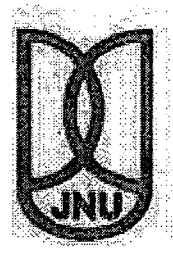
DISPUTE SETTLEMENT MECHNANISMS UNDER MULTILATERAL ENVIORNMENTAL AGREEMENTS: A PRELIMINARY SURVEY

Dissertation submitted to Jawaharlal Nehru University
in partial fulfilment of the requirement
for the award of the degree of
MASTER OF PHILOSOPHY

MERAJ AHMAD



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DECLARATION

I declare that the dissertation entitled "Dispute Settlement Mechanisms Under Multilateral Environmental Agreements: A Preliminary Survey" submitted by me in partial fulfilment of the requirements for the award of the degree of **MASTER OF PHILOSOPHY** of Jawaharlal Nehru University is my own work. The dissertation has not been submitted for any other degree of this University or any other university.

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CERTIFICATE

We recommend that this dissertation be placed before the examiners for evaluation.

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ACRONYMS

ADR	Alternative Dispute Resolution
CBD	Convention on Biological Diversity
CDR	Conflict Dispute Resolution
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora, 1973
DSM	Dispute Settlement Mechanism
ECR	Environmental Conflict Resolution
ECHR	European Court of Human Right
EIA	Environmental Impact Assessment
FAO	Food and Agriculture Organisation
GEF	Global Environmental Facility
ICJ	International Court of Justice
IUCN	International Union for Conservation of Nature
IEL	International Environmental Law
IEG	International Environmental Governance
LRTAP	Convention on Large-Range Transboundary Air Pollution, 1979
MEA	Multilateral Environmental Agreement
NCP	Non-Compliance Procedure
NCRI	Non-Compliance Response Information
NCRM	Non-Compliance Response Measures
PCA	Permanent Court of Arbitration
PIC	Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade 1998
PRI	Performance Review Information
RAMSAR	Convention on Wetland of International importance especially as Waterflow Habitat 1972
UNCED	United Nations Conference on Environment and Development
UNCITRAL	United Nations Commission on International Trade Law

UNCLOS	United Nations Convention on the Law of the Sea
UNEP	United Nations Environmental Programme
UNFCCC	United Nations Framework Convention on Climate Change
UNCCD	United Nations Convention to Combat Desertification
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
WHO	World Health Organisation

Chapter - I

EVOLUTION OF DISPUTE SETTLEMENT MECHANISMS: AN OVERVIEW

Introduction

There are growing concerns about the need of Dispute Settlement Mechanisms (DSM) under Multilateral Environmental Agreements (MEAs). The provisions for dispute settlement mechanisms complement the provisions aimed at compliance[1] because the provisions related to DSM are provided as a last resort in case of non-compliance. Compliance means the fulfilment by the contracting parties of their obligations under MEAs and any amendment thereto. In that sense, the growth of international environmental law is reflected in the large body of principles, rules and guidelines[2] which are in the form of MEAs and constitute the primary source of international environmental law.

The law-making process under the MEAs has launched the institutionalised form of international cooperation[3] to tackle with environmental challenges and imposes certain legally binding obligations upon the states which must be complied with. As a logical corollary, it has become a matter of concern for the members of international community in ensuring compliance with environmental obligation.[4] The absence of centralised law-making and regime specific law-making[5] has led to the uneven growth of international environmental law which as a result creates problems of fragmentation, conflict of jurisdiction, forum-shopping and conflict of norms in international environmental law itself.

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[1] UNEP (2006), *Manual on Compliance with and Enforcement of MEAs*, Nairobi, Kenya, p. 169. See also UNEP (2006), *Compliance Mechanisms under Selected Multilateral Environmental Agreements*, Nairobi, Kenya, pp. 12 & 33.

[2] Bharat H. Desai (2006), 'Creeping Institutionalization- MEAs and Human Security', *InetrSection Interdisciplinary Security Connection, Publication of UNU-EHS* No.4:3-49, pp. 9-17. See also Bharat H. Desai (2004), *Insitutionalising International Environnemental Law*, Aardsley, NY : Transnational Publisher, pp. 105-131 ; Elizabeth Maruma Mrema (2005), "Cross Cutting Issues in Compliance with and Enforcement of Multilateral Environmental Agreements", in Marko Berglund (eds.) *International environmental Law-Making and Diplomacy Review*, Finland: University of Joensuu-UNEP Course Series2, pp. 128-140.

[3] *Ibid.*

[4] Philippe Sands (1995), *"Principles of International Environmental Law I: Framework, Standards and Implementation"*, Manchester: Manchester University Press, p. 141.

[5] *Ibid.*

It seems that the global peace and security[6] has direct co-relation with the dispute related with environment and natural resources. As such, disputes related with environment and natural resources have many facets. Scientifically, it has been established that environment of the earth is deteriorating on continuous basis and it appears that many natural resources are swiftly reaching close to the level of extinction. Acid rain, ozone depletion, climate change, loss of biodiversity, melting of glaciers and depletion of natural water resources are some of leading examples. In this respect, the concept of ecological interdependence has by and large led to the development of international environmental law. As a corollary, problems related to environment and natural resources may be cumulatively termed as 'ecological' one. The environmental issues seems to have increasingly recognized that ecological interdependence does not respect national boundaries and as a consequence changed earlier notion that environmental problems are essentially a domestic and regional problems.[7] Therefore, it appeared necessary to establish international cooperation in order to protect environment of earth as well as to make sustainable use of its natural resources.

The growing relevance of environmental concern for international peace and security was affirmed by UN Security Council in January 1992 when its members declared that, "non-military sources of instability...ecological fields have become threat to international peace and security."[8] It underscores the adverse effects of degradation of environment which can lead to the multiple and overlapping nature of environmental disputes.

In recent times the concept of 'environmental crime' has also gained currency in order to fix criminal liability. Environmental crime means the violation or breaches of national environmental law and regulations that a state determines to be subject to criminal penalties under its national laws and regulations.[9] Over the past few decades, the international

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[6] See Gunther Handl (1990), "Environmental Security and Global Change: The Challenges to International Law", *Year Book of International Environmental Law*, Vol.1: 2-33; Valerie J. Assetto And B. Hans (1997), "Environment, Security, Social Conflict: Implications of the *Gabcikove-Nagymaos* Controversy", in Gerald Blake *et al.* (eds.), *International Boundaries and Environmental Security: Framework for Regional Cooperation*, London- The Hague-Boston: Kluwer Law International, pp. 349-370.

[7] See note 4 at p. 13.

[8] Noted by the President of the Security Council, 31st Jan. 1992, UN Doc. S23500, 2(1992), Cited in Philippe Sands (1995), *Principles of International Environmental Law I: Framework, Standards and Implementation*, Manchester: Manchester University Press, p. 141.

[9] See note 1, at p. 294.

community has come to recognise that some of the environmental violations can severely threaten the well being of the people as well as the environment that these should carry along with them stringent actions.

There is another concept of 'environmental justice' which is related to the arena of human rights. It appears that the ambit of human rights has been expanding to include various facets of environmental rights like right to live in healthy environment. These rights are particularly enforced by national courts. The concept can be explained in terms of law, the call for access to environmental justice involve at least three distinct issues: firstly, individual and public interest groups should be able to hold state accountable in law for the non observance of International Environmental Law (IEL). Secondly, individuals and public interest groups should be able to hold non-state actors, such as multinational corporations, accountable in law.[10] Finally, individuals, public interest groups and state should be able to hold international organisation accountable in law. In this context there is further need to reconsider the relationship between municipal law and international law.

In this chapter an effort is made to provide the basic background of the topic followed by the definition and characteristics of the term 'environmental dispute'. The objective of the chapter is to bring out the historical background of developments in the field of environmental dispute settlements: ranging from periods before Second World War including developments after United Nations Conference on Environment and Development (UNCED).

Definition of Environmental Disputes

The definition of "dispute" has been subject to consideration by World Court many times but in the reference made by PCA in *Mavrommatis Palestinian Concession (Jurisdiction)* Case where it was held that dispute means 'a disagreement over appoint of law or fact, a conflict of legal view or of interest between two persons'.[11] Environmental disputes arise due to opposing views of various groups about their environmental concerns and their

[10] See note 4, p.1. See also See also Adam S. Weinberg (1998), "The Environmental Justice Debate: A Commentary on Methodological Issues and Practical Concerns", *Sociological Forum*, Vol. 13, No. 1 (Mar., 1998), pp. 25-28.

[11] PCIJ, Series A, NO. 2, 1924, p. 11.

economic/developmental interests.[12] It seems that defining the 'environmental disputes' is an uphill task due to the fact that the term 'environment' is not absolute. The cases that have been ruled by international courts and tribunals illustrate the difficulties involved in defining international environmental disputes. In this context, sectoral, regime specific and fragmented growth of MEAs makes it more difficult to define it comprehensively.

Environmental disputes involve what is generally considered to be an 'environmental' as apparent from the object and purpose of the treaty in question.[13] The cases that have been ruled by international courts and tribunals expound the difficulties involved in defining environmental disputes.[14] It appears that in case any environmental standard is established under MEAs in the form of principles, object and scope which is based upon the consensus of the states as well as supported by scientific norms and accepted by public opinion, then, violation of such legal obligations, non-compliance, non-enforcement, non-implementation, unilateral interpretation of such norms etc. may be termed as "environmental dispute" for the purpose of that specific MEA only. Thus, it can be seen that definition is essentially departmental and fails to elucidate on the subject completely. In this regard it is seen that most of the MEAs visualise environmental dispute in two ways either dispute concerning the interpretation or application of the treaty.

Characteristics of Environmental Disputes

Many of the potential disputes which may arise under a treaty focuses primarily on the protection of the environment can be defined in terms of a dispute not only under other environmental treaties but also under the other branches of international law (for example: international water law, international human right law, international humanitarian law, international fisheries law, international trade law, law of succession and international treaty law etc.).[15] It can be mentioned that the aspects of disputes related to environment and

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[12] M. Raza Ghanbarpour and Keith William Hipel (2007), 'Sustainable Development Conflict over Freeway Construction, Springer Science+Business Media B.V. p. 1.

[13] Hey, Ellen (2000), 'Reflection on an International Environmental Court', *The Hague: Kluwer Law International*: 1-27, p. 5.

[14] *Ibid,* p. 6.

[15] *Ibid.* For detailed discussion see Alan Boyle (2007), "Relationship between International Environmental Law and Other Branches of International Law", in Daniel Bodansky (eds.) *The Oxford Handbook of International Environmental Law*, New York: Oxford University Press, pp. 126-145.

natural resources often finds contradiction with the concept of 'development'. Most of the MEAs aim to foster sustainable development. They explicitly incorporate international developmental law into MEAs and thereby operative provisions or additional protocols of MEAs often provide for trade-related instrument to be implemented. In that sense, the government are often prompted to characterise disputes as according to their own interest. Moreover, the subject matter of environmental issues raises several ethical and ecological dimensions that need critical considerations.[16]

Another important issue related with environmental disputes are proliferation of arbitral tribunals. It has been pointed out that proliferation of international courts and tribunals, in the absence of a hierarchy among these forums risk fragmentation in the international legal system.[17] On the other hand, some scholars have suggested that a choice of forums should be welcomed and that the danger of fragmentation should not be overestimated.[18] It is further contended that 'one of the strength of multiplicity of international tribunals is that it permits a degree of experimentation and exploration, which can lead to improvement in international law'.[19] Similarly, the potential choice of forum between the ICJ, ITLOS, arbitration and special arbitration raises novel issue of possible competition between forums[20]

The next important issue is related with applicable laws both in terms of rules within international environmental conventions and general international law. It appears that under the IEL state tries to justify its conduct under those conventions which are favourable to its interests. Further, rules of general international law, as well as those that reflect common intention of the parties to the IEL convention, remain crucial for the purposes of interpreting the IEL convention. Interpretation of IEL in isolation of other rules of general international

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[16] Karin Mickelsen and William Rees (1993), "The Environment: Ecological and Ethical Dimensions", in Elaine L. Hughes (eds.) *Environmental Law and Policy*, Toronto: Emond Montgomery Publications Limited, pp.1-29.

[17] Gilbert Guillume, "The Future of International Judicial System", 44 *International and Comparative law Quaterly* 1985, pp. 848-862; Sir Robert Jennings, " The proliferation of adjudicatory bodies: Danger and possible answers", Implications of the Proliferation of International Adjudicatory bodies for Dispute Resolution, *ASIL Bulletin* NO. 9, 1995, pp. 2-7.

[18] *Ibid* at p. 48.

[19] *Ibid* at p. 51.

[20] Howard Schiffman, (1998), "The Dispute Settlement Mechanisms of United Nations convention of the Law of Sea: A Potentially Important Apparatus for Marine Wildlife Management", *Journal of International wildlife Law and Policy*, 1(2): 293-06, p. 7.

law would wrongly portray IEL as some "*self-contained regimes*" and diminish its legitimacy.[21]

The environmental issues raise competing scientific claims. Government have found it more convenient to hide behind the scientific uncertainty of certain environmental issues in order to avoid agreeing on the taking of decisions of a preventive or even curative nature.[22] Unlike many national system that provide for environmental or scientific assessors to join panels and assist in deciphering technical information , the international judge will often find himself in difficult position when seeking to decide on the relative merits of scientific claim. Further, this problem not only provides uniqueness to the environmental field but also calls for a specialized approach.[23] The conflict of views stems from conflicting data resulting from different scientific methodologies adopted by different countries.[24]

Matz expounding on conflict of norms in international law opines that,

> "Conflicts between regulations within the same legal system are problematic, from policy point of view, because they interface with the coherence and, as a result, the efficiency of the respective legal system."[25]

It can be said that IEL is not exception in this regard. Conflicts of norms in IEL require approaches to the coordination of IEA. It is desirable to specify an automatic clause resorting to the more stringent provisions as the obligatory requirements for the resolving any conflicts

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[21] Alan Boyle (2007), "Relationship between International Environmental Law and Other Branches of International Law", in Daniel Bodansky (eds.) *The Oxford Handbook of International Environmental Law,* New York: Oxford University Press. See also Joost Pauwelyn (2005), "Judicial Mechanism: Is There a Need for world Environment Court?" In W. Brandee Chambers and Jessica F. Green (eds.) *Reforming International Environmental Governance: From Institutional Limits to Innovative Reforms*: Tokyo, NY and Paris: The United Nations University, p. 164.

[22] Erwan Fouere (1988), "Emerging Trends in International Environmental Agreements", in John E. Caroll (eds.) *International Environmental Diplomacy*, Cambridge and NY: Cambridge University Press, p. 32. See also Philippe Sands (2007), "Litigating Environmental Disputes: Coutrs, Tribunals and the Progressive Development of International Environmental Law", in Tafsir Malik Ndiaye and Rudiger wolfrum (eds.) *Law of the Sea, environmental Law and Settlement of Disputes*, Leiden/Boston: Martinus Nijhoff Publishers. See e.g. Judgement in case concerning the *Gabsikovo-Nagymaros Project*(Hungry vs Slovakia), 1997 ICJ Reports 7 et seq., 27, 29-31(Sept. 25); See also *EC Measures Concerning Meat and Meat Products* (Hormones), Appellate Body Reports WT/ DS26/AB/R, WT/DS48/AB/R, 16 Jan. 1998, WTO Dispute Settlement.

[23] *Ibid* at p. 315.

[24] Nisuke Ando (2007), "The Southern Bluefin Tuna case and dispute Settlement under the United Nations conventions of law of the Sea: A Japanese Perspectives", in Tafsir Malik Ndiaye and Rudiger wolfrum (eds.) *Law of the Sea, environmental Law and Settlement of Disputes*, Leiden/Boston: Martinus Nijhoff Publishers, p.870.

[25] Rudiger Wolfrum and Nele Matz (2003), *Conflict in International Environmental Law*, Germany: Die Deusche Bibliothek Ver Zeichnet Publication, p. 1.

under international environmental law. This should hold unless there are international explicit laws to the contrary.[26]

Many scholars at global level have observed that the growing severity of ecological crisis has lead to the need of establishing effective central institution in the world polity.[27] In this context, international ecological problems can involve more basic concerns like threat to integrity of ecosystem and their life-support capacities for human being.[28] Hence, a holistic 'eco-system approach' which promotes an integrated and sustainable approach to the environment and economy is required.[29]

Another dimension of environmental disputes is involvement of community interests. In international legal sphere states are primary actors in terms of rights and obligations, while, environmental protection require more elaborate approach involving and empowering the non-state actors also.

The next issue is irreversibility of environmental damage. Once environmental degradation and deterioration took place, it takes very long period of time to recover, sometimes thousands of years. Besides dispute settlements which are mainly intended to determine rights and obligations of the parties concerned, environmental health require precautionary approach.

Lastly, it is important to analyse what is and what should be the outcome of settlement like compensation, penalty, more severe obligation and precautionary obligations.

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[26] P.K. Rao (2002), *International Environmental Law and Economics*, Massachusetts USA and UK: Blackwell Publishers, p. 327.

[27] Johns Dryzek (1987), "Environmental Mediation for international Problems", *International Studies Quarterly*, Vol.31: 87-102, p. 88. This "ecological perspective" on international relations was introduced to the field by Harold Sprout and Margaret Sprout (1965), who pointed to the pervasive importance of man-nature relationship in international affairs.

[28] *Ibid* at p. 91.

[29] Donald Kaniaru (2005), "The Role of Institutions and Networks in Environmental Enforcement", in Durwood Zaelke *et al. Making Law Work: Environmental Compliance and Sustainable Development* Vol. I, London: Cameron May ltd at p.425.

Genesis of Environmental Dispute Settlement

In the international law making process, MEAs have emerged as a "predominant legal method for addressing environmental problems that cross national boundaries."[30] Taking account of the gravity of the environmental problems it seems that it has became necessary to forge international cooperation to grapple with it. Hence it seems that institutionalised cooperation has emerged as functional necessity.[31] Traditionally, environmental agreements were not intended to create legal rights and obligations so much emphasis was not given on compliance and dispute settlement within MEAs. The historical background of developments in the environmental disputes settlement may be broadly classified into following phases:

I. Before the period of Second World War

Despite the recent emergence of concept of environmental security, the legal issues relating to the environment concerning the implementation, enforcement and conflict resolution are similar to those of one hundred years age.[32] Since *Fur Seals Arbitration* of 1893, environmental disputes have been submitted to international dispute resolution arrangements.[33] These includes: transboundary air pollution[34]; the diversion of flow of international rivers[35]; conservation of fisheries resources[36]; import restrictions adopted to enforce domestic conservation standards[37] and responsibility for rehabilitation of mined lands[38] etc. It is found that due to lack of scientific knowledge environmental concerns were not as prominent as these are at the present time. In order to settle mostly soft norm building process followed by ad hoc settlements were used

The development of the principles and rules of IEL through treaties, other than international acts and customs, has tened to react to events or incidents or the availability of scientific

[30] Harvard Law Review 1991:1521. Cited in Desai (2006), "Creeping Institutionalization: MEAs and Human Security', *InetrSection Interdisciplinary Security Connection, Publication of UNU-EHS* No.4:3-49 at p. 1.

[31] See note 30, at p. 10.

[32] See note 4, at p. 142.

[33] *Ibid.*

[34] *Trail Smelter Arbitration Tribunal (*US v. Canada*),* 33 *AJIL* 182 (1939) and 35 *AJIL* 684 (1941).

[35] *Lake Lanoux Arbitration* (FRANCE v. SPAIN) (1957) 12 R.I.A.A. 281; 24 I.L.R., 101 *Arbitral Tribunal, November 16*, 1957.

[36] *Fisheries Jurisdiction Case* (Spain v. Canada), *ICJ*, 4 Dec. 1998, General List, No. 96.

[37] *Tuna Dolphin GATT Case (TUNA Case),* 1994, Case No. 72.

[38] *Certain Phosphate Land in Nauru (Nauru v. Austl.)* Preliminary Objection 1992, ICJ *Rep.* 240.

evidence rather than anticipated general or particular environmental threats and put in place an anticipatory legal framework.[39] Early attempt to codify international environmental rules focussed in the conservation of wildlife (fisheries, birds, and seals)[40] and, to a limited extent, the protection of rivers and seas.[41] Another important feature is that these were mostly bilateral in nature.[42] Earlier environmental agreements were not intended to create legal rights and obligations, hence, much emphasis was not given on compliance and dispute settlement within MEAs.

II. From creation of United Nations to Stockholm Conference

In this phase several new developments at international arena emerged which had direct and indirect corroboration with disputes relating to the environment and natural resources. These include the following:

- Period of Second World War and reconstruction efforts followed by it.
- Creation of United Nations and emergence of environmental consciousness within UN.
- Establishment of International Court of Justice (ICJ).
- Development of Laws relating to High Seas.
- Heavy industrialisation and industrial pollution.
- Decolonisation and development of wide infrastructure in developing countries.
- Debate of development versus Environment began.

It was a period characterised by the features that international organisations at global and regional level began to address environmental issues, and the range of environmental concerns addressed by the international regulatory activity broadened to include a focus on the causes of pollution resulting from certain ultra hazardous activities.[43] After Second World War, UN was established to replace its failed predecessor with broad mandates supported by sacred principles enshrined in it. Among its many purposes, the one was to achieve international problem of economic, social, cultural and humanitarian character. It is well evident from the UN Charter itself that in the charter disputes related with environment and

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[39] See note 4 at p. 26.

[40] For example, Convention for the Regulation of Whaling, Geneva, 1931; Convention to Protect Birds Useful to Agriculture, Paris, 1902.

[41] For example, North Sea Fisheries (Overfishing Convention), 1882.

[42] For example, The Water Boundaries Treaty between United States and Canada. 1909.

[43] See note 4, p.172.

natural resources was not visualised[44] although its broad mandate included environmental problems which laid the foundation for reinvigorating any future efforts in the field of environment. Moreover, compliance mechanism and other regulatory techniques were not developed barring few traditional mechanisms.

In 1954, the United Nations General Assembly (UNGA) convened a major conference on the conservation of living resources of sea[45], which led to the conservation rules adopted in the 1958 Geneva Convention. This convention signalled a shift in emphasis away from the protection of flora and fauna and towards international action addressing products and process associated with industrial and military activity[46]. In 1955, UNGA adopted a number of resolutions on the use of atomic energy and the effects of atomic radiation which led to the adoption of the Test Ban Treaty in 1963. This provided political context for Australia and New Zealand to bring actions to the ICJ calling on France to stop all atmospheric nuclear tests[47].

