the Tribunal and its Seabed Disputes Chamber shall have the power to prescribe provisional measures.
2. If the Tribunal is not in session or a sufficient number of members is not available to constitute a quorum, the provisional measures shall be prescribed by the chamber of summary procedure formed under article 15, paragraph 3, of this Annex. Notwithstanding article 15, paragraph 4, of this Annex, such provisional measures may be adopted at the request of any party to the dispute. They shall be subject to review and revision by the Tribunal.

Article 26
Hearing

1. The hearing shall be under the control of the President or, if he is unable to preside, of the Vice-President. If neither is able to preside, the senior judge present of the Tribunal shall preside.

2. The hearing shall be public, unless the Tribunal decides otherwise or unless the parties demand that the public be not admitted.

Article 27
Conduct of case

The Tribunal shall make orders for the conduct of the case, decide the form and time in which each party must conclude its arguments, and make all arrangements connected with the taking of evidence.

Article 28
Default

When one of the parties does not appear before the Tribunal or fails to defend its case, the other party may request the Tribunal to continue the proceedings and make its decision. Absence of a party or failure of a party to defend its case shall not constitute a bar to the proceedings. Before making its decision, the Tribunal must satisfy itself not only that it has jurisdiction over the dispute, but also that the claim is well founded in fact and law.

Article 29
Majority for decision

1. All questions shall be decided by a majority of the members of the Tribunal who are present.
2. In the event of an equality of votes, the President or the member of the Tribunal who acts in his place shall have a casting vote.

Article 30
Judgment

1. The judgment shall state the reasons on which it is based.
2. It shall contain the names of the members of the Tribunal who have taken part in the decision.
3. If the judgment does not represent in whole or in part the unanimous opinion of the members of the Tribunal, any member shall be entitled to deliver a separate opinion.
4. The judgment shall be signed by the President and by the Registrar. It shall be read in open court, due notice having been given to the parties to the dispute.

Article 3l
Request to intervene

1. Should a State Party consider that it has an interest of a legal nature which may be affected by the decision in any dispute, it may submit a request to the Tribunal to be permitted to intervene.
2. It shall be for the Tribunal to decide upon this request.
3. If a request to intervene is granted, the decision of the Tribunal in respect of the dispute shall be binding upon the intervening State Party in so far as it relates to matters in respect of which that State Party intervened.

Article 32
Right to intervene in cases of interpretation or application

1. Whenever the interpretation or application of this Convention is in question, the Registrar shall notify all States Parties forthwith.
2. Whenever pursuant to article 21 or 22 of this Annex the interpretation or application of an international agreement is in question, the Registrar shall notify all the parties to the agreement.
3. Every party referred to in paragraphs 1 and 2 has the right to intervene in the proceedings; if it uses this right, the interpretation given by the judgment will be equally binding upon it.

Article 33
Finality and binding force of decisions

1. The decision of the Tribunal is final and shall be complied with by all the parties to the dispute.
2. The decision shall have no binding force except between the parties in respect of that particular dispute.
3. In the event of dispute as to the meaning or scope of the decision, the Tribunal shall construe it upon the request of any party.

Article 34
Costs

Unless otherwise decided by the Tribunal, each party shall bear its own costs.

SECTION 4. SEABED DISPUTES CHAMBER

Article 35
Composition

1. The Seabed Disputes Chamber referred to in article 14 of this Annex shall be composed of 11 members, selected by a majority of the elected members of the Tribunal from among them.
2. In the selection of the members of the Chamber, the representation of the principal legal systems of the world and equitable geographical distribution shall be assured. The Assembly of the Authority may adopt recommendations of a general nature relating to such representation and distribution.
3. The members of the Chamber shall be selected every three years and may be selected for a second term.
4. The Chamber shall elect its President from among its members, who shall serve for the term for which the Chamber has been selected.
5. If any proceedings are still pending at the end of any three-year period for which the Chamber has been selected, the Chamber shall complete the proceedings in its original composition.
6. If a vacancy occurs in the Chamber, the Tribunal shall select a successor from among its elected members, who shall hold office for the remainder of his predecessor's term.