In 1954, under the auspices of International Maritime Organisation (IMO), the first global convention for the protection of oil pollution was adopted. This convention was to be followed fifteen years later by treaties permitting intervention to combat the effect of pollution, establishing rules of civil liability for oil pollution damages. Other global convention was 1958 Convention on High Seas Fishing and Conservation. This convention has mandate to prevent oil pollution and the dumping of radioactive wastes in high seas. In 1959, Antarctic Treaty committed parties to peaceful activities in that region and prohibited nuclear explosion[48] or the disposal of radioactive wastes[49]. Under this treaty rules relating to settlement of disputes were provided which were continuing in nature[50].

During Second World War huge devastation took place so cases related with mines and other extra-territorial disputes were bound to come which had element of natural resources and

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[44] See note 5, at p.30. However, under the auspices of ECOSOC some efforts were made for the conservation of natural resources as it is evident by 1949 UNCCUR.

[45] UNGA Res.900(IX) (1954)

[46] *Ibid*, at p.31.

[47] *Ibid*, at p.32.

[48] Art. V (1), Antarctica Treaty, 1951.

[49] Art. V (2), Antarctica Treaty, 1951.

[50] Art. XI, Antarctica Treaty, 1951.

environment. In 1954, the ICJ decided that *'it is every state's obligation not to allow knowingly its territory to be used for the acts contrary to the rights of other states.'*[51] This was very important principle which was incorporated in the Stockholm Conference[52] and laid the basis for further development. In 1957, *Lac Lanoux* Arbitral Tribunal provided detailed principles concerning limitations on the rights of their use of shared rivers.

In this period international procedure for ensuring the implementation of and compliance with international environmental standard were non-existent and the regulatory techniques available for addressing a growing range of issues were limited and no rules had yet been developed on procedural obligations such as Environmental Impact assessment (EIA) or dissemination of and access to environmental information.[53] Under MEAs primarily the focus was on alternative means and finally ICJ was incorporated as ultimate means which is still grappling with its own limitations. No procedural aspects to govern proceeding were incorporated in the form of annex or in any other form although the fashion of drafting dispute settlement clause under MEAs remained almost same with some minor variations.

III. Stockholm Conference to Earth Summit

This was the period which in real sense laid the foundation of international environmental law. Several innovative techniques were developed and incorporated into the MEAs for efficient compliance and effective dispute settlement. In particular, developments related with compliance and implementation took unique shape and provided Non Compliance Procedure (NCP)[54] as a means of dispute avoidance. *United Nations Conference on Human Environment* popularly called as Stockholm Conference[55] was convened in December 1968 by UNGA[56]. Another major development was creation of United Nations Environmental Programme (UNEP)[57] as a follow up programme. In the post Stockholm era, the UNEP has generally been the central piece of the UN's effort for the protection of environment.

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[51] The *Corfu channel* Case (UK v. Albania), ICJ Dec. of 9 April 1949, ICJ *Reports* [1949] 4. (1949).

[52] Principle 21, Stockholm Declaration, 1972.

[53] See note 4, at p.33.

[54] See chapter 4, at p. 97-102.

[55] The Conference adopted three non-binding instruments: a resolution on institutional arrangements, A Declaration containing 26 Principles, and an Action Plan containing 109 recommendations.

[56] UNGA res. 2398 (XXIII) (1968).

[57] UNGA res. 2997 to 3008; see also note 5, at p.37

However, it seems that UNEP is just remained programme[58] having no authority for compliance and no role in environmental dispute settlement. In recent times decline in its fund and erosion in its mandate has made UNEP virtually ineffective. In 1978, UNEP adopted a draft called as '*1978 UNEP Draft Principles*' in which principles related with settlement of disputes, responsibility and liability were addressed.[59]

It was UNEP's Programme for the Development and Periodic Review of International Environmental Law for 1990s (Montevideo II), which has among its many objectives "to develop further mechanism to facilitate the avoidance and settlement of environmental disputes" and which has endorsed a strategy of developing "methods, procedures and mechanism that promote, inter-alia, informed decisions, mutual understanding and confidence building with a view to avoiding environmental dispute and, where such avoidance is not possible, to their peaceful settlement".[60]

In 1980, the IUCN, UNEP, WWF, UNESCO and FAO prepared World Conservation Strategy in which one of the recommendations was for reviewing the adequacy of legal and administrative control and of implementation and enforcement mechanisms. It also recommended for granting citizen's group standing in judicial and administrative procedures to contribute to enforcement of the law and remedies for environmental damages.[61] This provided guidance for future MEAs to include above principles including IEA. The Brundtland Report[62] emphasised to strengthen procedure for avoiding or resolving disputes on environment and resource management issues.

In 1987, the UNGA adopted the *Environmental perspective to the Year 2000 and Beyond* as a framework to guide national action and international cooperation in policies and programmes

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[58] See Bharat H. Desai (2006), 'UNEP: A Global environmental Authority? "*Environmental Policy and Law*", 36/3-4:137-155.

[59] See Principles 12 and 13. Principles 13 and 14 elaborate the objectives of non-discrimation and the rights of persons in other jurisdiction who may be adversely affected by the environmental damage to the equal right of access to administration and judicial proceedings.

[60] See note 5, at p.143.

[61] *Ibid* at p.44.

[62] See World Commission on Environment and Development, Our Common Future (Oxford: Oxford University Press, 1987). The World Commission was established in 1983 by UNGA and was chaired by the then Norwegian Prime Minister, Mrs. Gro. Harlem Brundtland.

aimed at achieving environmentally sound development.[63] For legislation it required for the establishment of legal regime at international and national level to improve the environmental management of rivers, lakes and forests. It also suggested that the ICJ, International Court of Arbitration (PCA) and regional mechanisms should facilitate the peaceful settlement of environmental disputes. In this phase there was now a discrete area which can be called as international environmental law (IEL). New techniques for the implementation of those standards, such as EIA and access to environmental information were being adopted and applied.[64]

IV. From Earth Summit (UNCED) to Present

The landmark event in the history of IEL was *United Nations Conference on Environment and Development*, popularly called Earth Summit, held at Rio, Brazil in 1992. It represented organic growth of near to completeness of any new branch of international law. Unlike earlier efforts, UNCED which produced five documents[65] laid greater emphasis on principles and rules related with compliance, enforcement and implementation including DSM. The 1992 Rio Declaration on Environment and Development called on the states to resolve their environmental disputes peacefully and by appropriate means in accordance with the UN Charter.[66] It also called on the states to provide at national level, 'effective judicial and administrative proceedings, including redress and remedy' and 'internationally to resolve environmental disputes peacefully and by appropriate means.'[67] Agenda 21 further amplifies these objectives,[68] calling on the states to:

> "further study and consider methods to broaden and make more effective the range of techniques available at present, taking into account, among others, relevant experience under existing international agreements, instruments and institutions.....and for the effective peaceful means of dispute settlement in accordance with the Charter of United Nations, including, where appropriate, recourse to the ICJ, and their inclusion in the treaties relating to sustainable development."

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[63] UNGA Res. 42/186, 11 December 1987.

[64] See note 4, at p. 48

[65] These were: 1992 United Nations Convention on Climate Change; 1992 Convention on Biological Diversity; 1992 Agenda 21; 1992 Forest Principles; and 1992 Rio Convention on Sustainable Development.

[66] Principle 26, Rio Declaration, 1992.

[67] Principle 10, Rio Declaration, 1992.

[68] See note 2, at p. 3.

Further, Article 39.3(h) of Agenda 21 provides that:

> "to study and consider the broadening and strengthening of capacity of mechanisms, inter-alia, in the United Nations system to facilitate, where appropriate and agreed to by the parties concerned, the identification, avoidance and settlement of international disputes in the field of sustainable development, duly taking into account existing bilateral and multilateral agreements for the settlement of such disputes"

Agenda 21 sets the blueprint for action in the field of sustainable development. In 2002, Johannesburg Declaration on Sustainable Development under Para 13, declared that,

> "The global environment continues to suffer. Loss of biodiversity continues, fish stocks continue to be depleted, desertification claims more and more fertile land, the adverse effect of climate change are already evident, natural disaster are more frequent and more devastating and developing countries more vulnerable, and air, water, and marine pollution continue to rob millions of a decent life."

Johannesburg Principles on the Role of Law and Sustainable Development adopted at the Global Judges Symposium in August 2002, affirm that:

> 'an independent Judiciary and judicial process is vital for implementation, development and enforcement of environmental law, and that members of Judiciary, as well as those contributing to the judicial process at the national, regional and global levels, are crucial partners for promoting compliance with, and the implementation and enforcement of, international and national environmental law'.[69]

In the meantime, the International Law Commission continues its work on State Responsibility, International Liability for injurious consequences arising out of acts not prohibited by international law against peace and security of mankind.

In June 1993, Hungry and Slovakia submitted their disputes over the construction of Gabcikovo-Nagymaros dam on the Danube River to ICJ for the settlement. In this case besides ICJ, several other peaceful means were tried to solve the dispute which proved very beneficial. Keeping in the mind severity of the problem ICJ established a separate Environmental Chamber with the panel of seven judges, in 1993.

In case of environmental disputes, the role of Permanent Court of Arbitration (PCA) appears to be effective and more acceptable means of dispute settlement.[70] As such under MEAs,

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[69]Alfred Rest (2004), "Enhanced Implementation of International Treaties by Judiciary- Access to Justice in International environmental Law for Individuals and NGOs: Efficacious Enforcement by the Permanent Court of Arbitration", *MqJICEL*, Vol. 1:1-28, at p.3.

[70] For detailed discussion on this, see chapter 2, pp. 36-42.

PCA has been incorporated as a means of settlement of environmental disputes. There are number of MEAs that lacked either procedural rules or institutional mechanisms. In this regard there are multiple roles for PCA and facilities provided therein. This provides PCA an opportunity, working with the parties to the relevant treaties to assign the filling gaps. In 2001, PCA adopted Permanent Court of Arbitration Optional Rules for Arbitration of Disputes Relating to Natural resources and/or the Environment. Further, in 2002, PCA adopted Permanent Court of Arbitration Optional Rules for Conciliation of Disputes Relating to Natural resources and/or the Environment. PCA-UNEP Advisory Group is also working in the direction of environmental dispute settlement.

In 2001, the Governing Council of UNEP requested the Executive Director "to continue the preparation for the draft guidelines on compliance with MEAs and on the capacity strengthening, effective national environmental enforcement, in support of the ongoing development of compliance regime within the framework of international agreements and in consultation with the government and relevant organisation."[71] Pursuant to this decision, a draft guideline was prepared and adopted in UNEP Governing Council. In 2002, UNEP Study on 'Dispute Avoidance and Dispute Settlement in International Law' was a major breakthrough. In June 2006, UNEP developed a 'Manual on compliance with and enforcement of MEAs', to facilitate the use and application of the guidelines set forth in Annex-1. In December 2006, UNEP prepared 'Compliance Mechanisms under Selected MEAs' which noted that,

> "Disinclination to submit to the binding decisions produced by the dispute resolution procedure of arbitral or judicial tribunal could be the consequences of their adversarial nature and unpredictable and potentially expensive consequences. The trend towards use of multilateral non-compliance procedures, as opposed to adversarial dispute settlement procedures, seems to herald a focus on managing political relationship so as to maintain the viability and integrity of MEAs."[72]

These developments reflect that IEL remained no longer exclusively concerned with the adoption of normative standards to guide behaviour but increasingly addresses techniques of implementation which are practical, effective and acceptable to the most of the members of

[71] UNEP GC decision 21/27, 9 Feb. 2001.

[72] UNEP (2006), Compliance Mechanisms under Selected Multilateral Environmental Agreements, Nairobi, Kenya, p.12.

international community. In this phase several compliance measures were innovated and adopted. Non-compliance procedure (Implementation Committee) was established basically as a non-adversarial and non-contentious means of dispute avoidance.

Conclusion

A broad survey of the development of institutionalised cooperation in the field of IEL reveal that development in the field of compliance and DSM reflect the reality of prevailing political will, general awareness, scientific discoveries and inventions, economic milieu and the development in the other disciplines. Subject matter of disputes remains concerned with respective MEAs mainly because of compartmentalised development of IEL. Institutionalised and procedural means developed and incorporated gradually according to the subject matter and nature of MEAs. Basic form of inclusion of DSMs remained almost identical, however, the gravity of means to address global environmental problem raises question about effectiveness of techniques, procedures and institutions exist under international law to resolve conflicts over alleged non-compliance with environmental obligations. Another important feature is that states preferred ad-hoc settlement rather than permanent institutionalised mechanisms having binding outcome.

Chapter - II

CURRENT FRAMEWORK OF ENVIRONMENTAL DISPUTE SETTLEMENT

Introduction

The development of rules of international law concerning protection of environment will be of little significance unless accompanied by effective means for ensuring enforcement, compliance and dispute settlement. It is pertinent to underscore that "Conflict resolution and coordination to common purposes are perennial challenges in any anarchy, and the international system is no exception".[1] In this regard, international courts and tribunals have also played active role in clarifying the meaning and effect of treaty norms, identify the existence of customary norms of general applications, and establish a more central role for environmental consideration in the international legal order.[2]

It was observed that:

> [t]hat adjudicatory settlement of international disputes has become common feature of international relations, has taken effective shape and has developed into one of the most viable means of international dispute settlement....and now manifests itself in two forms- the arbitration and the standing courts- both forms consisting of diverse content."[3]

The judicial settlement of disputes seems to be preferred method among the sovereign states. In this context it is opined that,

> "[i]international law has in commanding and consistent way accepted judicial settlement as perhaps one of the most important methods of dispute settlement, even though negotiations and other non-judicial means of settlement still remains viable and important."[4] The decisions of international courts and tribunals have played an important role in enhancing the

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[1] Johns Dryzek (1987), "Environmental Mediation for international Problems", *International Studies Quarterly* Vol.31: 87-102, at p. 87. An 'anarchy', by definition lacks formal institution at the systematic level. See also J.G. Merrills (2005), 4th ed. *'International Dispute Settlement'*, Cambridge: Cambridge University Press, pp. 1-362.

[2] Philippe Sands (2007), "Litigating Environmental Disputes: Courts, Tribunals and the Progressive Development of International Environmental Law", in Tafsir Malik Ndiaye and Rudiger wolfrum (eds.) *Law of the Sea, environmental Law and Settlement of Disputes*, Leiden/Boston: Martinus Nijhoff Publishers, p. 313

[3] C.F. Amerasinghe (2007), "Reflections on Judicial Functions in International Law", in Tafsir Malik Ndiaye and Rudiger wolfrum (eds.) *Law of the Sea, environmental Law and Settlement of Disputes*, Leiden/Boston: Martinus Nijhoff Publishers, p.122.

[4] *Ibid.*

> legitimacy of international environmental concerns and confirming that global rules can play a significant role in contributing to the protection of shared environmental resources.[5]

Conflict over environmental and natural resources management issues can be severe as well as volatile. In this scenario when conflict is managed well it can bring parties together to sort out differences, understand the nature and factual information underlying the disputes and finally discover adequate responses. On the other hand when managed inadequately, conflict may deteriorate the situation, consume time and resources, destroy valuable relationship, and escalate other incidental issues as well.[6]

The chapter examines the current framework available at international level for resolution as well as handling of disputes related with environment and natural resources. It is well accepted notion of international legal system that every dispute at international level must be settled be peaceful means. The current means of settlement of dispute at international level has been developed over a century and reflects the politico-legal reality of the time.

There is a wide range of options available with considerable amount of derivations and innovations including good offices, mediation, conciliation, fact-finding commissions, dispute settlement panels, arbitration and other possible judicial arrangements which might be reached between parties to the dispute.[7] It assumes certain features which are entirely different in comparison to municipal system of dispute settlement. However, it appears that these methods are loaded with many limitations and states are not obliged to solve its differences at all.[8]

The technique of conflict management can be broadly divided into two categories namely, diplomatic procedures and adjudication. The diplomatic method of solving dispute is quite flexible and regulated by the will of the states parties. Parties retain control over disputes in so far as they may accept or reject a proposed settlement. This includes negotiation,

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[5] OECD (2008), *Litigating Environmental Disputes: Courts, Tribunals and the Progressive Development on International Environmental Law*, OECD Global Forum on International Investment, p.2.

[6] Stephen Higgs "The Potential for Mediation to Resolve Environmental and Natural Resources Disputes", [Online: web] Accessed on 5 March 2008, URL:http://www.acctm.org/docs/The%20Potential%20For%20Mediation%20to%20Resolve%20Environmental%20_CONNOR-Higgs_.pdf, p. 3.

[7] UNEP (2006), Manual on Compliance with and Enforcement of MEAs, Nairobi, Kenya, p.169.

[8] Malcolm Shaw (2007), *'International Law'*, Cambridge: Cambridge University Press, p.916.

consultation, mediation and conciliation. Adjudicatory means include arbitration and judicial settlements. It involves the determination by a disinterested third party of the legal and factual issues involved and provide for the legally binding settlement for the parties to disputes. [9]

The traditional mechanisms of dispute settlement are inherently bilateral and confrontational in character. The serious flaw in it seems to be requirement of tacit consent of the states, in the absence of which no proceeding can be initiated. Other lacunas include non-compulsory nature and interstate character of the proceeding. It is found that these limitations are becoming apparent especially with respect to disputes that relates to environment.[10] In fact international courts have played only a limited role in the development of international environmental law which is mainly piecemeal kind of effort. On the other hand Alternative Dispute Resolution (ADR) methods seem to have more potential role in resolution of environmental disputes. It also become clear that the essentially ad-hoc, one-time arbitration continues to survive and be resorted to on frequent basis.[11]

It seems that states may be reluctant to resort to adjudication where the rules of customary international law are themselves unsettled and suffers from lack of hierarchy of norms. Another roadblock is that environmental disputes lacks *erga omnes* character which proves detrimental to the community interest and access to justice. It seems that there remain certain areas where international environmental law has yet to take up a leading character.

Environmental Dispute Resolution and the UN system

The United Nations which is the successor of League of Nations,[12] presented huge opportunities for peaceful settlement of disputes especially disputes related with the environment. However it appears that these opportunities have never been fully exhausted for the purpose of environmental disputes. One of the purposes of UN is

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[9] *Ibid* at p. 31.

[10] Hey, Ellen (2000), 'Reflection on an International Environmental Court', *The Hague: Kluwer Law International*: 1-27, p.1.

[11] *Ibid* at p. 122.

[12] Under Article 12 of the Covenant of the League of Nations, it was declared that any disputes likely to lead to a conflict between members were to be dealt with in three ways: by arbitration, by judicial settlement or by inquiry by the Council of the League.

> 'to maintain international peace and security.....to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international dispute or situations which might lead to a breach of peace'.[13]

Moreover UN Charter mandates that 'all the members shall settle their disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered'[14]

UN system is divided on functional lines however often due to existing political reasons the distinction get blurred.[15] UN system offers political as well as legal mechanisms to maintain world peace and security. The UN Charter for the pacific settlement of disputes provides that, 'the parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or either peaceful means of their of their own choice'.[16] The role of United Nations Security council (UNSC) is primary for the maintenance of international peace and security.[17] The UNSC may investigate any dispute, or any situations which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of dispute or situation is likely to endanger the maintenance of international peace and security.[18] The UNSC may at any stage of a dispute of the nature referred to in Article 33 of UN charter or of a situation of the like nature, recommend appropriate procedures or methods of adjustment[19]. Further UNSC shall, when it deems necessary, call upon the parties to settle their dispute by the means provided under Article 33 of UN charter.[20] However, it is found that the cases where Council has recommended procedure or methods of adjustment under Article 36 of the Charter are comparatively rare.[21] Recently UNSC passed resolution under

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[13] Art. 1 UN Charter.

[14] Art. 1 UN Charter.

[15] See note 76, p. 1100.

[16] Art. 33 UN Charter.

[17] Art. 24 UN Charter.

[18] Art. 34 UN Charter.

[19] Art. 33 (2) UN Charter.

[20] Art. 33(2) UN Charter.

[21] The only precedent which olds state unequivocally responsible for environmental damage in law is UNSC Res. 687, adopted following Iraq's invasion and occupation of Kuwait in 1991; see UNGC Decisions 7 (1992), Para 35.

which it asked Iraq to pay compensation for causing environment degradation. After much dilly dallying Iraq agreed to pay the due compensation. It appears UNSC has played minimal role in resolution of environmental disputes because of lack of will of the states. It also underscores the point that until now environmental disputes has not been figured as 'threat to international peace and security' which can trigger action by Security Council.

Under the Charter UNGA may recommend measures for the peaceful adjustment of any situations, regardless of origin, which it deems likely to impair the general welfare or friendly relations among the nations, including situations resulting from violations of the provisions of UN charter set forth in the purpose and principles.[22] It can be postulated that the phrases 'any situations' and 'regardless of origin' may be utilised by UNGA to call attention of UNSC to any environmental situations which are likely to endanger international peace and security.[23]

The judicial organ of UN system, the International Court of Justice (ICJ) as a World Court has played significant role in the settlement of dispute. It appears, however, with reference to environmental dispute its potential has not been fully utilized. The UN system of environmental dispute settlement seems to operate under political pressures.

Dispute Settlement means available at International Level

The various mechanisms and forums available at international level for resolution of environment disputes includes (see Figure 2.1):

I. Alternative Dispute Resolutions
   a. Arbitration
   b. Conciliation
   c. Mediation
   d. Fact-finding commissions
   e. Inquiry commissions

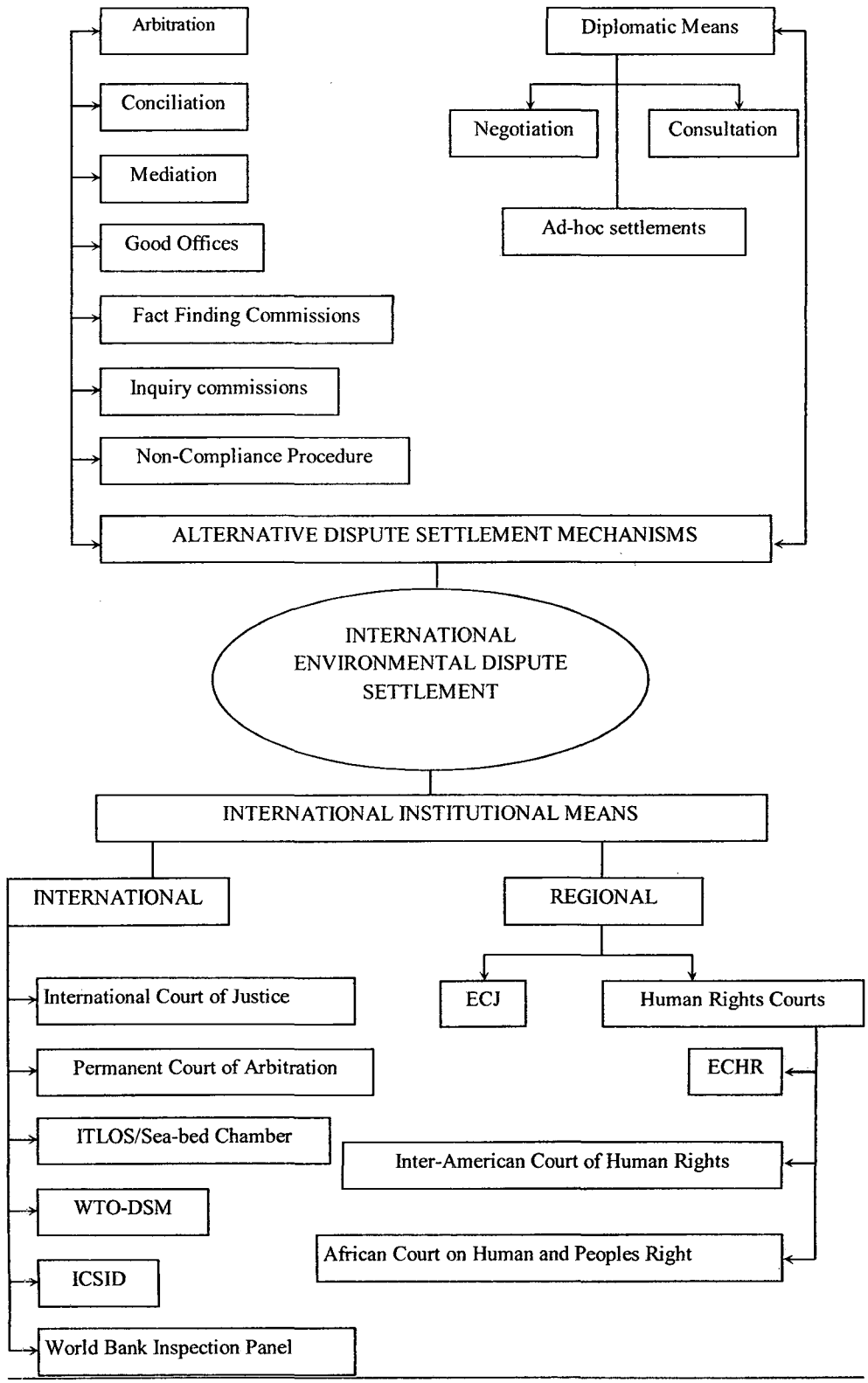
II. International Court of Justice (ICJ)

III. International Tribunal on Law of Sea (ITLOS)

[22] Art. 14 UN Charter.

[23] Art. 11 (3) UN Charter.

Figure 2.1: Dispute Settlement Mechanisms Available at International Level



Role of Alternative Dispute Resolution (ADR)

Definition and Background

ADR refers to the ways of settling disputes outside of the traditional court room setting.[24] In other words, Alternative dispute resolution (ADR) includes dispute resolution processes and techniques that act as a means for disagreeing parties to come to an agreement short of litigation.[25] ADR techniques typically involve setting legal conflicts and disputes using methods such as arbitration, mediation, and negotiation, etc.[26] Some additional methods are often used in ADR such as conciliation, conflict consulting and coaching and transformative interventions.[27] In recent years ADR has gained widespread acceptance among both the general public and the legal profession.[28] ADR is increasingly being used alongside formal as well as traditional legal system in order to capitalise on the typical advantage of ADR over litigation.

It seems that it complements the typical judicial process. This process is different from traditional litigation in the sense that a judge determining the final outcome may "allow parties or stakeholders in a dispute to reach mutually satisfactory agreements on their own terms."[29] ADR is being applied to many cases regardless of the subject-matter. Several factors must be present in order for ADR to work successfully. It is most likely to be work successful when all the parties participate voluntarily. The voluntary participation creates conducive atmosphere for acceptable outcome by the parties concerned.

Environmental Conflict Resolution (ECR): ECR is relatively new phrase coined for environmental dispute resolution. ECR is basically ADR applied to environmental

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[24] Alex Halem (2007), "Are Environmental Issues Suitable Subject Matter for ADR Methods", [Online: web] Accessed on 5 March 2008, URL:http://pegasus.rutgers.edu/~rcrlj/articlespdf/halem.pdf. p. 1. See also Francisco Orrego Vicuna (2001), "*International Dispute Settlement in an Evolving Global Society: Constitutionalization, Accessibility, Privatization*", Cambridge: Cambridge University Press, pp.98-123; Wex, Alternative Dispute Resolution: An Overview, at http://www.law.cornell.edu/topics/adr.html.

[25] Tornado Gianna, "Avoid Court at all Costs", The Australian Financial Review Nov. 14, 2008. See also http://en.wikipedia.org/wiki/Alternative_dispute-resolution .

[26] *Ibid* at p.3.

[27] *Ibid* at p.3; see for complete list http://adrbroker.com/ADRcategories.htm .

[28] *Ibid.*

[29] *Ibid.* Also see, U.S. Institute for Environmental Conflict resolution, "What is Environmental Conflict Resolution", at http://ecr.gov/what.htm.

conflicts.[30] The underlying idea behind the above notion is that complex nature and unique characteristics of environmental dispute can change the application of ADR to these issues.[31]

The involvement of multiple parties, the presence of technical scientific language and complexities, scientific uncertainty, unequal balance of power among the parties, politico-economic interest and issues of public interest[32] characterises the unique nature of environmental disputes. In this context it is observed that:

> "[e]environmental disputes are unique breed. They are not particularly well suited for judicial determination because they are so technically complicated and incredibly expensive."[33]

Hence it can be said that resolution of environmental disputes will require unique blend of dispute settlement methods, availability of most updated scientific knowledge, policy decisions on social choices and application of knowledge of other disciplines suited to each particular case. The proponents of ECR contend that:

> "The [environmental ADR] field has been proving that mediating and assisting parties created better and more timely solutions,.....[i]t's not a way of eliminating just court delays, but also reducing cost of environmental litigation. Also, in complex environmental cases, often the real issues are not what come out in court—and the parties can really solve the problem often are not on the table."[34]

On the other hand critics of EDR point out that it still lacks coherence as a discrete are of professional practice.[35]

The contesting question arises whether ADR is a viable method for resolution of environmental disputes?[36] Even if it is accepted that ADR can serve as appropriate technique for the resolution of such disputes, however, it first need to fill in gaps by providing answers

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[30] *Ibid* at p. 6.

[31] The Promise and Performance of Environmental Conflict resolution.6 In Rosemary O' Leary and Lisa B. Bingham (eds.), resources for the Future (2003); quoted in Alex Halem, "Are Environmental Issues Suitable Subject Matter for ADR Methods", p.6.

[32] Michael D. Young, *Esq.*, Resolving Environmental Disputes with Environmental Team Mediation: A New Model (http://mediate.com/article/young1.fm#; quoted in Alex Halem, "Are Environmental Issues Suitable Subject Matter for ADR Methods", p.6.

[33] *Ibid.*

[34] Environmental Health Perspectives (2000), Finding Middle Ground: Environmental Conflict Resolution (Vol. 111, No. 12, Sept. 2000) Cited in Alex Halem, "Are Environmental Issues Suitable Subject Matter for ADR Methods", at p.9.

[35] Michael Stone-Molloy and Wendy Rubenstein, "Principles of Alternative Dispute Environmental Dispute Resolution: Abstracted, Restated and Annotated", [Online: web] Accessed on 5 March 2008, URL: http://www.law.ufl.edu/conservation/pdf/ADR_principles.pdf, p.1.

[36] See note 30, at title page.

to questions such as Is ADR appropriate method for resolving some types of environmental conflicts?[37] Should certain environmental litigation cases be required to go directly to dispute resolution?[38] If so, is there a limitation on the types of environmental cases that should be subjected to ADR? How is that determined? What are the techniques and criteria for determining the types of the cases that are typically thought of as appropriate for ADR? When and how this technique is being used when it comes to environmental disputes and what successes have been made in solving environmental disputes using conflict resolution? Generally, EDR processes are reaction to the congested CDR processes[39] and have been developed for a number of reasons.

The benefits of EDR include:

I. *Time Savings:* EDR process can be used to resolve disputes in an expedited manner.[40] Some disputes do not require often complex procedural and substantive norms of CDR and in fact may become significantly worse when exposed to difficulties and delays of such processes.[41]

II. *Cost Effectiveness:* EDR process can be used to resolve disputes in an economical manner.[42] Because of time savings, freedom from lengthy and technical process EDR processes proves cost effective.

III. *Flexibility:* EDR process can be used to resolve disputes in adaptable manner.[43] In case of environmental disputes States are mainly relying on *ad-hoc* methods devoid of binding outcome. ADR provides wide range of options with greater flexibility.

IV. *Increased Control of Parties:* EDR processes can resolve disputes in a manner more under the control of the parties to the disputes, while still providing a reliable framework. It has also been experienced that greater control over whole dispute settlement process increase the possibility of greater compliance with the outcome.[44]

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[37] *Ibid.*

[38] *Ibid*, at p. 2.

[39] *Ibid.* at p. 1.

[40] *Ibid.* at p. 6.

[41] *Ibid*, at p. 6.

[42] *Ibid.*

[43] *Ibid.*

[44] *Ibid* at p. 6.

V. *Harmonize Relations:* CDR processes operate in contentious manner and generally spoil relations between the parties. EDR processes are perceived to be less intrusive, and therefore are more suited to resolving disputes between the parties with ongoing relationship.[45]

VI. *Public Participation and Community Interest:* Necessarily alternative process accommodates multiple parties including non-state actors, civil society groups and NGOs.

VII. *Allow Innovation:* One of the greatest advantages of ADR process is that it allows flexibility in procedure with possible innovation. Several derivatives may be formed and applied suited to particular disputes. It also discovers possibilities where within existing CDR process EDR may be accommodated or compulsorily mandated.

The win-lose adversarial approach forced by litigation typically does not resolve controversies satisfactorily for all the parties and can lead to continued conflict. This is an especially undesirable result in the environmental arena where the decision being made and policies enforced have far reaching impact beyond the interest of the parties in the court.[46] The underlying advantage ADR has over traditional litigation is that it offers more promising role in case of environmental disputes as it facilitates the classification of the outcome in many forms, devoid of, essentially damages or compensation.

Hence, ECR seeks to resolve environmental issues by mandating the elimination of adversarial process, and replacing it with a forum in which everyone involved has a chance to express their concerns and interests, and where the third party mediator are not bound by the same rules and restrictions that often tie judges' hands in these cases.[47]

Major components of ADR

ADR broadly include methods such as Negotiation and Consultation, Mediation and Good Offices, Arbitration, Conciliation, Inquiry/ Fact Finding Commissions.

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[45] *Ibid* at p. 7.

[46] *Ibid* at p.10.

[47] *Ibid.*

1. Negotiation

Negotiation, the simplest and most utilised form of diplomatic means, consists basically of discussion between the interested parties with a view to reconciling divergent opinions, or least understanding the different positions maintained.[48] It is normally forerunner to other procedures as the parties decide among themselves how best to resolve their differences,[49] as it was noted that, 'before disputes can be made subject of an action at law, its subject-matter should have been clearly defined by the diplomatic negotiations' because by mutual discussion the essence of the differences will be revealed and the opposing contentions can be explained.[50]

Negotiation is prominently suited to the clarification, if not always resolutions, of complicated disagreement.[51] The negotiation as a means of settlement of disputes has been used to resolve a number of environmental disputes. Further, resort to negotiation is provided in many environmental treaties, generally, before making use of other formal methods. The ICJ, in the *Fisheries Jurisdiction* Case, set out conditions establishing that future negotiation should be conducted

> "On the basis that each must in good faith pay reasonable regard to the legal rights of the other...the bringing about equitable apportionment of the fishing resources based on the facts of the particular situations, and having regard to the interests of the other states which have established fishing rights in the area. It is not a matter of finding simply an equitable solution, but an equitable solution derived from applicable law. "[52]

Resort to negotiation is provided in many MEAs, generally, before making use of other formal and institutional means.[53] For a successful negotiation following factors were considered necessary such as incentives, technical clarity, representativeness, power, commitment, urgency and rules.

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[48] See note 1 at 918.

[49] *Ibid*, at p.919; see also *Fisheries Jurisdiction* Case, ICJ *Reports,* 1973, p.3.

[50] *Ibid,* at p. 919.

[51] *Ibid.*

[52] Philippe Sands (1995), Principles of International Environmental Law I: Framework, Standards and Implementation, Manchester : Manchester University Press, p. 164; see also The North Sea Continental Shelf Case, ICJ Rep., 1969, p. 3.

[53] *Ibid.* For example, 1973 CITES, Art. XVIII; MARPOL 73/78, Art.10; 1972 Space Liability Convention, Art. IX; 1979 LRTAP Convention, Art. 13; 1985 Vienna Convention, Art.11(1) and (2); 1992 Climate Change Convention, Art.14; 1992 Biodiversity Convention, Art. 27(1).

2. Consultation

Consultation is conducted between the states as a means to avoid and resolve the latent disputes. The utility of consultation lies in the fact that it protects respondent State from being taken by surprise before any formal dispute settlement procedure begins.

In *Lac Lanoux* Case the arbitral tribunal held that France had a duty to consult with Spain over certain projects likely to affect its interest.[54] It was also observed that,

> "the reality of obligations thus undertaken is incontestable and sanctions can be applied in the event, for example, of an unjustified breaking off the discussion, abnormal delays, disregard of the agreed procedures, systematic refusals to take into consideration adverse proposal or interests, and more generally, in case of violation of the rules of good faith."[55]

The examples of the environmental treaties requiring consultation in certain situations includes: development plans which may affect the natural rescores of another states (1968 Article XIV (3) of African Nature Convention); measure to prevent pollutions of coastlines from oil pollution incidents on the high seas (Article III (a) of 1969 CLC); authorising ocean dumping in emergency situations (Article V (2) of 1972 London Convention; pollution by from certain substances from land-based sources (Article 9 (1) of 1979 Paris Convention; the permissibility of environmentally harmful activities (Article 11 of Nordic Environmental Convention); and generally problems in applying a treaty or the need for and nature of remedial measures for breaches of obligation (Article XII of Pacific Fur Sea Convention).

3. The nature of negotiation and consultation appears to bring out the fact that these diplomatic methods can be successfully applied to resolve environmental disputes. Further, in MEAs it may be recommended as compulsory procedure before going through more complex and adjudicatory methods. Although negotiations and consultation have potential to sort out differences on environmental matters, in case of failure of these methods other means such as good offices, mediation etc. may be used along with negotiations.

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[54] *Ibid,* at p. 165.

[55] *Ibid.*

4. Mediation

The employment of procedure of mediation involve the use of third party which can be an individual or individuals, or a state or group of states or an international organisation and it encourages the contending parties to come to settlement.[56] In other words, mediation can be defined as a process in which the parties to a dispute attempt to reach a mutually agreeable solution under the aegis of third party by reasoning through their differences. The process of mediation aims at persuading the parties to the disputes to reach satisfactory terms for its termination by themselves[57] and the product of mediation, unlike arbitration and judicial determination, is not verdict, but consensus among the actors involved. In this context it is noteworthy to mention that 'mediation operates in a cooperative manner. It would be unrealistic to expect a mediation forum to be established as a rationalistic, collegial, brainstorming group with problem solving in the mind.

The rules governing the mediation process are laid down in the Hague Convention of 1899 and 1907. It provides that, "In case of serious disagreement or conflict, before an appeal to arms the Signatory Powers agree to have recourse, as far as circumstances allow, to the good offices or mediation of one or more friendly Powers"[58]. The Convention further lay down that "Independently of this recourse, the Signatory Powers recommend that one or more Powers, strangers to the dispute, should, on their own initiative, and as far as circumstances may allow, offer their good offices or mediation to the States at variance. Powers, strangers to the dispute, have the right to offer good offices or mediation, even during the course of hostilities. The exercise of this right can never be regarded by one or the other of the parties in conflict as an unfriendly act."[59] In mediation the third party involves as an active participant in the interchange of proposals between the parties to the disputes but, the functions of the mediator are at an end when once it is declared, either by one of the parties

[56] See note 1 at p. 921.

[57] *Ibid.*

[58] Art. 2, Hague Convention of 1899 and 1907.

[59] Art. 3, Hague Convention of 1899 and 1907.

to the dispute, or by the mediator himself, that the means of reconciliation proposed by him are not accepted[60].

Its utility in resolution of environmental disputes has been examined by many scholars. Many MEAs includes mediation as one of means of dispute settlement[61], by the third party, where the negotiation has failed to settle a dispute, and before progressing to more formal and legally binding DSM. The advantage of mediation offers in dealing with environmental problems is that it retains the decentralised character of contemporary international political system.[62] However, the use of mediation in settlement of environmental disputes raises some significant questions such as who can mediate? What will be the capacity? What are the methods and modalities?

Benefits of Mediation

(i) Mediation can settle disputes and generate determinate outcomes at transaction costs lower than those of alternative forms of social choices, such as positional bargaining, coercive diplomacy, or litigation.[63]

(ii) Mediation can promote the exploration of means instrumental to the goals of the parties involved.[64]

(iii) The mediator can discourage articulation by the actors of their positions- between which one can at best only "split the differences".[65]

In order to ensure smooth process of mediation a number of conditions must be fulfilled namely: [66]

(i) There must be some problems in the eyes of law or significant to the parties.

(ii) A willing, competent, and credible intermediary must be available. Mediators associated with UN may be a good option.

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[60] Art. 5, Hague Convention of 1899 and 1907.

[61] For example, 1968 African Nature Convention, Art. XVIII; 1982 UNCLOS, Art.284 and Annex V, Section 1; 1985 Vienna Convention Art. 11(2).

[62] Johns Dryzek, (1987), "Environmental Mediation for international Problems", *International Studies Quaterly*, Vol.31: 87-102, p. 89.

[63] See note 28 at p.90.

[64] *Ibid*, at p.92

[65] *Ibid.*

[66] *Ibid*, at p. 9.

(iii) Mediation is only practicable if all the parties to the disputes have roughly equal capabilities. Capability here refers to the political power, economic resources, and ability to cooperate and share relevant information. However, this condition seems to be controversial as there exist huge differences between North and South.

(iv) It is also important that each party to the mediation regards others as legitimate participant of equal standing. The above proposition follows that there must be a degree of consensus.

(v) All the parties having sufficient and substantial interest must be included.

(vi) Number of parties must be kept at manageable level.

Stephen Higgs has made an observation in the context of mediation as more viable method for resolving international environmental disputes in comparison to other methods of dispute resolution.[67]

> "In many transnational environmental disputes, it can be difficult to determine which international treaty or convention to apply and therefore which dispute resolution mechanism to use. In mediation the parties are not required to fit their dispute into one provision or another from any number of applicable treaties. Many treaties have formal structure of dispute resolution that constrains the potential resolution to the conflict. In mediation the parties have more flexibility.
>
> The conflict between the states involve issues of both public and private significance that engage stakeholders with opposing point of views grounded in different culture and value system. Mediators with cross culture expertise can help disputant sift through these differences and help people resolve their disputes without damaging relationship.
>
> The mediation may be compulsorily used before escalation of dispute or use of more formal methods, for early solution of any prospective problems."

The mediation in environmental disputes offers a form of authority which is based upon consent and voluntary compliance. Moreover, mediation may be attractive to the actors in the international system precisely because it retains a respect for sovereignty-[68] "The voluntary, reasoned consensus is the essence of mediation which constitutes one of the most secure conceivable foundation for any international regime as spontaneous regime are vulnerable to decay in a dynamic environment, and imposed regimes will last only as long as the hegemon's enforcement capabilities."[69] Hence, it appears that mediation offers huge role in

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[67] *Ibid.*

[68] See note 28 at p. 99.

[69] *Ibid* at p. 100.

case of environmental disputes because if it's very nature. "It involves not only avoidance but also settlement on the basis of law, as it was noted that, most of the environmental mediation takes place in the shadow of law".[70]

5. Conciliation

The process of conciliation involves a third party investigation on the basis of dispute and the submission of a report embodying suggestions for a settlement.[71] It involves elements of both inquiry and mediation. The task of conciliation commission includes "to elucidate the question in dispute, to collect with that object all necessary information by the means of inquiry or otherwise, and to endeavour to bring the parties to an agreement. It may, after the case has been examined, inform the parties of the terms of settlement which seem suitable to it, and lay down the period within which they are to make their decisions."[72] In conciliation, the third party assumes a more formal role and often investigates the factual aspects underlying the disputes, making formal proposals for the resolution of the disputes in accordance with the applicable law. However, it must be noted that conciliation reports are only proposals[73] and as such do not constitute binding decisions.

Most of the environmental treaties include provisions relating to conciliation between the parties to the disputes.[74] The treatments of methods of conciliation into MEAs are not uniform. Its use is either mandatory or optional.[75] Some conventions provide that the conciliation will be used if the parties to the disputes have not accepted compulsory dispute settlement procedure by arbitration or ICJ.

Permanent Court of Arbitration adopted in 2002, a very progressive instrument for the amicable and non-confrontational settlement of disputes, namely, 'Optional Rules for

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[70] *Ibid.*

[71] See note 1 at p.925.

[72] Art. 15 (1) of 1928 General Act on the Pacific Settlement of International disputes (revised in 1949).

[73] See note 76 at p. 926.

[74] 1963 Vienna Convention, Optional Protocol Concerning the Compulsory Settlement of Disputes, Art.III; 1985 Vienna Convention, Art, 11 (4) (5) (providing for establishment of a conciliation commission); 1992 Biodiversity Convention, Art. 27(4) and Annex II, Part2; 1992 Climate Change Convention, Art. 14(5) to (7).

[75] See for detailed classification UNEP (2001), *Annex 1 Guideline on Dispute Settlement Mechanisms under MEAs*, Peace Palace Paper, 2001, p.7-9.