7. A quorum of seven of the members selected by the Tribunal shall be required to constitute the Chamber.

Article 36
Ad hoc chambers

1. The Seabed Disputes Chamber shall form an *ad hoc* chamber, composed of three of its members, for dealing with a particular dispute submitted to it in accordance with article 188, paragraph 1(b). The composition of such a chamber shall be determined by the Seabed Disputes Chamber with the approval of the parties.
2. If the parties do not agree on the composition of an *ad hoc* chamber, each party to the dispute shall appoint one member, and the third member shall be appointed by them in agreement. If they disagree, or if any party fails to make an appointment, the President of the Seabed Disputes Chamber shall promptly make the appointment or appointments from among its members, after consultation with the parties.
3. Members of the *ad hoc* chamber must not be in the service of, or nationals of, any of the parties to the dispute.

Article 37
Access

The Chamber shall be open to the States Parties, the Authority and the other entities referred to in Part XI, section 5.

Article 38
Applicable law

In addition to the provisions of article 293, the Chamber shall apply:
(a) the rules, regulations and procedures of the Authority adopted in accordance with this Convention; and
(b) the terms of contracts concerning activities in the Area in matters relating to those contracts.

Article 39
Enforcement of decisions of the Chamber

The decisions of the Chamber shall be enforceable in the territories of the States Parties in the same manner as judgments or orders of the highest court of the State Party in whose territory the enforcement is sought.

Article 40
Applicability of other sections of this Annex

1. The other sections of this Annex which are not incompatible with this section apply to the Chamber.
2. In the exercise of its functions relating to advisory opinions, the Chamber shall be guided by the provisions of this Annex relating to procedure before the Tribunal to the extent to which it recognizes them to be applicable.

SECTION 5. AMENDMENTS

Article 4l
Amendments

1. Amendments to this Annex, other than amendments to section 4, may be adopted only in accordance with article 313 or by consensus at a conference convened in accordance with this Convention.

2. Amendments to section 4 may be adopted only in accordance with article 314.

3. The Tribunal may propose such amendments to this Statute as it may consider necessary, by written communications to the States Parties for their consideration in conformity with paragraphs 1 and 2.

HAGUE DECLARATION ON THE ENVIRONMENT, 1989

Declaration of the Hague

The right to live is the right from which all other rights stem. Guaranteeing this right is the paramount duty of those in charge of all States throughout the world.

Today, the very conditions of life on our planet are threatened by the severe attacks to which the earth's atmosphere is subjected.

Authoritative scientific studies have shown the existence and scope of considerable dangers linked in particular to the warming of the atmosphere and to the deterioration of the ozone layer. The latter has already led to action, under the 1985 Vienna Convention for the Protection of the Ozone Layer and the 1987 Montreal Protocol, while the former is being addressed by the Intergovernmental Panel on Climatic Change established by UNEP and WMO, which has just begun its work. In addition the UN General Assembly adopted Resolution 43/53 on the Protection of the Global Climate in 1988, recognizing climate change as a common concern of mankind.

According to present scientific knowledge, the consequences of these phenomena may well jeopardize ecological systems as well as the most vital interests of mankind at large.

Because the problem is planet-wide in scope, solutions can only be devised on a global level. Because of the nature of the dangers involved, remedies to be sought involve not only the fundamental duty to preserve the ecosystem, but also the right to live in dignity in a viable global environment, and the consequent duty of the community of nations vis-a-vis present and future generations to do all that can be done to preserve the quality of the atmosphere.

Therefore we consider that, faced with a problem the solution to which has three salient features, namely that it is vital, urgent and global, we are in a situation that calls not only for implementation of existing principles but also for a new approach, through the development of new principles of international law including new and more effective decision-making and enforcement mechanisms.

What is needed here are regulatory, supportive and adjustment measures that take into account the participation and potential contribution of countries which have reached different levels of development. Most of the emissions that affect the atmosphere at present originate in the industrialized nations. And it is in these same nations that the room for change is greatest, and these nations are also those which have the greatest resources to deal with this problem effectively.

The international community and especially the industrialized nations have special obligations to assist developing countries which will be very negatively affected by changes in the atmosphere although the responsibility of many of them for the process may only be marginal today.

Financial institutions and development agencies, be they international or domestic, must coordinate their activities in order to promote sustainable development.