Conciliation of Disputes Relating to Natural Resources and/or the Environment'.[76] Being primarily based on the PCA Conciliation Rules and UNCITRAL Conciliation Rules, the Optional Rules reflect the particular characteristics of disputes having a natural resources conservation or environmental protection component.[77]

6. Commission of Inquiry/Fact-fining Commission

Use of inquiry commission, as another form of ADR for dispute avoidance and resolution appears to be very useful in case of environmental disputes. There are many treaties which provides for establishment of commission of inquiry or "fact-finding commissions".[78]

In cases where the difference of opinions on the factual matters underlies a dispute between the parties, the desirable solution may be to institute commission of inquiry conducted by the reputable observers to clarify and deduce the fact in question.[79] Hague Convention provides that, "In differences of an international nature involving neither honour nor vital interests, and arising from a difference of opinion on points of fact, the Signatory Powers recommend that the parties, who have not been able to come to an agreement by means of diplomacy, should, as far as circumstances allow, institute an International Commission of Inquiry, to facilitate a solution of these differences by elucidating the facts by means of an impartial and conscientious investigation."[80]

7. Arbitration: Permanent Court of Arbitration

International arbitration has been described as having 'for its object the settlement of disputes between States by the judges of their own choice and on the basis of respect for law. Recourse to arbitration implies an engagement to submit in good faith to the award.'[81] The procedure of arbitration grew out of the processes of diplomatic settlement and represented

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[76]See http://www.pca-cpa.org/upload/files/ENVIRONMENTAL(1).pdf.

[77] See http://www.pca-cpa.org/showpage.asp?pag_id=1049.

[78] Annex VIII, 1982 UNCLOS. Relating to the special arbitration, 1982 UNCLOS allows parties to a dispute to restrict the tribunal to an inquiry into the facts giving rise to the disputes; 1909 Boundary waters Treaty, Art. IX. 1952 FAO International Plant Protection Convention, Art. IX.

[79] See note 76, p.19 at p.923.

[80]Art. 9 of the 1899 Hague Convention. Available at http://www.pca-cpa.org/upload/files/1899ENG.pdf; see also http://pca-cpa.org/ENGLISH/BD/inquiryenglish.htm

[81] 1907 Hague Convention on the Pacific settlement of International disputes, Art.37.

an advance towards a developed international legal system.[82] The 1899 Hague Convention for the Pacific Settlement of Disputes included a number of provisions on international arbitration.

International arbitration was held to be the most effective and equitable manner of dispute settlement, where diplomacy had failed.[83] However, States are not obliged to submit a dispute to the procedure of arbitration in the absence of their consent.[84] Arbitration as a method of settling disputes combines element of both diplomatic and judicial procedures in which award is final and binding and the arbitrators are required to base their decision on law.[85] The law to be applied in arbitration proceedings is international law, but the parties may agree upon certain principles to be taken into account by the tribunal and specify this in the compromise.[86]

In recent years states negotiating environmental treaties have favoured the inclusion of specific provision for the establishment of an arbitral tribunal, with the power to adopt binding and final decisions.[87] Arbitration is extremely useful process where some technical expertise as well as flexibility is required. .[88] Role of arbitration in settlement of environmental disputes appears to be salutary. The international courts and tribunals dealing with environmental issues have added to the jurisprudence historically significant awards in the *Bering Fur Seals Case* (1893), *The Trail Smelter Case* (1941) and *The Lac Lanoux Case* (1957). Way back in 1893, a distinguished international arbitration tribunal gave an award in

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[82] See note 1, p. 19 at p.952.

[83] *Ibid* at p. 953.

[84] *Ibid*, at p. 955. For example see the *Eastern Carelia* Case, PCIJ Series B, No.5, 1923, p.27; *Ainbatilos* Case, ICJ *Reports*, 1952, p. 19.

[85] *Ibid.* at p. 958.

[86] *Ibid.* at p. 955.

[87] For example see 1958 High Seas Convention, Art. 9 to 12; 1979 Berne Convention, Art.18; 1988 CRAMRA, Arts. 55 to 59 and Annex; 1973 CITES, Art. XVIII (to the Permanent Court of Arbitration at The Hague); 1989 Basle Convention, Art.20 and Annex VI; 1992 Biodiversity Convention, Art.27 and Annex II, part I; 1992 Climate Change Convention, Art.14; 1992 Watercourses Convention, Art.22.

[88] See note 76, p.19 at p.959.

the *Pacific Fur Seals Arbitration.*[89] In 1941, an Arbitral Tribunal gave its final award in the famous *Trail Smelter Arbitration*, between United State and Canada.

The modern international system of state responsibility for transboundary environmental harm is widely considered to have its genesis in the town of Trail, British Columbia, located on Canada- United States border.[90] The 1941 decision of the arbitral tribunal set forth *dicta* the principle that has become cornerstone of international environmental law:

> "No states 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 person therein, when the case is of serious consequences and the injury is established by clear and convincing evidence."[91]

In other words, nations have a responsibility to not allow their territory to be used in ways that cause environmental harm to, or within, the territory of other nations.[92]

In 1957, another distinguished tribunal gave its award in the *Lac Lanoux Arbitration,* between France and Spain concerning the circumstances in which one state made lawfully use of shared water.[93] The tribunal discussed the applicable law because the Parties (France and Spain) disagreed on this issue of international rights and obligations of states sharing common natural resources such as water. The tribunal observed that,

> "[b]ecause the question before it related to a treaty of 1866, the tribunal would apply the treaty if clear. But if interpretation was necessary, the tribunal would turn to international law, allowing it in this case to take account of "spirit" of the *Pyrennes treaties* and *des regles du droit international commun*, and also consider certain rules of customary international law in order to proceed to the interpretation of the treaty and the Act."[94]

The above mentioned cases are noteworthy in the following respects: firstly, it highlighted the conflict between economic interests and environmental preservation. Secondly, it highlighted the use of arbitration in case of environmental disputes. Thirdly, these are

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[89] See note 72, p.18 at p.3. This concerned a dispute between the U.K. and U.S. as to the circumstances in which the U.S.- a coastal State could interfere with British fishing activities on the high seas. This case pitted interests of conservation against interests of economic exploitation.

[90] Aron Schwabach (2006), International Environmental Disputes: A Reference Handbook, England: ABC-CLIO Inc., p.14

[91] *Ibid*, at p.15.

[92] *Ibid.*

[93] See note 72, p.18 at p.15. See also Compendium of Judicial decisions on matters Related to Environment, Vol. 1, 1998 available at http://www.unep.org/paedia/publications/Jud.dec.%20PreInt%20.pdf.

[94] *Ibid.*

significant also because it identifies issues concerning the need to balance competing interests: in the field of foreign investment rules, for example, of the need to balance the legitimate interests of the community to protect its environmental resources and the legitimate interests of a private investor to protect his or her property rights.

Permanent Court of Arbitration (PCA)

The PCA is an intergovernmental organisation. It was established by the Convention for the Pacific Settlement of International Disputes, concluded at The Hague in 1899 during the first Hague Peace Conference.[95] The conference was convened at the initiative of Czar Nicholas of Russia "with the object of seeking the most objective means of ensuring to all people the benefits of real and lasting peace, and above all, of limiting the progressive development of existing armaments."[96] As a specialist International Environmental Court with mandatory jurisdiction does not yet exist, the Permanent Court of Arbitration could be appropriate forum to settle environmental disputes.[97] The Second Conference of the members of the PCA by its Resolution of May 1999 called upon Secretary-General and the International Bureau of PCA:

> "To expand the courts role ... including the area of environmental disputes, taking into account the entire range of international disputes resolution mechanisms administered by the court."[98]

It is contended by proponents of PCA as potential forum for the resolution of environmental disputes that this forum can play key role in the adjudication of matters related with environment because of below mentioned reasons:

(a) An institutional role for PCA in the dispute settlement provisions of new environmental agreements- in the form of draft model clauses- as many MEAs lack this facility.

(b) Existing MAEs might allow PCA to play a role where it has exiting capacity and experience: fact finding, conciliation, mediation, and arbitration.

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[95] See http://www.pca-cpa.org/showpage.asp?pag_id1044.

[96] *Ibid.*

[97] Alfred Rest (2004), "Enhanced Implementation of International Treaties by Judiciary- Access to Justice in International environmental Law for Individuals and NGOs: Efficacious Enforcement by the Permanent Court of Arbitration", *MqJICEL*, Vol. 1:1-28, p.19; see also C.P.R. Romano (2000), "The Peaceful Settlement of International Environmental Disputes: A pragmatic Approach in Daniel Bodansky (eds.) *The Oxford Handbook of International Environmental law*, New York: Oxford University Press; Alfred Rest (1999), " An International Court for the Environment: The Role of Permanent Court of Arbitration", 4 *Asia Pacific Journal of International Law* 107.

[98] *Ibid*, at p. 20, see in particular Para 9 of the Resolution, 238.

(c) It is well recognized and accepted by many UN Member States.

(d) Recently it adopted Optional Rules on Arbitration and Conciliation based on UNCITRAL Model Rules especially suited to environmental disputes.

(e) By allowing parties other than states, it widened its jurisdiction to all parties of the community of states, including organisations, and all members of society.

(f) The flexibility of the court with regard to place of arbitration. In transnational environmental litigation in particular, this place can be important in terms of providing evidence of harm which has occurred.[99]

(g) The important issue of extra *financing* required for a new court for the environmental disputes advocates in favour of existing PCA. Besides, the PCA Financial Assistance Fund for the Settlement of International Disputes of 1995 grants financial support to the State which needs help to meet the cost involved.

(h) it is very advantageous that the PCA is very experienced in matter of trade law, investment law and socio-economic matters which it can combine with environmental disputes.[100]

International bureau of the PCA in January 1998 commissioned a study on Dispute Settlement Clause under MEAs which prepared "Annex 1 Guidelines for Negotiating and Drafting Dispute Settlement Clause for International Environmental Agreements".[101] In 2003 the UNECE approved reference to the PCA Environmental Arbitration Rules in its draft "Legally Binding Instrument on Civil Liability under the 1992 Watercourse Convention and TEIA Convention".[102]

A number of MEAs lacks either procedural rules for and/or institutional mechanisms to support arbitration, conciliation or fact finding and in most of the agreements provisions for dispute settlement relies upon ad-hoc arrangements. This provides an opportunity for the PCA, working with parties to the relevant treaties, to assist the filling gaps and the PCA may consider that it is in a position to offer institutional support to the proceedings that might be instituted under these agreements, or, when necessary that the procedural rules of the PCA on arbitration, conciliation and inquiry commission might themselves be adopted and utilised under these agreements.[103] It seems that it may be appropriate for the PCA to establish

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[99] *Ibid*, at p. 21.

[100] *Ibid.*

[101] Available at http://www.pca-cpa.org/upload/files/envannex1.pdf . This study was prepared in the context of, and with a view to contributing to the implementation of, Principle 26 of Rio Declaration on environment and Development.

[102] UNEP (2006), *Manual on Compliance with and Enforcement of MEAs*, Kenya, p. 173.

[103] See note 141, p.35 at p. 20, Para 58.

contact with the relevant convention secretariat to inform them of the PCA's existing rules and the administrative support that PCA can offer in relation to the arbitration, conciliation or inquiry commission.[104]

PCA has adopted guidelines and model clauses for traditional dispute settlement in environmental treaties. These generally rely and build upon precedents, since existing approaches have been tested and more likely to be adopted. In 2001, the PCA adopted *Optional Rules for Arbitration of Disputes Relating to the Environment and/or Natural Resources*. Further, in 2002, the *Optional Rules for Conciliation Relating to the Environment and/or Natural Resources* were adopted.[105] These Rules provide the most comprehensive set of environmentally tailored dispute resolution procedural rules presently available.[106]

These rules were drafted by, inter alia, to serve as procedural rules for the resolution of disputes between state parties to MEAs. These Rules are based on UNCITRAL Arbitration Rules with changes in order to reflect the public international law element which pertains to disputes which may involve States and utilization of natural resources and environmental protection issues, and international practice appropriate to such disputes, and reflect the particular characteristics of disputes having a natural resources conservation or environmental protection component.

These Rules are structured into four main sections: the Introductory Rules(Section I, Article 1-4), the Composition of the Arbitral Tribunal (Section II, Articles 5-14), the Arbitral Proceedings (Section III, Articles 15-30) and the Award (Section IV, Article 31-41). They are further clarified by explanatory Memorandum. The Rules provides for the establishment of a specialized list of arbitrators considered to have expertise in this area. The Rules also provides for the establishment of a list of scientific and technical experts who may be appointed as expert witness.[107] It provides that where all the parties have agreed in writing that a dispute may arise or that has arisen between them shall be referred to arbitration under

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[104] See note at p. 20, Para 58.

[105] See http://www.pca-cpa.org/showpage.asp?pag_id=1058.

[106] Available at http://www.pca-cpa.org/upload/files/ENVIRONMENTAL.pdf. These Rules were drafted by a Working Group and Committee of Experts in environmental law and arbitration. The environmental rules seek to address the principles lacunae in environmental dispute resolution identified by Working Group.

[107] For the list see http://www.pca-cpa.org/upload/files/CPE%2020071113.pdf

PCA Optional Rules, such disputes shall be settled in accordance with these rules subject to such modification as the parties may expressly agreed upon in writing.[108]

These Rules which are mindful of multiparty involvement, provide extreme flexibility to all stakeholders, for example, the choice of arbitrators or experts is not limited to the PCA Panels.[109] One of the unique innovations is that these Rules have been elaborated for the use in arbitrating deputes arising under treaties, or other agreements or relationship between the parties one or more of which is not a state.[110]

In resolving disputes, the arbitral tribunal shall apply the law or rules of law designated by the parties as applicable to the substance of the disputes. Failing such designation by the parties, the arbitral tribunal shall apply the national and/or international law and rules of law it determines to be appropriate,[111] however, this provision shall not prejudice the power of the tribunal to decide a *case ex aeqou et bono,* if the parties expressly agrees thereto.[112] Further, it provides that in addition to making a final award,[113] the arbitral tribunal shall be entitled to make interim, interlocutory, or partial awards. The awards shall be made in writing and shall be binding on the parties.[114] The Rules contained a lot of innovative instruments which will contribute to an enhanced judicial control concerning the application of environmental law and strengthen the legal positions of NGOs as well as of the individual victims of deleterious environmental activities. In essence, role of PCA, however, not exhausted fully so far, are very extensive in both ways: institutional and procedural.

International Court of Justice (ICJ)

The ICJ is established as a principle judicial organ in 1945 under the Charter in which all the Member States of UN *ipso facto* be parties to the court statute[115] Further, a state which is not

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[108] Art. 1 of the Optional Rules.

[109] Para V, Optional Rules, p. 5.

[110] *Ibid.*

[111] *Ibid*, Art. 33, Para 1.

[112] *Ibid*, Art. 33, Para 2.

[113] *Ibid*, Art. 32. Para 1.

[114] *Ibid,* Art. 32, Para 1.

[115] See http://www.icj-cij.org/court/index.php?p1=1&P2=2#Permanent; Art. 92 and 93(2) of UN Charter.

a member of the UN may also become a party to the statute of ICJ on condition to be determined in each case by UNGA upon recommendation of the UNSC.[116]

Chambers and Committees

The Court generally performs its duties as a full Court[117] but it may also form permanent or temporary chambers by the virtue of Article 26 and Article 39 of the Statute. 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 the particular type of categories of cases, the Court may form chambers composed of three or more judges as the Court may determine.[118] For dealing with a particular case, the Court with the approval of the parties may at any time form a chamber for aforesaid purpose.[119] Further the Court may hear and determine cases by summary procedure with a view to the speedy dispatch of business. For this purpose, the Court shall form a chamber composed of five Judges annually at the request of the parties.[120]

Environmental Chamber

In July 1993, the court established a Chamber for environmental matters consisting of seven members.[121] This was the period just after Earth Summit in which special emphasis were paid on judicial settlement of environmental disputes. Moreover, since several years need was felt to establish an international court specifically for the purpose of environmental disputes. Established in 1993, it was reconstituted until 2006. In its 13 years of life no state ever took recourse to Environmental Chamber so in 2006 court decided not to hold election for a Bench of the said Chamber.[122] In Environmental Chamber only states have direct access. This is regrettable because by its very function, the ICJ could be proper forum to control the implementation of every treaty obligations, to develop further and improve international environmental law and to concentrate on the urgent problems of protecting the global commons by applying the concept of *erga omnes* obligations.

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[116] See Art. 93(2) with Arts, 34(2) (3), 35 (3).

[117] A quorum of nine judge, excluding judge *Ad hoc.*

[118] Art. 26 (1) of the Statute. For example labour cases, cases relating to the transit and communication.

[119] Art. 26 (2) of the Statute.

[120] Art. 29 of the Statute.

[121] The chamber was established under Art. 26 (1) of the Statute by the ICJ *communiqué* 93/20, 19 July, 1993. See http://www.icj-cij.org/court/index.php?p1=1&p2=4 .

[122] *Ibid.*

Jurisdiction

It must be noted here that only States may be parties in cases before the Court.[123] The jurisdiction of the Court can be divided into Contentious Jurisdiction and Advisory Jurisdiction.

(i) ***Contentious***

Contentious jurisdiction of the court arises under Article 36(1) of the Statute. It provides that, the jurisdiction of the Court comprises all cases which the parties to it and all matters specially provided for in the Charter of the UN or in Treaties and Convention in force[124]. The State Parties may refer a particular dispute by means of a special agreement or compromise which will specify the terms of the dispute and framework within which the Court is to operate.[125] The jurisdiction of the Court is founded upon the consent of the parties, which need not be in any particular form. In certain circumstances the Court will infer it from the conduct of the parties.[126] The Court has emphasised that such consent has to be voluntary and indisputable.[127]

Recent practices in MEAs permit the parties at the time of signature, ratification or accession or at any time thereafter, to accept compulsory dispute settlement by recourse to ICJ.[128] Only few state parties, however, accepted this option.

Another option is available under Article 36(2) of the Statute which is generally referred to as an "optional clause". Under Article 36(2), Parties to the Statute may at any time declare that they recognise as compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of Court in all legal dispute concerning:

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[123] Art. 34 (1) of Statute of ICJ.

[124] *Ibid.*

[125] See note 76, p. 19 at p. 973. See also http://www.icj-cij.org/jurisdiction/index.php?p1=5

[126] *Ibid*, at p. 974, for example in *Corfu Channel* (Preliminary Objection) case, the court inferred consent from the unilateral application of the plaintiff state (the U.K.) followed by subsequent conduct from the other party (Albania) intimating acceptance of the court's jurisdiction.

[127] *Ibid.*

[128] For example 1985 Vienna Convention, Art.11 (3); 1989 Basle Convention, Art. 20 (3); 1992 Climate Change Convention, Art.21; International Watercourse Convention, Art.22.

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.

It is to be noted that the declaration made under Article 36(2) may be made unconditional or on condition of reciprocity on the part of the several or certain States, or for a certain time.[129] The practice of the Court has been to accept reservations or conditions to declaration made under the optional clause.[130] Further, Article 36 (2) of the Statute of the Court requires that the matter brought before it should be a legal dispute.[131] This provision was intended to operate as a method of increasing the Court's jurisdiction, by the gradual increase in its acceptance by more and more States. Declaration made under Article 36(2) of the Statute are in majority of cases are conditional and are dependent upon the reciprocity.

(ii) ***Advisory***

While in contentious proceedings only States may be the parties to the dispute, the UN Charter allows, UNGA and UNSC to seek an advisory opinion on any legal question from ICJ.[132] Besides UNGA and UNSC, other organs of the UN and Specialised Agencies which may at any time be so authorised by the GA, may also request advisory opinion of the Court on legal question arising within the scope of their activities.[133] The purpose of the advisory jurisdiction is not to settle at least directly, interstate dispute but rather to offer legal advice to the other organs and institutions requesting the opinions. Advisory opinions are however not binding in law upon the requesting party.

Although no legal question on an environmental issue has been the subject of a request for an Advisory opinion this route could provide for a useful and non contentious way of obtaining

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[129] Art. 36 (3) of the Statute.

[130] See note 69, p.17 at p. 172; see also Malcolm Shaw (2007), *International Law*, Cambridge: Cambridge University Press, pp. 972-982 ; S.K. Kapoor (2007), *International law and Human Rights*, Allahabad: Central Law Agency, pp.565-567.

[131] *Ibid*, at p. 969.

[132] Art. 96(1) of UN Charter read with Art. 65 of the Statute.

[133] Art. 96 (2) of the UN Charter.

independent international legal advice on environmental matters.[134] In July 1993 the Assembly of WHO requested an advisory opinion from the ICJ[135] on the legality of the use of nuclear weapons in the context of their effect on human health and the environment.[136] The question was as follows:

> "[i]n view of the health and environmental effects ,would the use of nuclear weapons by a State in war or other armed conflict be a breach of its obligation under international law including the WHO constitution?"[137]

The UN and other several states took the position that WHO has no right to ask for an advisory opinion about the legality of the use of nuclear weapons.[138] The Court considered that the question raised in the request for an advisory opinion submitted to it by the WHO does not arise "within the scope of its activities" of the organization as defined by its Constitution.[139]

The Court declined to give its advisory opinion requested by WHO. The Court, however, emphasised that nuclear weapons are subject to international humanitarian law despite

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[134] See note 69, at p. 173.

[135] In accordance with Art. 96 (2) of the UN Charter, Art. 76 of the Constitution of WHO and Art. X of the agreement between UN and WHO, approved by the UNGA on 15 Nov. 1947in its *Res.* 124 (II).

[136] See Michael Matheson, 'The Opinion of the ICJ on the Threat or Use of Nuclear Weapons, 1997, *AJIL*, pp. 417-435; see also Bharat H. Desai (1997), '*Non-Liquet* and the ICJ Advisory Opinion on the Legality of the Threat or Use of nuclear Weapons: Some reflections, *IJIL*, pp.201-218; *The Use of Nuclear Weapons (Advisory Opinion)*, 1996, ICJ *Report*, p.68 In 1994, UNGA also requested for advisory opinion from ICJ on the following question: "Is the threat or use of nuclear weapon in any circumstances permitted under international law?" See http:// www.icj-cij.org/ocket/files/95/7446.pdf; UNGA Res. Entitled "Request for an Advisory Opinion from ICJ on the Legality of the Threat or Use of Nuclear Weapons" (No.1), was adopted at the forty-ninth Session of the UNGA on 15 Dec., 1994 under agenda item 62 entitled "General and complete disarmament".

[137] *Ibid.*

[138] *Ibid.*

[139] See the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, 8 July, 1996, ICJ Reports, General List No. 93. This question was set forth in resolution WHA 46.4. Adopted by the WHO Assembly on 14 May, 1993. The resolution read as follows:

> Recalling resolution WHA 42.26 on WHO contribution to international efforts towards sustainable development is and...which draws attention to the effects on health of the environmental degradation and recognizing the short and long term environmental consequences of the use of nuclear weapons that would affect human health for generations.
>
> Recalling the primary prevention is the only appropriate means to deal with health and the environment from nuclear weapons.
>
> Realizing that primary prevention of the health hazard of nuclear weapons requires clarity about the status and their use in international law.

having been invented after most humanitarian principles and rules came into existence.[140] This decision is a major setback considering the following fronts:

(i) It discouraged role of international organizations, specialised agencies to ask for advisory opinion having elements of environment.
(ii) This decision is serious reversal to progress made in the field of international environmental law against Armament, Human Rights law and Humanitarian law.
(iii) This could be landmark judgement having enough pressure to desert from any activities harming ecology.

Interim Measures of Protection

Art. 41 of the Statutes provide:

(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.

This provision can be of special importance in case of environmental disputes considering the fact that environmental damages are generally irreversible in nature. The purpose of exercising the power is to protect the rights which are the subjects of dispute in judicial proceedings. The Court has also stated that provisional measures are only justified if there is urgency.

In *Nuclear Test* cases[141] the Court directed interim measures of protection. The Court indicated interim measures of protection asking the parties to ensure that no action shall be taken which might aggravate or extend the disputes or prejudices the rights of another party and calling on France to avoid nuclear tests causing the deposit of radio-active fall out on Australian territory.

The Court pending its final decision in the proceedings instituted by Australia against France indicated following provisional measures:

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[140] *Ibid.*

[141] Viz., Nuclear Tests (NZ vs. France), 1973 and Nuclear Tests case (Australia vs. France), available at http://www.icj-cij.org/docket/index.php?p1=3&p2=3&code=pp&case=60&k=d0; http://www.icj-cij.org/docket/index.php?p1=3&p2=3&code=af&case=58&k=78 .

> "The Government of Australia and France should each of them ensure that no action of any kind is taken which might aggravate or extend the dispute submitted to the Court.....and, in particular, the French Government should avoid nuclear tests causing deposit of radio-active fall out on Australian territory."[142]

In *Fisheries jurisdiction* case,[143] interim measures of protection were also indicated.

> "The Federal Republic of Germany and the Republic of Iceland should each of them ensure that no action of any kind is taken which might aggravate or extend the dispute submitted to the court."

Recently in an inter-state dispute related to the use of shared natural resources, the ICJ set the criteria for adopting provisional measures aimed at protecting environmental resources under the risk of imminent and irreparable damages.[144]

In its order *Pulp Mills on the River Uruguay*[145] the ICJ found that any prejudice or harm to Argentina as a result of the construction of the mills was not imminent; and that any detriment could be restituted on the merits of the disputes. Further, there was no proof that the injury could not be rectified exclusively by implementing provisional measures suspending the mills' construction.

The ICJ observed that:

> The environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond the national control is now part of the corpus of international law relating to the environment.[146]

The most important feature of the order is that it triggered debate about requisites of granting provisional measures. In this separate opinion, Judge Abraham observed that, "the ICJ established jurisdiction as to provisional measures focuses only on the imminence and irreparability of damages over the rights of the claimant states and there is no legal analysis

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[142] See *Nuclear Tests (Australia vs. France)*, Interim Protection, Order of 22 June, 1973, IC Rep., p.99; *Nuclear Tests (New Zealand vs. France)* Inter Protection, ICJ Rep. 1973, p. 135.

[143] Fisheries Jurisdiction (Federal Republic of Germany vs. Iceland), Interim Protection, Order of 17 Aug., ICR Rep. 1972, p. 30.

[144] Alberto Alvarez- Jimmez (2007), "Inter-state Environmental Disputes, Provisional Measures and ICJ's order in the *Case Concerning the Pulp Mills on the River Uruguay*", *Temple Journal of Sci. and Tech. and Envtl. Law*, Vol. XXV, No.2, pp.161-172, p.162.

[145] The *Pulp Mills on the River Uruguay (Argentina vs. Uruguay)*, Provisional Measures, Order of 13 July 2006, ICJ *Reports*2006, p. 113. See http://www.icj-cij.org/docket/ffiles/135/11235.pdf .

[146] *Ibid*, p.165.

of the basis of the claimant rights argued to be at imminent and irreparable risk."[147] He further suggested more stringent test to indicate provisional measures which would contain three requirements.[148]

(i) The existence of the alleged violated right must be demonstrated plausibly;
(ii) It is reasonable to expect that the respondent's behaviour could or threatened to produce an imminent harm on such right;
(iii) Under the circumstances of the case, it is imperative to adopt protective measures in order to prevent such right from suffering an irreparable damage.

However, it is important to highlight that ICJ's existing requirement for the indication of provisional measures strike an appropriate balance between respondent's sovereignty and claimant's environmental concerns for the risk of an immediate and irreparable damages[149] so that strict test might not detract from granting interim measures.

In spite of the fact that ICJ never dealt completely with a major international environmental dispute, it has had opportunity to consider matters concerning environment and natural resources and to give judgements which establishes important general principles.[150] Beside few abovementioned cases, the following cases influenced the development of international environmental law. These include *Corfu Channel* case, *Certain Phosphate Lands in Nauru* case, and recently *Gabcikovo-Nagymaros Project (Hungry/Slovakia)* case. It seems ICJ has shown its inclination for *ad hoc* settlements because states showed reluctance for any binding environmental dispute settlement. Apart from it, it remains a major drawback that only states are parties to it.

International Tribunal for Law of the Sea (ITLOS)

One of the most important achievements of the third United Nations Conventions of Law of the Sea conference (UNCLOS) is the establishment of a real code for the settlement of disputes which may arise with respect to the interpretation and application of the Law of Sea convention.[151] It was recognised early in the negotiation that if the parties to the convention had retained the right of the international interpretation then the complex text drafted by the

[147] See note 209, p.48 at p.169. Available at http://www.icj-cij.org/dockte/files/135/11241.pdf.
[148] *Ibid*, p.170.
[149] *Ibid*, p. 171.
[150] See n.69 at p. 172.
[151] See http://www.Un.org/depts/Los.index.htm

conference would have looked stability certainly and predictability.[152] The underlying idea behind the above notion, 'is concept of sovereign equality, in the sense that 'in the absence of an agreement on impartial third party adjudication the view of one state with reference to the in the interpretation of the convention cannot prevail over the views of the member states.[153]

Part XX of the convention deals exhaustively on provision relating the settlement of disputes basically the divided into the section: Section 1 deals with General provision dealing with obligation to settle disputes by peaceful means,[154] settlement of disputes by any peaceful means chosen by the parties,[155] procedure where no settlement has been reached by the parties,[156] obligation under general regional or bilateral agreement,[157] Obligation to exchange view,[158] conciliation,[159] application of this section to disputes submitted pursuant to part XI.[160]

Section 2 of the Convention deals with the compulsory procedure entailing binding decisions dealing with application of procedure under this section, choice of procedure, jurisdiction, experts, provisional measures, access, prompt release of vessel ex crews, applied law primarily proceeding, exhaustion of local remedies, and finally the binding force of decisions.[161]

Section 3 deals with limits of exceptions applicability of Section 2 deals with 297-299.

It is also further divided into two categories, namely, settlement of general categories of disputes and settlement of specific categories of disputes.

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[152] Louis B. Sohn (1983), "Peaceful Settlement of Disputes in Oceanic Conflicts: Does UNCLOS-III Point the Way?", *Law and Contemporary Problems*, Vol.46, No.2: 195-200, p. 195.

[153] *Ibid.*

[154] Art. 279, UNCLOS, 1982.

[155] Art. 280, UNCLOS, 1982.

[156] Art. 281, UNCLOS, 1982.

[157] Art. 282, UNCLOS, 1982.

[158] Art. 283, UNCLOS, 1982.

[159] Art, 284, UNCLOS, 1982.

[160] Art. 285, UNCLOS, 1982.

[161] See Art. 286-296, UNCLOS,1982.

Choice of Procedures

It is the primary duty of every state to settle any disputes between them regarding the interpretation of application of convention, by peaceful means prescribed under Article 33 of the UN Charter, however, states are free to choose any peaceful means of their own choice.[162] The procedure provided in part XV shall apply only in those cases where no settlement has been reached between the parties. Further, states are free to agree on the methods of dispute settlements entails binding decisions, though general regional or bilateral agreements.[163] This procedure shall have priority over law of the sea convention provided that adopted procedure must entail binding decisions. It is the obligation of state parties to proceed expeditiously to exchange views in two conditions:

(i) Where the dispute arises between state parties concerning interpretation or application of the conventions.[164]
(ii) Where the procedure for the settlement of such disputes has been terminated without a settlement or where a settlement has been reached required further consultation.[165]

In *Southern blue Tuna* case, the tribunal stated its views that, "a state party is not obliged to pursue procedures under part XV, Section 1, of the convention when it concluded that the possibilities of settlement have been exhausted."[166] The tribunal was more specific in its order prescribing provisional mechanism in the *MOX Plant* case in stating that a state party is not obliged to continue with an exchange of views when it concludes that the possibilities of reaching agreement has been exhausted.[167]

A more wide and exhaustive review of Article 283 by the tribunal was made in the *Land reclamation case or Barbados Trinidad* case[168]. The term "exchange of view" is distinct from a "negotiation" with the meaning of Article 33 of UN Charter.[169] The exchange is completed

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[162] Art. 281, UNCLOS, 1982.

[163] Art. 282, UNCLOS, 1982. For example some African Countries have expressed preference for submitting the disputes relating to the interpretation application of the Law of the Sea Convention to the Commission of Mediation, Conciliation, and Arbitration of the Organization of African Unity.

[164] Art. 283 (1), UNCLOS, 1982.

[165] Art. 282 (2), UNCLOS, 1982.

[166] Anderson Davis (2007), "Article 283 of the UN Convention of the Law of the Sea", in Tafir Malick Ndiaye and Rudiger Wolfrm (eds.) *Law of the Sea, Environmental Law and Settlement of Disputes*, Leiden/Boston: Martinus Nijhoff Publishers, p. 847; see also ITLOS Reports 1999, P.280.

[167] *Ibid,* p. 95.

[168] See http://www.pca-cpa.org/upload/files/Final%20Award.pdf

[169] *Ibid,* p. 852.

when the second state expresses its view in response to the first or chooses to remain silent after a reasonable period of time lapsed; however, there is no requirement to seek to reach agreement.[170]

The need of consultation is clear from the fact that often a dispute has more than one aspect to which different provision in the convention would apply for example a boundary disputes may involve issues to do with access to fish stocks straddling the future boundary. The parties thus can clarify the scope of dispute in the preliminary exchange and identify those questions that are best suited to any future litigation.[171]

It is interesting to note that under Section 1 of part XV, only *conciliation* as a means of dispute settlement is provided. A state party may invite other party or parties to submit the disputes to conciliation in accordance with the procedure under annex V section 1 or another conciliation procedure.[172]

Compulsory Procedure and Binding Decisions

One of the achievements of UN Convention on Law of Sea is its provisions for binding dispute settlement,[173] subject to Section 3 of Part XV, where no settlement has been reached by recourse to section 1 of Part XV.[174] It allows the state at the time of signature, ratification of accession or at any time thereafter to designate any of the following dispute settlement procedure:

(i) The ITLOS established in accordance with annex VI;
(ii) Recourse to judicial settlement through the ICJ;
(iii) An arbitral tribunal constituted in accordance with annex VII;
(iv) A special arbitral tribunal constituted in accordance with annex VIII for one or more of the categories of disputes specified therein.[175]

A court or tribunal listed in Section 2 has jurisdiction over any disputes concerning the interpretation or application of the convention submitted to in accordance with this part.[176]

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[170] *Ibid.*

[171] *Ibid*, p. 853.

[172] Art. 284; for list of conciliators and arbitrators under Annexes V and VII to the convention see www.un.org/Depts/Los/settlement_of_disputes/concilaitors-arbitrators.htm .

[173] Section 2, part XV UNCLOS, 1982.

[174] Art. 286, UNCLOS, 1982.

[175] Art.287 (1), UNCLOS,1982.

Such court or tribunal shall have jurisdiction over any disputed concerning the interpretation of application of an international agreement related to purpose of this convention.[177] Where the parties to a dispute have accepted the same procedure, it must be utilized unless they agree otherwise.[178] It provides for arbitration as default procedure in case of state fails to designate any choice in its written declaration.[179]

Provisional Measures

The power of a tribunal to exercise provisional measures pending a final decision of a dispute is common in international settlement of disputes.[180] The court of tribunal having *prima facie* jurisdiction, may prescribe any provisional measures which it consider appropriate under the circumstances to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment, pending the final decision if dispute has been duly submitted to it.[181]

Limitation and Exception to Compulsory Procedures

Although the provision of Section 2 entailing compulsory and binding methods were drafted to provide maximum flexibility, not all disputes were deemed to be appropriate for binding settlement.[182] These exceptions are applicable in case of sovereign rights and jurisdiction of a coastal state. The exercise by a coastal state of its sovereign rights or jurisdiction under UNCLOS is only subject to the compulsory procedure when it is alleged that has violated certain UNCLOS provisions, including internationally lawful uses of the EEZ or specified

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[176] Art. 288 (1), UNCLOS, 1982.

[177] Art, 288 (2), UNCLOS, 1982.

[178] Art. 290 (1), UNCLOS, 1982.

[179] Art. 287 (4), UNCLOS, 1982.

[180] *Ibid,* n.17, p.5

[181] Art. 290 (1), UNCLOS, 1982.

[182] Section 3 of Part XV. Three categories of cases are subject, however, to different procedures: (a) Art, 297 govern disputes relating to the exercising by a coastal stat of its sovereign right or jurisdiction in the EEZ; (b) Art. 298 governs disputes relating to sea boundary delimitation, to military or law enforcement activities or to disputes submitted to the UNSC; and (c) Arts. 186-191 govern the disputes relating to seabed mining. See note 217, p.50 at p. 197. See also Settlement of Dispute mechanism under the Agreement for the Implementation of the Provisions of the Convention Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks- choice of procedure under Art.30 of the Agreement and Optional Exception. Available at

http://www.un.org/los/settlements_of_disputes/choice_procedure.htm , see also http://www.un.org/depts/los/convention_agreemnt/convention_overview_fish_stocks.htm .

international rules and standards for the protection and preservation of marine environment which are applicable to that state, established under UNCLOS or by a competent international organisation or diplomatic conference.

Dispute Settlement Mechanism of UNCLOS: Protection of Marine Environment

Part XII of the UNCLOS deals with protection and preservation of marine environment. This part is divided into 11 sections: General provision (Article 192-196) and global regional cooperation (Article 197-201). It is stated that under international law states have an obligation to protect and preserve the marine environment. Further, states have the sovereign right to exploit their natural resources in accordance with their environment policies. In this context, states shall take, individually or jointly as appropriate, all measures consistent with this convention that are necessary to prevent reduce and control pollution of the marine environment from any source. It incorporates one of the fundamental principles of the environmental obligation of states stating that state shall not transfer, directly or indirectly, damage or hazard from one or to another.

The substantive provision of UNCLOS regarding the protection or preservation of the marine environment seems to be meaningful in their scope. The convention confers jurisdiction upon the coastal state for "the protection and preservation of marine environment" the conservation of living resources is entrusted to coastal states. The balancing of interests that underlie the entire convention virtually ensures that disputes between coastal states and other maritime parties, as well as competing interests on high sea.[183]

Conciliation

The third party dispute settlement mechanism of conciliation reflects special interest in the area of wild life conservation and textually significant in the areas of fisheries and the conservation and management of living resources.[184] In disputes involving the conservation, management, determination and allocation of living resources in EEZ, Article 297 (3) (b) requires conciliation upon the demand of any party to the dispute, where no settlement has

[183] Kwait Kowska, Barbara (2001), "Southern Bluefin Tuna", *ASIL*, Vo. 95, No.1: pp.162-171, p.2

[184] *Ibid*, at p.3.

been reached under section1.[185] Some disputes involving marine research may also be submitted to conciliation, at the request of either party, subject to certain rights of the coastal states.[186] It further provides that in no case conciliation commission shall substitute its discretion for that of the coastal state however.[187]

· ***Special Arbitration***

The method of special arbitration provided under Article 287 (d), offer promising role in the area of marine wildlife management and conservation. The primary difference between 'arbitration' and 'special arbitration' is in the technical character of the disputes and the qualification of potential arbitrators.[188] Annex VIII defines the categories of disputes that may be referred to special arbitration. These are: fisheries; protection and preservation of marine environment; marine scientific research; navigation, including pollution from vessels and by dumping.[189] The special arbitral tribunal is comprised of recognised expert in those fields.[190]

One of the key purposes of special arbitration is to submit those disputes involving technical and scientific issues to designate arbitrators who have previously been classified as experts in

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[185] Article 297 (3) (b) (i-iii)of UNCLOS, 1982:

Where no settlement has been reached by recourse to section 1 of this Part, a dispute shall be submitted to conciliation under Annex V, section 2, at the request of any party to the dispute, when it is alleged that:

(i) a coastal State has manifestly failed to comply with its obligations to ensure through proper conservation and management measures that the maintenance of the living resources in the exclusive economic zone is not seriously endangered; or

(ii) a coastal State has arbitrarily refused to determine, at the request of another State, the allowable catch and its capacity to harvest living resources with respect to stocks which that other State is interested in fishing; or

(iii) a coastal State has arbitrarily refused to allocate to any State, under articles 62, 69 and 70 and under the terms and conditions established by the coastal State consistent with this Convention, the whole or part of the surplus it has declared to exist.

[186] Art. 297 (2) (b), UNCLOS, 1982.

[187] Art. 297 (3) (c) of UNCLOS, 1982.

[188] See note 247 at p. 5.

[189] Annex VIII, UNCLOS, 1982.

[190] Annex VIII, Art.2; see for the list of experts http://www.in.org/Depts/los/settlement_of_disputes/experts_spl_arb_htm .

those categories, and such expertise should reduce the time necessary for consideration of highly technical disputes and potentially yield to most informed findings.[191]

Compulsory Binding Settlement

In case of coastal states, the power granted to special arbitration to decide every related disputes are taken away by the limitations on compulsory and binding dispute settlement.[192] Since many environmental disputes directly involve rights of the coastal states, such limitations may prove significant in future. These limitations are severe setback to the disputes relating to marine environment, however, provided for the protection of sovereign rights of coastal states. For instance, it states:

> Disputes concerning the interpretation or application of the provisions of this Convention with regard to fisheries shall be settled in accordance with section 2, except that the coastal State shall not be obliged to accept the submission to such settlement of any dispute relating to its sovereign rights with respect to the living resources in the exclusive economic zone or their exercise, including its discretionary powers for determining the allowable catch, its harvesting capacity, the allocation of surpluses to other States and the terms and conditions established in its conservation and management laws and regulations[193].

A coastal state may also avoid a binding decision in certain cases involving marine scientific research in its waters.[194]

It is hard to predict whether future activity under Part XV will be "environmental friendly", however, it appears as if the substantive and dispute settlement of UNCLOS were drafted to address environmental and wildlife management concerns in a thoughtful and informed manner.[195]

International Seabed Authority

Disputes relating to the exploration and exploitation of the international seabed and ocean floor (the Area) and its recourse are subject to special dispute settlement procedures, which will generally involve disputes submitting to a Seabed Dispute Chamber of the International Tribunal for the Law of Sea (Article 186-191, and Annex VI, Articles 35-40). The

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[191] *Ibid.*

[192] Arts. 286-296, Section 2, Part XV, UNCLOS, 1982.

[193] See Article 297 (3) (a)

[194] Art. 297 (2) (a) (i) and (ii), UNCLOS, 1982.

[195] See note 180.

jurisdiction of the Seabed Chamber will extend to cover a wide range of disputes, including environmental disputes involving those engaged in activities in the Area (Article 187).

Human rights courts

In 1968 the Un General Assembly first recognised the relationship between the quality of the human environment and enjoyment of basic rights.[196] The Stockholm Declaration in 1972 declared that,

> "Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well being, and he bears a solemn responsibility to protect and improve the environment for present and future generation. The international community has not defined in practical terms the threshold below which the levels of environmental quality must fall before a breach of the individual's human rights will have occurred."[197]

The human rights courts established under regional rights conventions (most notably European Court of Human Rights and Inter-American Court of Human Rights) may also have jurisdiction over environmental matters. The jurisdiction of European Court of Human Rights (ECHR) has paved new ways to improve environmental protection through an expanded concept of human right and by linking both fields of which traditionally have been treated separately.[198] The progressive decisions of ECHR provide for a more comprehensive environmental protection of the individual and stimulate the discussion on the existence of human right to a decent environment.[199]

The ECHR has jurisdiction over all cases concerning the interpretation and application of the European Convention provided that the party concerned in the case has accepted its compulsory jurisdiction, or failing that, with the consent of defendant state.[200] The court may deal with a case after the efforts by the communication to achieve a friendly settlement have failed, and only communication or the party whose national is the alleged victim, or which

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[196] See note 69, p.17, pp. 222-229; UNGA Res. 2398 (XXII) (1968).

[197] Principle 1, Stockholm Declaration, 1972; available at www.uneo.org/law.PDF/Sotockholm_Declaration.pdf

[198] See note 169, p. 39 at p. 15.

[199] *Ibid*, p.15.

[200] *Ibid.*

referred the case to comm., or against which the complaint has been lodged, may bring a case before the court.[201]

Despite some progress achieved by the court, the main problem of direct access to the ECHR still remains, and an individual is only allowed access to the court after having exhausted all local remedies, that is, all stages of jurisdiction in the individual's home state.[202] Perhaps the greatest single factor that makes ECHR so effective is the right of individual application to the court, especially now that application no longer need the consent of state concerned. In line with the development in European countries, such possibilities may be also applied in other international human right foras. In fact, linking the concept of human right to healthy environment provide more consideration to environmental norms and principles, in effect, may have considerable impact on environmental dispute settlement process.

Conclusion

It seems the emergence of multiple forums at international level to solve environmental disputes poses significant problems concerning not only proliferation but also competition among these some of these forums. Issue of hierarchy is also significant that needs effective construction within particular MEAs. However, within all the available means it appears that the alternatives methods offer more promising role in environmental dispute settlement in which several considerations, considering the nature of environmental issues, can be accommodated. More formal and institutional means seems to be not in used except format established under UNCLOS. Recently, the developments in the form of non compliance procedure as a means of dispute avoidance and capacity building reflects that traditional means has not proved effective. There is a need for more exhaustive approach rather than focussing narrowly on dispute settlement. As such there appears need to constantly examine issue of dispute settlement methods under the MEAs.

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[201] *Ibid.*

[202] See note 163 at p. 18.