Without prejudice to the international obligations of each State, the signatories acknowledge and will promote the following principles:

(a) The principle of developing, within the framework of the United Nations, new institutional authority, either by strengthening existing institutions or by creating a new institution, which, in the context of the preservation of the earth's atmosphere, shall be responsible for combating any further global warming of the atmosphere and shall involve such decision-making procedures as may be effective even if, on occasion, unanimous agreement has not been achieved;

(b) The principle that this institutional authority undertake or commission the necessary studies, be granted appropriate information upon request, ensure the circulation and exchange of scientific and technological information - including facilitation of access to the technology needed - develop instruments and define standards to enhance or guarantee the protection of the atmosphere and monitor compliance herewith;

(c) The principle of appropriate measures to promote the effective implementation of and compliance with the decisions of the new institutional authority, decisions which will be subject to control by the International Court of Justice;

(d) The principle that countries to which decisions taken to protect the atmosphere shall provoke to be an abnormal or special burden, in view, inter alia, of the level of their development and actual responsibility for the deterioration of the atmosphere, shall receive fair and equitable assistance to compensate them for bearing such burden. To this end mechanisms will have to be developed;

(e) The negotiation of the necessary legal instruments to provide an effective and coherent foundation, institutionally and financially, for the aforementioned principles.

The Heads of State and Government or their representatives, who have expressed their endorsement of this Declaration by placing their signatures under it, stress their resolve to promote the principles thus defined by:

- furthering the development of their initiative within the United Nations and in close coordination and collaboration with existing agencies set up under the auspices of the United Nations;

- inviting all States of the world and the international organizations competent in this field to join in developing, taking into account studies by the IPCC, the framework conventions and other legal instruments necessary to establish institutional authority and to implement the other principles stated above to protect the atmosphere and to counter climate change, particularly global warming;

- urging all States of the world and the international organizations competent in this field to sign and ratify conventions relating to the protection of nature and the environment;

- calling upon all States of the world to endorse present declaration.

The original of this Declaration, drawn up in French and English, will be transmitted to the Government of the Kingdom of the Netherlands, which will retain it in its archives. Each of the participating States will receive from the Government of the Kingdom of the Netherlands a true copy of this Declaration.

The Prime Minister of the Netherlands is requested to transmit the text of this Declaration, which is not eligible for registration under Article 102 of the Charter of the United Nations, to all members of the United Nations.

The Hague, 11 March 1989

DRAFT TREATY FOR THE ESTABLISHMENT OF AN INTERNATIONAL COURT OF THE ENVIRONMENT

Preamble

RECOGNIZING that there is now a global environmental crisis that threatens all the major ecosystems of the planet;

RECOGNIZING that the international community has an obligation, as the stewards of global natural resources, to preserve and protect those resources and all other species from further pollution, contamination and extinction;

RECOGNIZING that the right to a healthy, pollution-free environment is a fundamental human right;

RECOGNIZING that there is an urgent need for the establishment of an International Court of the Environment to resolve transnational and international environmental disputes and to preserve and protect global ecosystems; and

RECOGNIZING that such a court is intended to be complementary to national and regional compliance, enforcement and judicial systems.

THEREFORE the Parties to this Statute have agreed as follows:

Part 1. Establishment of the Court

Article I: The Court

1.1 There is established an International Court of the *439 Environment (the Court), which shall have the power to resolve environmental disputes between Parties by mediation, arbitration and/or judicial decisions, and which

shall be complementary to national judicial systems. Its jurisdiction and functioning shall be governed by the provisions of this Statute.

Article II: Composition of the Court

Option 1. The Court shall be composed of 15 independent judges elected by the U.N. General Assembly to a term of 7 years. The President of the Court shall be directly nominated by the U.N. Secretary General.

Option 2. The Court shall be composed of 15 independent judges serving 7 year terms elected by the parties to this agreement. The President of the Court shall be selected by the parties (or by the other judges).

N.B. The Court may be established either as a U.N. affiliate, as an adjunct to some other international body (e.g., the Permanent Court of Arbitration) or as a totally independent entity.

Article III (Optional): Relationship of the Court with the United Nations

3.1 The Court shall be brought into relationship with the United Nations by an agreement to be approved by the Parties to this Statute and concluded by the President of the Court.

N.B. The Court may be established independent of the United Nations.

Article IV: Seat of the Court

4.1 The seat of the Court shall be established at ______.

4.2 The President, with the approval of the Parties, may conclude an

agreement with the host State, establishing the relationship between the State and the Court.

*440 4.3 The Court may exercise its powers and functions on the territory of any State Party and, by special agreement, on the territory of any other State.