Chapter - III

DISPUTE SETTLEMENT MECHANISMS UNDER MEAs

Introduction

It is stated that any regime of control, whether municipal (domestic) or international, performs two functions, namely, Rule Making and Compliance Mechanisms.[1] Rule-making may be further sub-divided into two parts: Customary Norms and Treaty Making. Although the customary rules of international law relating to the protection of environment is outside the scope of the present chapter, a brief discussion on the subject is not out of place mainly because of two reasons: first, it has significant impact on environmental dispute settlement. Second, it directly relates to the enforcement aspects of established international environmental norms.

In this chapter an attempt is made to provide brief account of whole process of environmental law making process. It shall begin with the basic idea of MEAs to the inclusion, adoption and innovation of tools and machinery adopted to ensure efficient global environmental governance. Further, it shall examine inclusion and treatment of DSM under MEAs followed by emerging trends and effectiveness. The second part of the chapter shall examine the basic question that why *environmental* law should be enforced by DSM and viability of compliance mechanism in case of non-use of DSM.

It appears that customary norms of international law offer some modest protection for the environment.[2] As the environmental consciousness expands, the practice of nations alters to comply with new norms, which makes it easier to contend that an "international custom, as evidence of a general practice accepted as law," has emerged.[3] The more traditional approach of the development of rules relating to protection of environment is familiar with one of the

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[1] Aron Schwabach (2006), International Environmental Disputes: A Reference Handbook, England: ABC-CLIO Inc., p. 27.

[2] *Ibid.*

[3] Brownlie (1973), "A Survey of International Customary Rues of Environmental Protection", *13 NAT. RESORCES* Cited in Geoffery Palmer (1992), "New Ways to Make International Environmental Law", *AJIL*, Vol. 86:259-283, p. 265.

inter-state claim based on principle of state responsibility, and employing the variety of forms of dispute settlement machinery provided under Article 33 of UN Charter.[4] Customary norms of international law develop slowly, over a long period of time, after careful balancing of interests of the international actors and after wide acceptance of the same. It reflects long standing state practices, in case of environment, for example, state responsibility for transboundary environmental harm. Sometimes these standards of practices are pronounced and established by international institutional tribunals.

There are various disadvantages in enforcing international environmental law in this way, particularly if it involves compulsory resort to judicial institutions.[5] In practice, states have preferred to avoid law of state responsibility mainly because such a system is inherently bilateral and confrontational in character; it assumes that 'injured state' whose right are affected are the primary actors in seeking compliance with legal standards of environmental protection.[6] However, one of the underlying modern concepts of IEL is the "principle of limited territorial sovereignty".[7] Limited territorial sovereignty is an inevitable consequence of the customary international law concept of state responsibility developed through the practice of states undertaken out of a sense of legal obligation.[8]

In case of environmental damages the liability rules are still evolving and in the need of further development.[9] State liability for environmental damage is premised upon the violation of an international legal obligation established by a treaty, or by rules of customary international law, or by rules possibly under general international law.[10] Stockholm Declaration in 1972 called on the states "to cooperate to develop further the international regarding the liability and compensation for victims of pollution and other and other environmental damage caused by the activities within the jurisdiction or control of such

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[4] P.W. Birnie and A.E. Boyle (2004), *International Law and the Environnent*, New York : Oxford University Press, p. 178.

[5] *Ibid.*

[6] *Ibid.*

[7] *Ibid.*

[8] *Ibid.* p. 60.

[9] See note 69 at p. 629.

[10] *Ibid*, at p. 32.

states to areas beyond their jurisdiction".[11] Similarly, Principle 13 of Rio Declaration provides that, 'states shall develop national laws regarding liability and compensation for the victims of pollution and other environmental damage...'

It is stated that despite considering the work of ILC on state responsibility, no single instrument set forth generally applicable international rules governing the state liability for environmental damages. Further, rules of international law of responsibility have been subject of many international disputes, however, not purely in the sense of environmental damages.

The last three decades, especially after the 1972 Stockholm Conference, the rule making in the form of international treaty making for environmental regulations saw an unprecedented growth. Multilateral Environmental Agreements (MEAs) came into existence widely to resolve global environmental problems with significant achievements, however, marred by its qualification as "soft law"[12] instruments provided with weak compliance system.

MEAs: An Overview

The term "multilateral environmental agreement" (MEA) is a broad term that relates to any of a number of legally binding international instruments through which national governments commit to achieve specific environmental goals. These agreements may take different forms, such as "convention", "treaty", "agreement", "charter", "final act", "pact", "accord", "covenant", "protocol", or "constitution".

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[11] *Ibid.*

[12] See Gunther Handl (1990), "Environmental Security and Global Change: The Challenges to International Law", *Year Book of International Environmental Law*, Vol.1: 2-33, pp. 7-8; Desai, H. Bharat Desai (2004), *'Insitutionalising International Environnemental Law'*, Aardsley, NY : Transnational Publisher, pp.117-122 ; Desai, H. Bharat (2006), 'Creeping Institutionalization- MEAs and Human Security', *InetrSection Interdisciplinary Security Connection, Publication of UNU-EHS* No.4:3-49, pp. 34-36; Ivana Zovko (2005), "International Law Making for the Environment: A question of effectiveness", in Marko Berglund (eds.) *International environmental Law-Making and Diplomacy Review*, Finland: University of Joensuu-UNEP Course Series2, pp.114-123; Geoffery Palmer (1992), "New Ways to Make International Environmental Law", *AJIL*, Vol. 86: 259-283, pp 269-270; Brunnee, Jutta (2006), "Multilateral Environmental Agreements and the Compliance Continuum", in Gred Winter (eds.) *Multilateral Governance of Global Environmental Challenge: Perspective from Scientific, Sociology and the Law*, Cambridge: Cambridge University Press, p.388-390.

In recent years MEAs have emerged as a "predominant legal methods for addressing environmental problems that cross national boundaries."[13] At international level MEAs represent institutionalised form of international cooperation to sort out environmental issues. Absence of centralised law-making, sectoral growth, issue specificity, anthropogenic thrust in law-making, lack of coherence and coordination, weak institutional mechanisms, limited mandate, prevalence of scientific uncertainty, priority to the economic and trade concerns, conflict of norms are some specific features of MEAs[14] which create considerable impact on compliance and dispute settlement aspects.

Due to its fragmented growth and unguided proliferation, concept of 'clustering' of MEAs emerged for effective environmental governance. It seems to promote better coordination and coherence and avoidance of duplication of efforts, and is provided with several approaches. For the purpose environmental dispute settlement, its chief merit lies in the fact that it advocates the concept of "ecological disputes", at least in its respective cluster. It may be understood from an example- any dispute related with marine environment may be linked with laws relating to biodiversity, climate change, hazardous wastes, etc. This requires clubbing all issues first and, then sorting out cumulatively with varied outcome. In addition, it has its unique merits in overall environmental compliance.

However, this approach may have significant impact on choice of DSMs and its substantive and procedural requirements. A state may not be not be parties to all MEAs, hence all relevant (not applicable) may not be applied. Further, inconsistency between treaties may also hamper the process. It appears that, clustering of MEAs for the purpose of environmental dispute settlement is surely going to much debated in the whole regime of environmental dispute management.

MEAs may be classified into the following forms: it may be stand alone document that includes all the relevant requirements, or they can be "framework agreements" for which further agreements (protocols) are necessary to provide the necessary standards, procedures,

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[13] "Development in the Law: International Law" (1991), *Harward Law Review*, Vol. 104, No.3, p. 1521 Cited in Bharat H. Desai (2006), 'Creeping Institutionalization- MEAs and Human Security', *InetrSection Interdisciplinary Security Connection, Publication of UNU-EHS* No.4:3-49, p. 9.

[14] *Ibid.* See also Bharat H Desai (2004), *'Insitutionalising International Environnemental Law'*, Aardsley, NY: Transnational Publisher, pp. 106-130.

and other requirement to implement the MEA effectively.[15] MEA may be "appendix driven"[16] in which technical details etc are provided. Many MEAs provide in the detail provisions relevant to DSM which forms the crucial part of the whole agreement.

Multilateral environmental protection regimes typically begin with an initial treaty framework, with relatively little infringement on the sovereignty of the parties.[17] This "framework-treaty-plus-protocol" process makes it possible to reach agreement in a series of small steps, when one big or "radical" step might have been impossible due to reluctance of states.[18] This approach seems to be more suitable because initially states may not agree to any concrete obligations specially related with binding dispute settlement mechanisms. It is only during the succession Conference of Parties (COPs) meetings several unfinished agendas are worked out and adopted by consensus of the parties as per necessity. One of the prominent features of MEAs is establishment of Inter-governmental Organisation or Institutional Mechanism to implement, develop and review the concerned MEA. These institutional arrangements provide the backbone to the agreement.[19] These arrangements may be in the form of COPs/MOPs and Secretariat. The Secretariat of an agreement may administer agreement but COP/MOP takes the key policy decisions.[20]

It has been estimated that nearly 700 MEAs are currently in place[21] with membership varying from relatively small group to over 180 countries. Major global MEA may be categorized on several parameters.[22] For the purpose of present study it has been categorized under the

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[15] UNEP (2006), Manuel on Compliance with and Enforcement of MEAs, Nairobi, Kenya, p. 51.

[16] *Ibid,* see for example CITES and CMS.

[17] Aaron Schwabach (2006), *International Environmental Disputes: A Reference Handbook*, England: ABC-CLIO Inc., p.28.

[18] *Ibid*, at p.28; see also Bharat H. Desai (2004), *Insitutionalising International Environnemental Law*, Aardsley, NY : Transnational Publisher, pp. 127-130 ; Gunther Handl (1990), 'Environnemental Security and Global Change : The challenge to International Law', *Yearbook of International Environnemental Law*, vol.1, pp. 5-7.

[19] See note 9 at p.92; see also note 283 at pp. 133-238.

[20] *Ibid.*

[21] UNEP (2007), *Negotiating and Implementing MEAs: A Manual for NGOs*, Kenya, p.16, available at http://ww.unep.org/dec/docs/MEA%20Final.pdf.

[22] Prof. Desai mentioned MEAs into three categories: (a) core environmental conventions and related agreements of global significance, associated with UNEP; (b) global conventions related to the environment, including regional conventions of global significance, negotiated independently of UNEP and (c) other MEAs, which are restricted by the scope and geographical range. He further categorized core MEAs, on the basis of

following heads or clusters. Only those MEAs are included which are considered widely as global with wide membership, scope and mandate. The following categorisation will lay the basis for two purposes: analysis of DSM provided therein and with respect to compliance mechanisms. These clusters are as follows:

1. **Nature Conservation**

   i) Wetland-Convention on Wetland of International importance especially as Waterfowl Habitat 1972 (Ramsar Convention)
   ii) Heritage- Convention for the Protection of World Cultural and Natural Heritage 1972
   iii) Endangered species- Convention on International Trade in Endangered Species of Wild Fauna and Flora 1973
   iv) Migratory species- Convention on the Conservation of Migratory Species of Wild Fauna and Flora 1979
   v) Biological diversity- Convention on Biological Diversity 1992
   vi) Deserts- United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa 1994
   vii) Tropical Timber- International Tropical Timber Agreement 1994
   viii) Plant genetic resources- International Treaty on Plant Genetic Resources for Food and Agriculture 2001.

2. **Atmosphere**

   i) Ozone Layer- Vienna Convention for the Protection of Ozone Layer 1985
   ii) Ozone depleting substances- Montreal Protocol on Substances that Deplete the Ozone Layer 1987
   iii) Climate change- United Nations Framework Convention on Climate Change 1992
   iv) Greenhouse gas emission reduction- Kyoto Protocol to the UNFCCC
   v) Air pollution- Convention on Large-Range Transboundary Air Pollution 1979 and its Protocols[23]

3. **Hazardous Materials**

   i) Hazardous wastes- Basel Convention on the control of Transboundary Movements of Hazardous Wastes and their Disposal 1989
   ii) Dangerous chemicals- Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade 1998
   iii) Biosafety- Cartagena Protocol on Biosafety to the Convention on Biological Diversity of 5 June 1992, 2002
   iv) Persistent organic pollutants- Stockholm Convention on Persistent Organic Pollutants 2001

4. **Marine environment**

   i) Whaling- International Convention for the regulation of Whaling 1946

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subject matter, into following five groups: the bio-diversity-related conventions, the atmospheric convention, the land conventions, and the regional se convention and related agreements. See note 278, p.63 at pp. 9-15.

[23] There are total five Protocols under this convention.

ii) Sea dumping- Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matters 1972
iii) UNCLOS- United Nations Convention on the Law of Sea 1982
iv) Fish stocks- Agreement for the Implementation of the provision of the UNCLOS of 10 December 1982 relating to the Conservation and Management of Straddling Fish and Highly Migratory Fish Stocks 1995
v) Pollution from ship- Convention for the Prevention of Pollution from Ships 1973, and its Protocol

5. Miscellaneous

i) Espoo Convention on Environmental Impact Assessment 1991
ii) Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to the Justice in Environmental matters

Apart from the above global conventions, there are some important regional agreements, such as:

i) International Convention for the Conservation of Atlantic Tunas 1966
ii) Bern Convention on the Conservation of European Wildlife and Natural Habitats 1979
iii) Convention on the Conservation of Antarctic Marine Living Resources 1982
iv) OSPAR Convention for the Protection of the Marine environment of North East Atlantic

These global and regional MEAs provide an extensive framework for the protection of global environment- though some subjects are more effectively covered than others.[24] Cumulatively, these MEAs cover almost every aspect of ecological system. In spite of this, ironically, the state of environment continues to decline. Moreover, the divide between developed and developing countries continues to expand.[25] The law-making process to craft various sector-specific MEAs, soft law commitment and national policies without due consideration to their relationship with one another, and with the wider international system has resulted in a multifaceted institutional architecture at the international level which lacks cohesion and coherence.[26] The global environmental problems make up a classical case of the tragedy of commons. To deal effectively with the global environmental problems it appears that a form of legislative capacity can provide some solution along with effective and efficient compliance mechanism and dispute settlement mechanisms, in which interlinkages are worked out.

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[24] Farhana Yamin and Depledge Joanna, *The International Climate Regime: A Guide to Rules, Institutions and Procedures*, Cambridge, UK: Cambridge University Press, p. 5.

[25] Stakeholder forum for Our Common Future (2004), *International Environmental Governance: A Briefing Paper*: 1-19, p. 1.

[26] *Ibid.*

Compliance Mechanisms

After the rule making, the next part deal with compliance mechanism.[27] The development of rules of international law concerning the protection of environment is of little significance unless accompanied by effective means for ensuring compliance. In effect, it completes the whole picture of law making process, and for effective environmental governance. It has been observed that "strengthened governance at the global level should first of all be targeted at improving and guaranteeing compliance with existing MEAs."[28] There is no authoritative definition available for the term "compliance mechanism" and it may be defined on the basis of several classifications. For the purpose of this chapter, compliance mechanism may be divided into following parts: (i) Implementation; (ii) Enforcement; and (iii) Dispute Settlement

Inclusion and Treatment of Dispute Settlement Mechanisms

It has been observed that DSMs are included into MEAs as a last resort in case of non-compliance by the State Parties of the MEAs. Dispute settlement provisions are not unique to MEAs- they have long been an essential element of international agreements, because they provide the procedure by which disagreement among the Parties regarding the agreements can be resolved.[29] The chance to resort DSM came only when diplomatic efforts fail. It reflects crisis in international environmental governance.[30] The inclusion of compulsory, binding, third party dispute settlement provisions in multilateral treaty regime may serve variety of purposes provided that they are utilised.

The commonest purpose is to provide an authoritative mechanisms for determining questions relating to the 'interpretation or application' of the treaty.[31] Indeed, most of MEAs visualise disputes these phrases in more or less same manner: In the event of disputes between any two or more parties concerning the interpretation or application of the Convention, the parties concerned shall seek a settlement of the disputes through peaceful means of their own choice.

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[27] For detailed discussion see Chapter 4.

[28] *Ibid.*

[29] UNEP (2006), *Manual on Compliance With and Enforcement of MEAs*, Kenya, p. 169.

[30] UNEP (2006), *Compliance Mechanisms under Selected Multilateral Environmental Agreements*, Kenya, p. 119.

[31] P.W. Birnie and A.E. Boyle (2004), *International law and the Environment*, New York: Oxford University Press, p. 226.

In essence, judicial institutions can serve as the main guarantor of a treaty's integrity, undertaking not only the task of interpretation and adjudication of alleged breach, but also determining the validity of reservation and derogations. It has been explained:

> What is important- what is indeed crucial- is that there should always be in the background, as a necessary check upon the making of unjustified claims, or upon the denial of justified claims, automatically available procedure for the settlement of disputes.[32]

Dispute resolution procedure under MEAs vary in sophistication, from simple provision that require parties to negotiate bilaterally to resolve disputes peacefully, to the elaborate, compulsory binding third party dispute resolution procedure.[33] The following preliminary survey (see Table 3.1) portrays the nature and manner in which dispute resolution mechanisms (diplomatic and adjudicatory) are adopted or included. In the following Table there are basically six clusters or groups of MEAs. Each dispute settlement mechanisms are provided in columns which are further sub-divided into two parts: voluntary and compulsory/binding.

On the basis of the above table the following conclusions may be drawn:

Firstly, in earlier environmental treaties, for e.g., RAMSAR, World Heritage, London, Whaling and Atlantic Tuna, dispute settlement provisions are almost absent in each group or cluster.

Secondly, MEAs provide extreme flexibility to the states in relation to the choice of means which are in most of the cases voluntary. A state party is not bothered to settle disputes at all without express consent and concern of other state party. In fact, in case disputes are not resolved by diplomatic means, provision of the treaty allows state party when ratifying, accepting, approving or acceding to the convention, or at anytime thereafter to declare in writing to accept compulsory means of dispute settlement.

Fourthly, for the above reasons, diplomatic means, especially, negotiation are made compulsory in almost all MEAs.

Fifthly, mediation, however offer great role in case of environmental disputes, is restricted to few treaties, viz., CBD, Vienna, and Montreal Protocol.

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[32] Sinclair (1984), "The Vienna Convention on the Law of Treaties" (2nd ed.), p. 435 Cited in Birnie, P.W. and Boyle A. E. (2004), *International law and the Environment*, New York: Oxford University Press, p. 226.

[33] See note 25, at p. 119.

Sixthly, conciliation is provided widely as a compulsory means in case other diplomatic means fail to sort out issues.[34] It is the only means which is provided separately under UNCLOS. The provisions related to procedures and institutional structures are either provided in Appendices or yet to be negotiated.

Thirdly, binding the third party settlements are avoided and depend upon the will the states except in case of UNCLOS.

Seventhly, in case of arbitration, binding arbitration is not provided anywhere except UNCLOS. Like conciliation, procedural and institutional details are either provided or yet to be negotiated by the top policy making body (COPs/MOPs). Interestingly, recourse to PCA is not frequent and provided only in CITES and CMS.

[34] *Ibid.*

Table 3.1: Dispute Settlement Mechanisms under MEAs

International Environmental Conventions	Year	Dispute Settlement Mechanisms under MEAs												
		Negotiation		Mediation		Conciliation		Binding Arbitration		Recourse To PCA		Submission to ICJ		other
		V*	B**	V	B	V	B	V	B	V	B	V	B	
Nature Conservation														
RAMSAR	1972													
World Heritage	1972													
CITES	1973		√					√		√				
Migratory Species (CMS)	1979		√					√		√				
CBD	1992		√	√			√	√				√		
UNCCD	1994		√				√	√				√		
ITPGRFA	2001		√	√			√	√				√		
Atmosphere														
LRTAP	1987		√											
Vienna	1985		√	√			√	√				√		
Montreal Protocol	1987		√	√			√	√				√		
UNFCCC	1992		√				√	√				√		
Kyoto Protocol	1997		√				√	√				√		
Hazardous Material														
Basel Convention	1989		√			√		√				√		
Rotterdam PIC	1998		√				√	√				√		
Cartagena Protocol	1992, 2002			√			√	√				√		
Stockholm POPs			√				√	√				√		
			√											
Marine Environment														
Whaling Convention	1946													
Sea Dumping-London	1972													
UNCLOS	1982		√	√		√			√			√		ITLOS, Sea Bed Chamber
Fish Stock	1995		√	√		√			√			√		
Miscellaneous														
Espoo EIA	1991		√					√				√		
Aarhus	1998		√					√				√		
Regional														
Atlantic Tuna	1966													
Bern Convention	1979													
OSPAR Convention	1992		√			√		√						

*V- Voluntary

**B- Binding

Eighthly, submission to ICJ in every MEA is voluntary. It is the discretion of State parties to accept its compulsory jurisdiction at the time of ratification, acceptance, approval to the Convention, with respect to other State Party accepting the same obligations.

Ninthly, among every MEAs UNCLOS sits on its own category and provide most extensive framework of dispute settlement. It establishes ITLOS and Sea Bed Chamber for specific categories of disputes. In fact, "UNCLOS represents an example of tailoring dispute settlement options to deal with particular categories of disputes under the convention, with the establishment of specialist chamber within the ITLOS, and exclusion of certain categories of disputes from the otherwise mandatory, binding procedures." It's important to mention that only under UNCLOS and Fish Agreement arbitration is binding.

Tenthly, potential linkages even among the cluster or group of MEAs are absent. Considering that dispute resolution procedures tend to comprise mainly compulsory conciliation and voluntary binding arbitration, potential linkages are feasible in respect of common dispute resolution bodies.[35]

Hence, it can be concluded that, with few exceptions, the provisions of MEA on binding dispute resolution are tend to be weak and/or permissive and states are generally reluctant to formulate legal obligations in MEAs that might compel them to submit their environmental conflicts to binding dispute resolution procedures.[36]

Emerging Trends under MEAs

Unlike earlier environmental agreements recent MEAs provides parties with a range of options of dispute avoidance and dispute settlement. As a consequence, 'these means offer parties a hierarchy of procedures ranging from the informal, non-contentious and non-adversarial through to more formal (and highly contentious and adversarial) mechanism for utilisation where other means have not succeed in resolving disputes".[37] There are also gradual trend toward developing mechanism for resolving dispute of facts.

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[35] See note 25, at p. 121.

[36] *Ibid* at p. 119.

[37] UNEP (2001), *Annex 1 Guideline on Compliance with and Enforcement of MEAs*, Peace Palace Paper, (2001), p. 16, Para44.

Dispute settlement under the international environmental law making regime gained prominence especially after UNCED and Johannesburg Declaration. These increasing trends to utilise more effective judicial mechanisms were affirmed and shaped by several international legal instruments. The severity of environmental issues, reluctance of states to third party intervention and non use of binding dispute settlement procedures set off creation of more facilitative tools and mechanism. Apart from wide range of dispute settlement procedures, which are rarely utilised, there is emerging trend to incorporate Non-Compliance Procedures (NCP), in order to facilitate compliance in non-adversarial and non-contentious manner.

It has been remarked that, "the increasing trend towards the use of NCPs, as opposed to adversarial dispute settlement procedures, seems to herald a new focus in international environmental law on managing political relationship so as to maintain the viability and integrity of MEA."[38] This facilitative approach seems more in consonance with the present reality of international relations and international environmental regime. Catherine Redgewell noted that,

> Recourse to such procedure is evidence of a growing awareness that traditional rules of international law concerned with material breach of treaty obligations and with state responsibility are inappropriate to address problems of environmental treaty interpretation.[39]

Effectiveness of Environmental Dispute Settlement

Effectiveness of international environmental law lies in the international relations domain.[40] While legal, institutional and policy instruments remain the driving force good global environmental governance, their effectiveness many times depend upon the non-legal factors such as pressure groups, the media, multinational trade corporations, scientific certainty, domestic politics and international policy bargaining.[41]

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[38] *Ibid.*

[39] Ibid, note14, p. 3

[40] Ivana Zovko (2005), "International Law Making for the Environment: A question of effectiveness", in Marko Berglund (eds.) *International Environmental Law-Making and Diplomacy Review*, Finland: University of Joensuu-UNEP Course Series2., p 109.

[41] *Ibid.*

Effectiveness may be defined in terms of producing the results that is wanted or intended[42] which vary from one to another MEA, sets in the form of objective and purpose of the treaty. In other words, effectiveness can for example, relate to such goals as environmental problem solving, economic efficiency and wanted change in political behaviour.[43] A statement of effectiveness entails measurement of environmental or social change overtime generated by the MEA, in effect requires proof of causal link to the measured change and an assessment of the relative success of the regime in solving the environmental problems that it was intended to address. The question of effectiveness poses following hierarchical issues:

1. Effectiveness of overall global environmental governance which include international institutional arrangements including United Nations and its specialized agencies; UNEP; MEAs, COPs/MOPs and its secretariats.
2. Effectiveness of MEAs- soft law and hard law dilemma. In other words, effectiveness related to the choice of legal format of an international legal instrument, in particular legally binding MEAs as opposed to soft law. Soft law dilemma of international environmental instruments can be best described as what Prof. Desai called 'hard shell with soft belly'.
3. Effectiveness of compliance mechanisms *in toto* considering important indicators of non-compliance.
4. Effectiveness of dispute settlement mechanism which are provided as a last resort, in the form of institutional and procedural deficiency.

Effectiveness vis-a-vis Dispute Settlement Mechanisms Provided under MEAs

Effectiveness of dispute settlement mechanisms can be examined only if these mechanisms are utilised. It has been examined in the last preceding pages that these are rarely used. Therefore, we are left to examine what procedural and institutional requirements MEAs lacks, in general, if compared with traditional dispute settlement procedure available at international level; and what should be the approach of inclusion of dispute settlement procedure under MEAs to make overall compliance mechanism more effective. While doing so, interlink ages may be find out among the clusters or groups which provide common dispute settlement procedures.

The above assertion about effectiveness raise following different issues which needs consideration:

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[42] Oxford Dictionary, 7th edition (2005), p 488.

[43] Oran Young (1998), *"The Effectiveness of International Environmental Regime"* (MIR Press Massachusetts), p. 3-6. Cited in see note 295 at p. 20.

1. After effect of reluctance of states to submit third party decision-making (dispute settlement) may pose severe threat to the effectiveness of international environmental regime.[44]
2. Institutional and procedural deficiencies of dispute settlement procedures provided under MEAs.
3. Issues related with coordination and interlinkages.

Analysis of this head depends on recognition of the fact that the effectiveness of the growing body of principles and rules requires the availability of appropriate dispute settlement mechanism.[45] The growth of dispute settlement provisions under environmental agreements forced international lawyers to analyse the effectiveness of whole administration of dispute settlement. Weaknesses and strengths are basically set as a criterion to determine effectiveness.

One of the key weaknesses related with dispute settlement provisions is that they lack of compulsory character.[46] Submission of disputes to the binding mechanism requires consent of the parties expressly. And states have not been forthcoming in granting the necessary jurisdiction to courts or tribunals that would allow other states or non-state actors to challenge their environmental policies and conduct. Procedural and institutional deficiencies are another important aspect of effectiveness. Philippe Sands and Ruth MacKenzie identified procedural deficiencies in the following words:[47]

i) Where the Convention provides for, say, arbitration or conciliation, but contains or has adopted no detailed rules to govern these procedures; and
ii) Where there are deficiencies or gaps in the procedural rules that have been adopted.

The possibility of coordination and interlinkages among various MEAs regarding environmental disputes settlement may be found out at various points: subject matter, procedural arrangements and institutional level. As far as the subject-matter is concerned, environmental problems issues are often interlinked and form the subject matter under many MEAs (for example a dispute may be defined under CBD and UNCLOS). Harmonisation of the subject matter may prove effective to sort out issues and define it concretely. Similarly,

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[44] Gunther Handl (1990), "Environmental Security and Global Change: The Challenges to International Law", *Yearbook of International Environmental Law,* Vol.1: 2-33, p. 16.

[45] Philippe Sands (1995), 'Principles of International Environmental Law I: Framework, Standards and Implementation', Manchester: Manchester University Press, p. 178.

[46] See note 38 at p. 18.

[47] *Ibid.* Para. 53, p. 19.

institutional and procedural arrangements may also be worked, at least, within clusters of MEAs.

Enforceability of International Environmental Law through DSM

Enforcement of International Environmental Law (IEL) raises complex proposition: whether nature and subject matter require different treatment other than institutional and binding dispute settlement. Many authors have questioned the appropriateness of enforcing IEL by means of third party adjudication where interstate claims are brought based on the principle of state responsibility.[48] Scholars of this approach contend three main points. Firstly, they contend that judicial settlement of disputes is inherently bilateral and confrontational, whereas problems of environmental protection often involves many states and situations in which it is unclear who exactly is the wrongdoer and who is victim; Secondly, judicial enforcement operates *ex post facto* and is negative in nature, focussed on reparation. Protection of environment, in contrast, requires a system of prevention and positive incentives in order to achieve compliance; thirdly, third party adjudication may not be appropriate because environmental disputes often raise complex question of social choice and courts are not well equipped to solve such disputes.[49]

As an alternative to the judicial enforcement, some authors have favoured multilateral compliance mechanism based essentially on monitoring and reporting.[50] However, presence of both, viz., dispute settlement procedure and compliance mechanisms raises question of their interrelationship: whether both are separate and independent; whether both can be utilised simultaneously and are mutually exclusive. Further, there may be following two situations:

- Injecting dispute settlement procedure as an integral part of compliance mechanism.
- Providing dispute settlement procedure independent of compliance system.

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[48] Joost Pauwlyn (2005), "Judicial Mechanisms: Is there a Need for World Environment Court?" In W. Brandee Chambers and Jessica F. Green (eds.) *Reforming International Environmental Governance: From Institutional Limits to Innovative reforms*: Tokyo, NY and Paris: The United Nations University Press, p. 151; see also Alan E. Boyle, "Saving the world? Implementation and Enforcement of International Environmental Law through International Institution", *Journal of Environmental Law*, Vol. 3, 1991, p. 229..

[49] *Ibid.*

[50] *Ibid.*

In this regard, in practical terms, the present approach seems in between the above two. The recent MEAs gradually containing more stringent provisions on compliance, however, simultaneously provide for independent dispute settlement procedures, which may be utilised simultaneously.

The case for exclusion of dispute settlement procedures from environmental agreements traces its origin from the fact of non-use of institutional procedure and lack of binding and compulsory character. These are resulted into delaying the process to sort out environmental issues, hence, further deterioration and degradation. The non-use of the procedure in case of environmental dispute may be equated with vestigial organs of human body.

The positive arguments which are in favour of inclusion are that to deprive IEL of judicial branch risks creating two classes of society of international norms- those that can be judicially enforced (e.g. WTO) and those that cannot (in particular IEL).[51] It is argued that even if there are shortcomings, its more damaging in case of serious and persistent disagreement, not to have resolution at all than to have one through judicial settlement. Richard Bilder observed that

> "[w]hat is special about environmental problem and disputes? How they differ from other kinds of international problems? One possibility, which you may wish to keep in mind, is that they are not really very different."[52]

The above observation favours the solution of environmental problems through adjudication, but at the same time it must be remembered that the above argument was made in quite early phase of the development of IEL and may not reflect current reality.

Moreover, more favourable argument may cite example of UNCLOS where dispute settlement is compulsory with few limitations. Critic of above argument may be convinced that this compulsory inclusion is because of "trade reasons". Joost Pauwlyn noted that, "to certain extent, environmental disputes are already subject to compulsory jurisdiction, but only where they overlap with trade laws or the law of the sea."[53] Inclusion in favour of DSM presents following arguments:

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[51] See note 48, at p. 152.

[52] *ibid.*

[53] *Ibid.*

1. Since the early part of the 20th century international law has in a commanding and consistent way accepted judicial settlement as perhaps one of the most important method of dispute settlement, even though negotiations and other non-judicial means of settlement still remains viable option.[54]
2. A foundational rule of international law is that states have an obligations to make reparation for breach of international obligation, to give practical effect, international legal order establishes a number of general and specific international legal and administrative bodies to provide states who consider their rights to have been breached with the means of legal redress, such as arbitration and judicial settlement.[55]
3. The behaviour of states must fall within judicial control, as states themselves may commit or tolerate environmental destruction.[56]
4. Only an independent judicial institution can scrutinize the implementation and enforcement of international treaty law and international law obligations, if states at an earlier stage have failed to achieve compliance by 'politically non-confrontational' mechanism or agreement.[57]
5. More importantly, the necessary protection of Global Commons and the development of '*erga omnes* obligation', as well as human rights to a decent environment can be ensured and promoted by judiciary.

Can Compliance Mechanism be Viable Option?

Traditional dispute settlement provisions tend to be adversarial and bilateral in nature in that one state takes proceedings against another usually after an international obligations has been breached and damages to the environment has already occurred. For these reasons, no party to MEA has actually used traditional dispute settlement procedure to correct non-compliance. In this circumstance the obvious question arise about the search of other possible options to secure effective compliance and avoid non-compliance without use of confrontational means and without establishment of WEC. This requires more facilitative approach which focuses on capacity building, the most essential part of compliance. It denotes shift in approach from

[54] C.F. Amerasinghe (2007), "Reflections on Judicial Functions in International Law", in Tafsir Malik Ndiaye and Rudiger wolfrum (eds.) *Law of the Sea, environmental Law and Settlement of Disputes*, Leiden/Boston: Martinus Nijhoff Publishers, p. 122.

[55] Jutta Brunnee (2006), "Multilateral Environmental Agreements and the Compliance Continuum", in Gred Winter (eds.) *Multilateral Governance of Global Environmental Challenge: Perspective from Scientific, Sociology and the Law*, Cambridge: Cambridge University Press, p.382.

[56] *Ibid.*

[57] *Ibid.*

individual state to seeking recourse to legal proceeding to multilateral oversight of compliance.

Further, Capacity building in the form of fund support and economic instruments, growing awareness, technology transfer, diffusion of information technology and administrative support etc. are more in consonance with the socio-economic conditions of developing and least developing societies. In this sense, multilateral non-compliance procedures and multilateral non-compliance response measures seems more appropriate.

Conclusion

It can be seen that with respect to pattern of inclusion of DSM the approaches differ from one to another MEAs. It also differs even with respect to same groups or clusters. Emerging trends shows that more stringent measures of compliance were adopted to enforce effective compliance, implementation and enforcement. However, it seems that inclusion of more formal mechanisms may not prove effective without capacity building measures directed to effective compliance. Moreover, states are resorting disputes settlement mechanisms only in case of severe violations or until and unless they are 'injured'. This tendency may further prove detrimental to environmental protection. Therefore, focus should be on non-compliance procedure and non-compliance response measures which are the core theme of the next chapter.

Chapter - IV

COMPLIANCE MECHANISM

Introduction

The promotion of compliance with international commitments is among the most challenging issues of global environmental governance.[1] In essence, effective compliance system constitutes the core of the multilateral environmental cooperation while moulding state's behaviour towards the common end. These common ends are set out in the respective MEAs in the form of purpose and objective. The object of the present chapter is to provide brief summary of international compliance mechanism primarily from international perspective, and with special reference to international implementation of IEA. This study shall not focus on any specific MEA. Discussion on international and national enforcement aspects of compliance mechanism, however, constitute integral part of compliance mechanism, is outside the scope of the study. The rationale to include this chapter is based on two considerations: first, dispute settlement procedure is integral of broad compliance mechanism; second, compliance mechanism offer several innovative means to promote compliance, in turn, facilitates dispute avoidance.

This chapter is structured to provide theoretical understanding of compliance mechanisms which will include sources of compliance and non-compliance, design and strategies to promote compliance, synthesis of prevailing approaches and current practices under MEAs. After analysing theoretical understanding, co-ordinations and interlinakges among shall be examined. At the end of the chapter, compliance mechanism with respect to developing countries is provided with brief analysis on Indian experience.

Components of Compliance Mechanisms

The compliance mechanism could be broadly divided into the following three parts: Implementation, Enforcement and Dispute Settlement (see Figure 4.1). The implementation

[1] Jutta Brunnee (2006), "Multilateral Environmental Agreements and the Compliance Continuum", in Gred Winter (eds.) *Multilateral Governance of Global Environmental Challenge: Perspective from Scientific, Sociology and the Law*, Cambridge: Cambridge University Press, p.387.

may be further divided into two parts: national and international. National implementation broadly includes three parts: National Legal Measures to Implement MEAs, National Compliance and Reporting. International implementation sub-divided into two kinds: Non-Compliance Procedure and Non-Compliance Response Measures. International Enforcement is further divided into national and international enforcement. Each of the above system constitutes broad understanding of "Compliance Mechanism". It must be noted here that it is not necessary that every MEA include all above elements and format of compliance mechanisms greatly vary into several MEAs.

Definitions

Compliance Mechanisms

The word 'compliance' is a generic term which is used interchangeably with many other similar words such as implementation, enforcement, dispute settlement and effectiveness. It must also be distinguished from the components of implementation and enforcement. There is no authoritative definition available to define it comprehensively. UNEP Guideline provides the following two definitions:

> "Compliance means the fulfilment by the contracting Parties of their obligations under multilateral environmental agreements and any amendment to the multilateral environmental agreements."[2]

> "Compliance means the state of conformity with obligations, imposed by a State, its competent authorities and agencies on the regulated community, whether directly or through conditions and requirements in permits, licences and authorizations, in implementing multilateral environmental agreements."[3]

The first definition focuses on international compliance while second on national compliance as a part of national compliance. The first definition mainly concentrates on obligations which each State Party agrees to undertake. It should be observed that compliance is not an 'all or nothing' game.[4] The fact that a party is not fully compliant does not mean that it is

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[2] UNEP (2001), *Guidelines on Compliance with and Enforcement of MEAs,* Nairobi, Kenya. See www.unep.org/dec/onlinemanual/ , www.enep.org/DEC/OnlimeManual/Compliance/tabid/56/Default.aspx , www.eneo.org.org/DEC/docs/UNEP.Guidelines.om.Compliance.MEA.pdf.

[3] *Ibid.*

[4] UNEP (2006), Compliance Mechanisms under Selected Multilateral Environmental Agreements, Nairobi, Kenya, p. 19.

fully non-compliant.[5] Compliance many times is matter of degree, the parameters and indicators of which are most of the time very difficult to define clearly. Compliance can also be defined as "a state of conformity or identity between an actor's behaviour and a specified rule," regardless of motivations, circumstances, or causes that lead to that conformity.[6] In other words, an actor is in compliance if the actor is doing what the law says the actor must be doing.[7]

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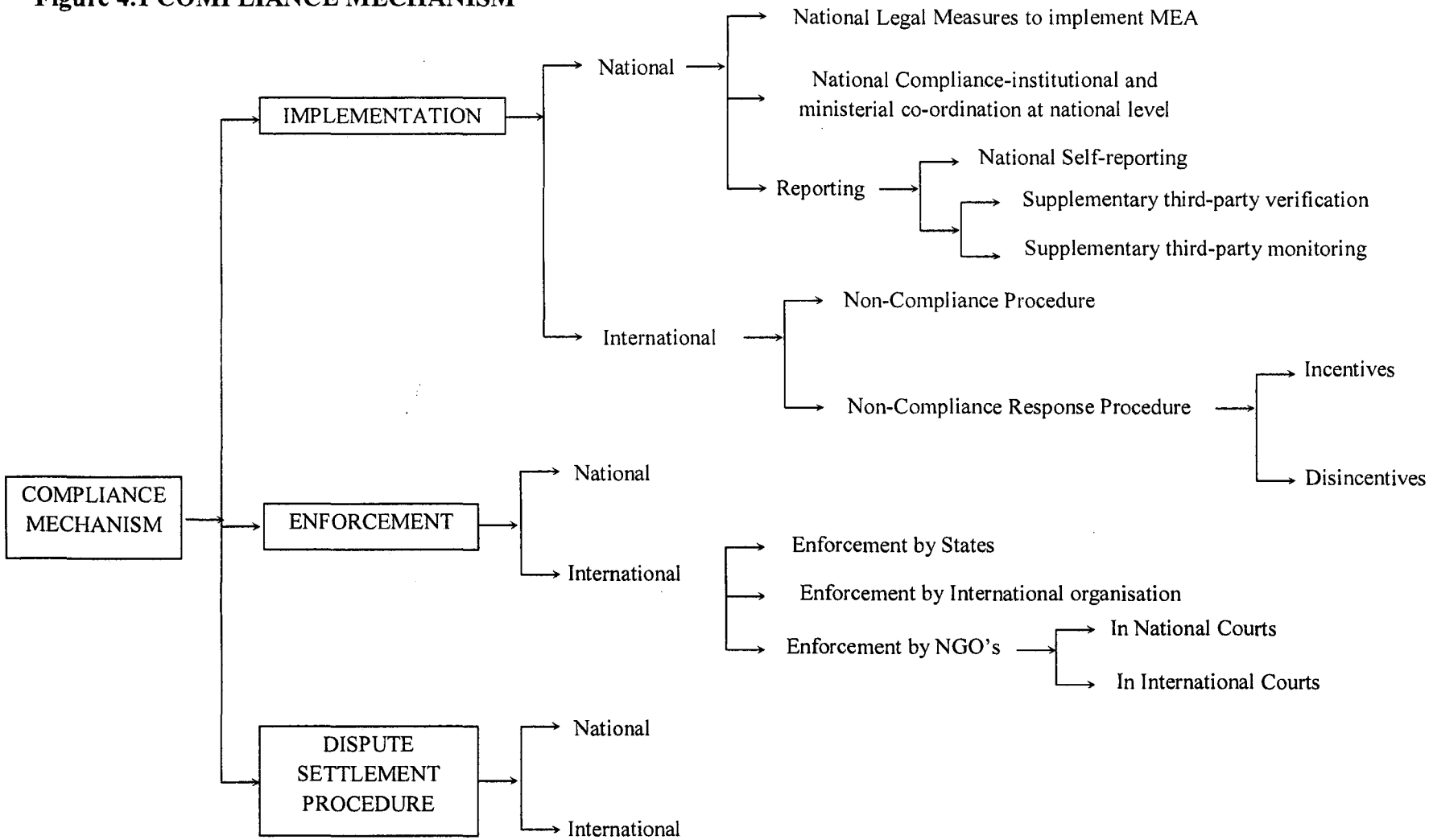
[5] *Ibid.*

[6] Kal Raustiala and Anne-Marie Slaughter (2002), "International Law, International Relations and Compliance", in Handbook of International Relations 539 Cited in Durwood Zaelke *et al.* (2005), *Making Law Work: Environmental Compliance and Sustainable Development* (eds.), Vol. 1, Cameron May International Law and Policy.

[7] *Ibid* at p. 22.

Figure 4.1 COMPLIANCE MECHANISM



Compliance refers to specific actions and inactions envisaged under international agreements that are to be implemented by the parties to the agreement and the mechanism which facilitates such actions and inactions is called "Compliance Mechanisms". Compliance mechanisms are the system adopted under MEAs to promote compliance. Compliance mechanism may be defined as *whole set of factors required to realise international environmental obligations, accepted by the consensus of the state parties, in its practical forms.*

Implementation

Like compliance, the term "implementation" is not defined authoritatively. Implementation is generally essential predicate for compliance. UNEP 2001 defines it as follows:

> "Implementation" refer to, inter alia, all relevant laws, regulations, policies, and other measures and initiatives, that contracting parties adopt and/or take to meet their obligations under a multilateral environmental agreements and its amendments if any."[1]

Implementation is "the process of putting...commitments into practices", whether those are international commitments, domestic rules, or other sources of law that are not self-executing.[2] However, it must be noted that compliance can happen without implementation (as when the commitments reflects current practices or when external factors result in compliance), and implementation may not lead to compliance (as when external factors outweigh the implementation efforts.)[3]

Enforcement

UNEP 2001 defines as follows:

> "Enforcement means the range of procedures and actions employed by a state, its competent authorities and agencies to ensure that organisation or persons, potentially failing to comply with environmental law or regulations implementing multilateral environmental agreement, can be brought or returned into compliance and/or punish through civil, administrative or criminal action."[4]

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[1] See note 4, p. 82.

[2] *Ibid.*

[3] *Ibid.*

[4] Available at http://unep.org/DEC/docs/UNEP.Guidelines.on.Compliance.MEA.pdf, see also www.unep.org/DEC/OnlineManual/Enforcement/tabid/57/Default.aspx

These are main three components of broad understanding of compliance mechanism. Now, the next important step is to provide theoretical understanding of compliance mechanism and to analyse what are design and strategies to ensure effective compliance.