Article V: Status and Legal Capacity

5.1 The Court is a permanent institution open to all parties in accordance with this Statute. It shall act when requested or required to consider a case submitted to it, in accordance with the provisions of Articles VI and VII herein.

5.2 The Court shall have international legal personality and such legal capacity as may be necessary for the exercisee of its functions and the fulfillment of its purposes.

Part 2: Jurisdiction, Admissibility and Applicable Law

Article VI

6.1 The function of the Court shall be:

(a) To adjudicate environmental disputes of a significant international nature, insofar as such disputes involve the responsibility of members of the international community;

(b) To adjudicate all disputes between private and public parties (including states) concerning environmental damage, insofar as it is of such a scale as to affect the general interests of the international community, and is accepted for adjudication by the President of the Court upon the recommendation of the

Office of General Counsel.

(c) To order such emergency, injunctive and preventative measures as necessary and appropriate;

(d) To mediate and arbitrate environmental disputes submitted and accepted by the Court, without prejudice to its judicial function;

(e) Either on the Court's own initiative or at the request of the United Nations, international bodies or other parties, to direct the Office of General Counsel to institute such investigations, supported by independent technical or scientific experts, and to take such other *441 actions as necessary and appropriate to address environmental problems of international significance.

Article VII

7.1 The following parties may appear before the Court:

(a) International public organizations including agencies of the United Nations;

(b) States;

(c) Regional, provincial and local authorities and other public bodies;

(d) NGO's;

(e) Companies, partnerships and other enterprises;

(f) Individuals.

7.2 Legal actions by individuals and non-governmental organizations shall be subject to the following conditions:

(a) All legal recourse to the courts of the relevant state or states has been exhausted, or the filing of such an action in such court or courts would by futile; and

(b) the Office of General Counsel has fully investigated the claim and recommended to the President that the Court should exercise its jurisdiction; or

(c) the environmental question or issue is of such international importance that the Court should exercise its original jurisdiction.

Article VIII: Civil and Criminal Matters Within the Jurisdiction of the Court

8.1 The court has jurisdiction over environmental crimes, which shall be defined as the international infliction of widespread, long-term and severe damage to the natural environment.

8.2 All civil disputes relating to transnational and international environment disputes submitted to it by the Parties.

*442 Article IX: Exercise of Jurisdiction

9.1 The Court may exercise its jurisdiction over a person, corporation or State Party with respect to an environmental crime or a civil action submitted to it in accordance with the provisions of Article VII.

Article X: Precondition to the Exercise Of Jurisdiction

10.1 The Court shall exercise its jurisdiction over any criminal or civil action submitted to it by a State Party.

10.2 The Court shall exercise its jurisdiction over any criminal or civil action after the Court's Office of General Counsel has conducted a full investigation of a charge or claim submitted to it by a non-State Party, and based on the report of said investigation, the Presiding Justice has determined that there is reasonable cause for the Court to hear the criminal charge or civil complaint.

Article XI

11.1 The Court has jurisdiction only in respect of crimes committed after the date of entry into force of the statute, or such civil matters occurring within four years of the date of entry into force of the Statute.

Article XII: Office of the General Counsel

12.1 An Office of General Counsel shall conduct investigation of any matters within the jurisdiction of the Court on the basis of information it may seek or obtain from any source, including State Parties, United Nations organs, inter-governmental and non-governmental organizations. The Office of General Counsel shall process the information received or obtained and decide whether there is sufficient basis to proceed. The Office of General Counsel shall make its report and recommendation to the Presiding Justice regarding all claims and complaints filed with it. In all environmental crime cases, the Office of General Counsel shall act as the Prosecutor.

*443 Article XIII: Challenges to the Jurisdiction of the Court or the

Admissibility of a Case

13.1 At all stages of the proceedings, the Court shall satisfy itself as to its jurisdiction over a case.

13.2 Challenges to the Court's fundamental jurisdiction over a case may be made by:

(a) a suspect or accused in the case of an environmental crime;

(b) a defendant in a civil case;

(c) an interested State Party which has jurisdiction over the crime or civil action under investigation or filed with the Court.

13.3 Any challenge to the Court's jurisdiction must take place prior to or at the commencement of an action.

Article XIV: Applicable Law

14.1 The Court shall apply:

(a) this Statute and its Rules of Procedure and Evidence;

(b) applicable treaties and the principles and rules of general international law; and

(c) the national laws of the legal systems of the world to the extent they are consistent with the objectives and purposes of this Statute.