Theory of Compliance Mechanism

The inclusion of compliance regime under the MEA has become a common practice during the MEA negotiation. In several MEAs compliance regime have either been adopted or in the process of negotiation.[5] Earlier MEAs were using relatively simple compliance procedure, for example requirement of national reporting, seldom clubbed with third party monitoring and verification, in addition with dispute settlement procedures. Gradually more comprehensive model were innovated and adopted, considering the fact that, as Brown Weiss observed, '[i]n international environmental affairs, neither binding dispute settlement nor the traditional rule-breach-sanction model of international law have played a significant role'.[6]

Several approaches and models are put forth by international legal scholars that vary in contents and orientations. However, the overall debate hovers over the questions that what shall be the approach in developing compliance procedure? Shall it be largely 'soft' and facilitative, or 'hard'?[7] Earlier the debates were mostly concerned with behaviour of the states induced by interest assessment. In fact, the evolution of compliance procedure was shaped by the assumption that states' compliance decisions are mainly driven by interest estimation. Until recently compliance issues were primarily the domain of international relation scholars and their inquiries into cause of state behaviour. They were concerned with any behavioural or environmental or environmental change that can be attributed to the international environmental agreement- whether these changes involve compliance or not and regardless of whether these changes were desired, unintended, or even perverse. International

[5] It need to mention that various components of compliance mechanisms: National Performance Information, Multilateral NCP, Non-Compliance Response Information and dispute settlement procedure are at various stages of inclusion into various clusters or groups of MEAs. For example requirement of national reporting is provided in almost all MEA whine NCP etc. are provides either only in few MEAs or in the process of negotiation. It denotes that there are not uniform practices regarding inclusion of compliance mechanisms.

[6] Brown Weiss E. (1999), " Understanding Compliance with International Agreements: The Baker's Dozen Myths", *University of Richmond* L.R. 32, p. 555, at 1572 Cited in Brunnee, Jutta (2006), Multilateral Environmental Agreements and the Compliance Continuum, in Gred Winter (eds.) Multilateral Governance of Global Environmental Challenge: Perspective from Scientific, Sociology and the Law, Cambridge: Cambridge University Press, p. 389.

[7] *Ibid.*

relational scholars also focused on the reasons why states change their behaviour and what aspects, if any, of international environmental agreements explain those changes.

In this process, four categories of behaviour are identified: treaty induced compliance; coincidental compliance; good faith compliance; and intentional non-compliance. This typology highlights that the compliance/non-compliance distinction does not always correspond well to the international environmental agreement influence/non-influence distinction. Ronald B. Mitchell identified three schools of thought: realist, institutionalist and pragmatist.[8] He observed that realist consider international law as having little significant impact on nation's international politics: "consideration of power rather than law determines compliance"[9] in all important cases. He further observed that, "[i]nstitutionalist have sought to identify the conditions under which treaties can influence behaviour and the types of norms, principles, rules and processes that do so most effectively" and that "the great majority of the rules of international law are generally observed by the all nations".[10]

Theories about compliance provide accounts of why different actors comply or do not comply with international and domestic laws. Durwood Zaelke *et al* advocated, *inter alia*, for strengthening the theoretical foundation of compliance for enhancing compliance. They observed that,

> "theories about compliance provide accounts of why different actors comply or do not comply with international and domestic laws. Some theories assume that actors decide to comply or not to comply based on rational evaluation of the logical consequences of their actions vis-a-vis the rules, in order to maximize pay offs. Other theories examine a wider range of factors shaping behaviour, including whether behaviour is appropriate vis-a-vis underlying norms".[11]

It can be construed from above mentioned paragraph the in order to be effective policy makers must understand the various theories and when they will be useful, make their own

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[8] Ronald B. Mitchell (2007), "Compliance Theory: Compliance, Effectiveness, and Behaviour Change in International Environmental Law", in Daniel Bodansky (eds.) *The Oxford Handbook of International Environmental Law*, New York: Oxford University Press, p. 83.

[9] *Ibid.*

[10] Zaelke, Durwood et al. (2005), Compliance, Rule of Law and Good Governance, in Durwood Zaelke et al. Making Law Work: Environmental Compliance and Sustainable Development Vol. I, London: Cameron May ltd., p. 29.

[11] See note12.

theoretical assumptions explicit, measure these assumptions against the evolving empirical results to ensure they are sound, and make adjustments as required.[12]

Sources of Compliance and Non-Compliance

Theoretical understanding of sources of compliance identifies two situations: compliance as independent self interest and compliance as interdependent self interest. The simplest explanation of why a government or other actor regulated by a treaty undertakes a given behaviour is because they believe it furthers their interest.[13] States may comply because the treaty rules require no change in behaviour especially when agreement reflects lowest common denominator policies (because many states find themselves already in compliance).[14] Moreover, states can also facilitate their own compliance by negotiating vague and ambitious rules. Compliance as interdependent self interest may be furthered by interdependency of interests. Interdependency of interest finds its place in the realm of 'ecological' and mutual understanding of the problem. It reflects democratic and independent decision making.

Sources of non-compliance have been identified as: non-compliance as a preference, non-compliance due to incapacity and non-compliance due to inadvertence. A state may prefer non-compliance simply because the benefits of compliance- absence of coercive efforts simply do not outweigh its costs. In other words, commitments may go unfulfilled because states calculates costs and benefits and finds the former to exceed the latter. Likewise, the agreements that have not generated strong normative expectations are likely to have less influence than those that have.[15]

However, the most important factor of non-compliance is due to incapacity especially of developing countries. Lack of or inadequate capacity to implement MEA obligations are often due to limited financial, human and technical resources and/ or lack of environmental awareness among the decision makers[16]. The failure of developing countries to meet their

[12] See note 12.
[13] *Ibid.*
[14] *Ibid.*
[15] See note 16 at p. 909.
[16] *Ibid.*

environmental commitments often reflects more pressing concerns, and the lack of adequate resources, more than a conscious decision that compliance is not in their interests. In this regard facilitative approach of compliance seems to be more appropriate. Indeed, the shift to a facilitative rather than an enforcement model of compliance in many environmental agreements- including compliance-financing mechanism under the Montreal Protocol and the UN Framework Convention on Climate Change- reflects the increasing recognition of the role of incapacities in non-compliance.

Strategies to Promote Compliance

Theoretical perspective on compliance has been dominated by a debate between proponents of managerial and/ or diplomatic and enforcement oriented models.[17] Indeed, these two models have been propagated as existing measure to compliance or as compliance strategies. Julta Brunnee observed that "the latter tends to realist end of the institutionalist spectrum, the former draws upon norm-focussed, process oriented, explanation of compliance."[18] He further advocated for 'constructivist framework' which, according to him, got less attention[19].

The managerial approach finds its origin in the work of Abram Chayes and Antonia Handler Chayes, which argues for a 'cooperative and problem-solving approach' to promote compliance with international regulatory agreements such as MEAs.[20] It may also be called as 'positive inducements', as Ronald B. Mitchell observed, 'giving positive rewards for compliance provides means of increasing incentives for compliance'[21]. It consists in a blend of transparency (regarding the regime's norms and producers and the parties' performance), dispute settlement, and capacity building.[22] Consequently, management and/or diplomatic measures are some of the facilitative approach mechanisms undertaken or instituted to assist and facilitate countries to create the necessary and prerequisite capacity to comply with their

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[17] See note 12 at p. 391.

[18] *Ibid.*

[19] *Ibid.* According to him, constructivist focuses on interaction among actors. Constructivist theory questions the assumptions that interests are separate from interaction, and that state action is largly driven by the strategic pursuit of interests.

[20] *Ibid.*

[21] *Ibid.*

[22] *Ibid* at p. 392.

international commitments. Elizabeth Mrema identified following components of managerial measures:[23]

- Reporting requirements imposed on the state parties.
- Compliance monitoring.
- Positive economic measures.
- Issue-linkage where cooperation is encouraged.
- Settlement of disputes by diplomatic means.

Besides enforcement measure, the other approach which has been advocated is enforcement and /or coercive oriented approach. Coercive and/or enforcement measures are accusatory and focus on forceful or punitive measures to ensure that treaty obligations are enforced. These measures are essentially applied in cases where there is no political will to comply with its obligations. Such measures are directed toward adversarial dispute settlement mechanism and sanctions which are confrontational in character. Mitchell termed these measures as 'negative sanctions'.[24] He observed that proponents of sanction contend that "compliance can be obtained efficiently by making violation unattractive rather than by altering the cost and benefits of compliance".[25] Negative sanctions include withholding or suspending treaty privilege until a party is back in compliance. This can be in the form of losing access to technology transfer or financial assistance or losing the right to produce,

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[23] Elizabeth Maruma Mrema (2005), "Cross Cutting Issues in Compliance with and Enforcement of Multilateral Environmental Agreemnts", in Marko Berglund (eds.) *International environmental Law-Making and Diplomacy Review*, Finland: University of Joensuu-UNEP Course Series2., pp. 132-136.

[24] Mitchell, Ronald B. (2007), "Compliance Theory: Compliance, Effectiveness, and Behaviour Change in International Environmental Law", in Daniel Bodansky (eds.) *The Oxford Handbook of International Environmental Law*, New York: Oxford University Press, p. 90. The term "sanction" is particularly important in IEL. Peter H. Sand observed that MEAs do avoid using the term "sanction". He further cited following examples.

- the 1987 Montreal Protocol merely refers to the "treatment" of parties in Article 8, and specifies "steps" and "measures" to induce compliance, under its 1990 Non-Compliance Procedure;
- the 1992 OSPAR Convention uses the term "steps" for bringing about full compliance (Article 23/b, including assistance "measures");
- the 1997 Kyoto Protocol refers to "consequences" of non-compliance (Article 18);
- the 2000 Cartagena Protocol to the Biodiversity Convention refers to "additional measures" in case of repeated non-compliance, under its 2004 Non-Compliance procedure (Article VI/2/d).

For detailed discussion see Peter H. sand (2005), "Sanction in case of non-compliance and state responsibility: *Pacta sunt servanda*–or else?", in Durwood Zaelke *et al.* (eds.) *Making Law Work: Environmental Compliance and Sustainable Development*, London: Cameron May international Policy.

[25] *Ibid.*

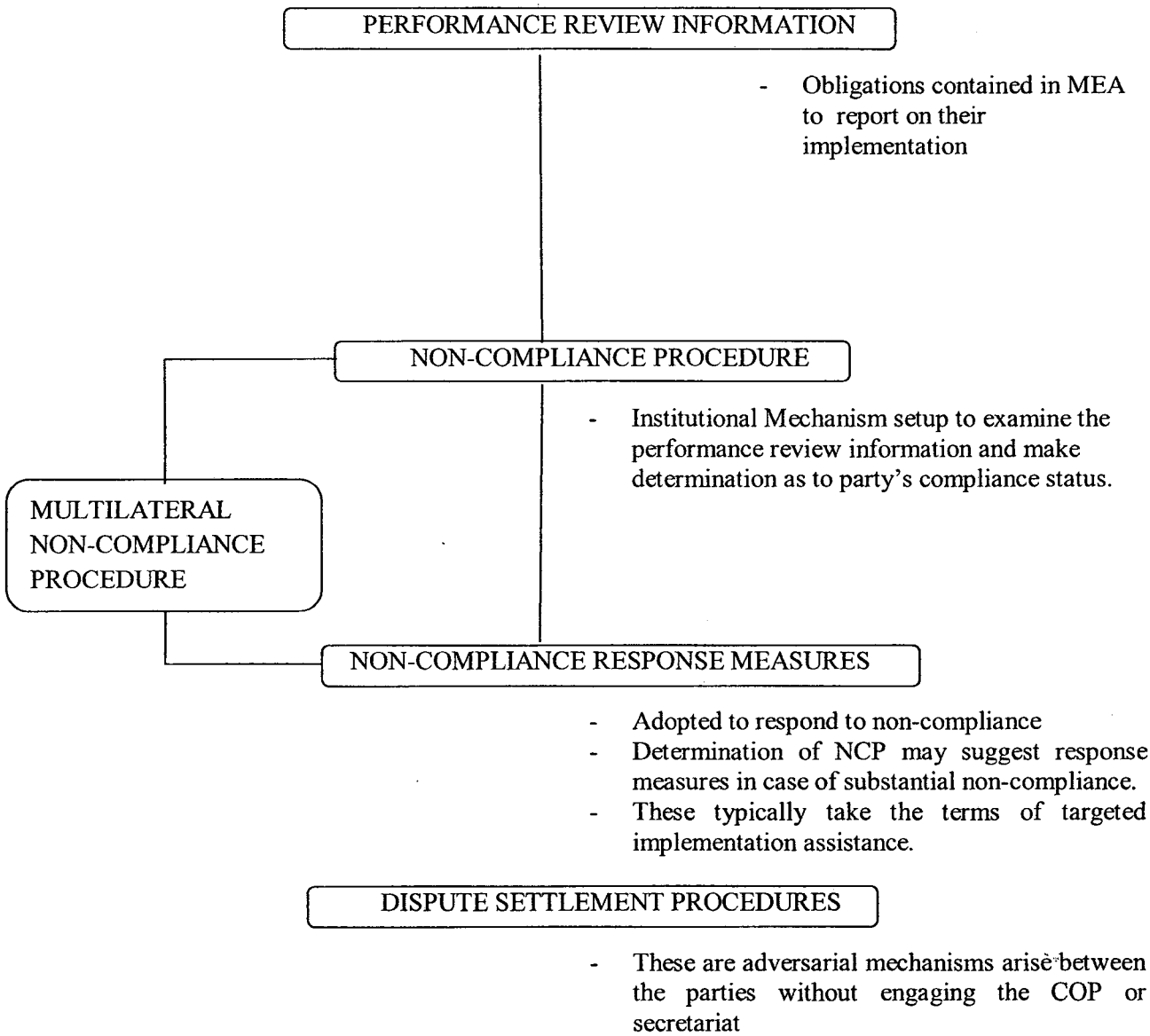
consume or trade in controlled substances or species or to participate in cooperative mechanisms and sometimes penalty and liability.

Current Practices under MEAs

The theoretical debate about compliance mechanism briefly highlights the scholarly debate about approaches, source and strategies of compliance mechanisms. Keeping track record of current practice to adopt compliance mechanism, it can be divided into four components namely; Performance Review Information, Non-Compliance Procedure, Non-Compliance Response Measures and Dispute Settlement Procedures (see Figure 4.2).[26] The above typology shall further lay the basis of comparative analysis of compliance mechanisms under selected multilateral environmental agreements. Except dispute settlement procedure, the remaining components are the subject of the present study.

[26] The above categorization is based on UNEP (2006), Compliance Mechanisms under Selected Multilateral Environmental Agreements, Nairobi, Kenya.

Figure 4.2 COMPLIANCE MECHANISM



Performance Review Information

Performance Review Information (PRI) is the most common compliance mechanism; and on which the majority of international studies and capacity building efforts focus.[27] Performance information will usually indicate a degree of compliance rather than perfect compliance or absolute non-compliance. PRI obligations in MEAs require parties to report on their implementation performance.[28] PRI is gathered primarily through national self-reporting, however, few MEAs, discussed hereafter, also provide for supplementary third party verification or monitoring. Reporting system developed under MEAs constitute the core of compliance system. Almost all MEAs provides for reporting system with some variation in the form of National Performance Review and Non-Compliance Response Information (see Table 4.1). National Performance Review includes self reporting and/or third party verification and/or monitoring. In some MEAs Review Format are provided in the form of Template while others provide guidelines.

Reporting

Almost all MEAs, if not all, impose an obligation and duty upon the parties to prepare, produce and submit periodic national reports to the respective COPs, through the specific MEA secretariat, on how the MEA has been put into force and implemented nationally.[29] The extent of this obligation varies, but it usually covers at least the measures taken by the parties towards implementing this obligations.

These may involve details on the development of the national programs, policies and measures. Philippe Sands noted that

> "the information on production, imports and exports; information on the grants of permits or authorisation including certain criteria; information on implementation measures which have been adopted; details of decisions taken by national authorities; scientific information; and information on breaches or violations by persons under the jurisdiction or control of the party."[30]

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[27] See note 58, chapter 3, p. 9.

[28] *Ibid* at p. 103.

[29] *Ibid.* at p. 132.

[30] Philippe Sands (1995), Principles of International Environmental Law I: Framework, Standards and Implementation, Manchester: Manchester University Press, pp. 41-47.

Table: 4.1 Performance Review Information

Convention	Review Format		National Performance Review			Non-Compliance Response Information		
	Template	Guidelines	Reporting	3rd Party Verification	3rd Party Monitoring	Reporting	3rd Party Verification	3rd Party Monitoring
Ramsar	✓		✓		✓			✓
World Heritage		✓	✓		✓			✓
CITES	✓		✓	✓	✓		✓	
Migratory Species (CMS)		✓	✓					
CBD		✓	✓					
UNCCD		Pending	✓					
ITPGRFA				✓				
Basel convention	✓	✓	✓	✓	✓			
Rotterdam PIC								
Biosafety		✓	✓			✓		
Stockholm POPs		✓	✓					
Vienna		✓	✓					
Montreal Protocol		✓	✓					
UNFCCC		✓	✓	✓				
Kyoto Protocol		✓	✓	✓	✓	✓		
Whaling convention			✓	✓	✓			
Sea Dumping London			✓					
UNCLOS								
Fish Stocks								

SOURCE: UNEP REPORT ON COMPLIANCE MECHANISMS UNDER SELECTED MULTILATERAL ENVIRONMENTAL AGREEMENTS, 2006.

In essence, reporting requirements imposed on the parties furnishes the following benefits:

1. These reports enable parties to assess how effectively an MEA is implemented and enforced.[31]
2. Information on a Party's performance is essential to determine whether it is complying with its obligations.[32]
3. Thorough database of information provides backbone to evaluate overall effectiveness of compliance regime.
4. It identifies several shortcomings in overall compliance system, in effect, promote facilitative measures and remove foibles and defaults.
5. Reporting requirements serves as conflict avoidance measures that permit parties to examine and assess the extent to which states are committed to their obligations.[33]
6. After identifying the shortcoming and incapacities it serves as basis for financial and technical assistance.

It must be noted that many states fails to fulfil the basic reporting obligations which suggest that more substantive obligations may also remain unimplemented.[34] However, non-fulfilment of these basic obligations, many times, remains due to lack of administrative, financial and technical incapacity and not due to intentional behaviour. At the end, obvious weaknesses also remain due to problem with diligence and accuracy of information[35] which require monitoring and inspection by the third party.

Monitoring and Verification

Good monitoring and verification of practices in international institutions are important in building trust between and among cooperating parties, and in strengthening wider societal confidence.[36] In international setting, "monitoring has to do with the ascertainment and reporting of state's behaviour; and verification refers to procedures and systems for quality

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[31] P.W. Birnie and A.E. Boyle (2004), *International Law and the Environnent*, New York : Oxford University Press, p.132.

[32] See note 58, chapter 3 at p. 105.

[33] *Ibid.* at p. 132.

[34] *Ibid.*

[35] *Ibid.*

[36] Jorgan Wettestad (2007), "Monitoring and Verification", in Daniel Bodansky (eds.) *The Oxford Handbook of International Environmental Law*, New York: oxford University Press, P. 975.

and reliability checks of the reported data".[37] Within the field of environment, verification and monitoring systems have been developed since the mid 1970s, mainly to underpin and facilitate assessment of the follow-up of not very sophisticated or finely tuned international commitments.[38]

By definition, verification is the process of testing accuracy of performance information provided, usually through on site inspections.[39] Some MEAs provide for verification of input information.[40] In contrast to self reporting, third party monitoring of performance engages a non-Party in reporting on national implementation of MEA obligation. In contrast to verification, performance monitoring may address a Party's establishment of systems to implement the MEA but does not involve review of accuracy of particular information for its own sake.[41]

Monitoring on to procedural changes, the 1992 UNFCCC was a forerunner in terms of designing a verification process with a significant independent review element.[42] At the first COP, states decided that national reports should be subject to in depth reviews carried out by experts review teams. These teams are staffed by experts nominated by the Parties and chosen by UNFCCC Secretariat, ensuring that membership reflect both a balance between Annex 1 and non-Annex 1 parties and a diversity in expertise.[43]

Implementation Committee were established within 1989 Montreal Protocol was first to be established in 1990.[44] The parties to the LRTAP Convention decided in 1994 under second Sulphur Protocol to establish implementation committee comprising eight legal experts. Recently, within the framework of Kyoto Protocol, the parties established a compliance committee composed of Facilitative Branch and an Enforcement Branch, each with ten members.

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[37] See note 45, p. 95.

[38] *Ibid.* A classic example is the 1985 Helsinki Protocol to the Convention on Long-Range Transboundary Air Polluution (LRTAP Convention)

[39] *Ibid.*

[40] For example the RAMSAR and UNFCCC/ KYOTO Secretariat.

[41] *ibid.*

[42] *Ibid.*

[43] *Ibid.*

[44] See http://www.unep.ch/Ozone/Meeting_Documents/impcom/index.shtml.

In addition to the implementation and compliance committees, regimes bodies- such as the secretariats and the COPs- became more active in the field of reporting and verification. Rosalind Reeve noted that,

> "the [secretariat] wields considerable power, since not only does it review and verify information, but it also makes recommendation to the COP and the Standing Committee, which on occasions are far reaching and often acted upon."

Edith Brown Weiss and Harold K. Jacobson observed that the most effective way to ensure compliance is through what they called "Sunshine Strategy" which relies on:

> "monitoring behaviour of various actors through regular reports, site visits, and international review procedure; transparency and access to information; media access and coverage to stimulate public awareness; NGO participation in monitoring compliance; and informal pressures by the parties and secretariat to comply; and finally, reputation factor to induce compliance."[45]

Non-Compliance Response Information

Failures to comply with obligations concerning submission of national performance information undermine the regime of a MEA because the information deficit can conceal national non-performance of primary operational obligations.[46] Consequently, failure to comply with performance review obligation is substantive default that can trigger an MEA's NCP, as is the case under CITES and the Montreal Protocol. Upon processing through the NCPs, a response that imposes further information obligations on the defaulting Party can result. The information required under a NCP can be additional to that ordinary required, or simply require the original performance information as part of a package of additional measures.[47]

Non-Compliance Procedures

Non-compliance procedures (NCP) are usually planned to secure compliance by parties with the terms of a treaty or legally binding decision, although they are sometimes also applied to

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[45] Edith Brown Weiss and Jacobson Harold K. Jacobson (2005), "Strengthening National Compliance with International Environmental Agreements", in Durwood Zaelke *et al.* (eds.) *Making Law Work: Environmental Compliance and Sustainable Development* Vol. I, London: Cameron May Ltd., p. 178.

[46] See note 52, p. 83.

[47] *Ibid.*

non-binding soft law.[48] NCP has become rather prevalent in international environmental law, allowing T. Kuokkanen to observed that

> 'it appears that establishing such a compliance mechanism has become standard practice in environmental context.'[49]

Catherine Redgewell noted that,

> "recourse to such procedure is evidence of growing awareness that traditional rules of international law concerned with material breach of treaty obligations and with state responsibility are inappropriate to address problems of environmental treaty implementation".[50]

It is found that thirteen of the MEAs have developed or in the process of developing, NCP to deal with instances of apparent non-compliance.[51] The Montreal Protocol on Substances That Deplete the Ozone Layer was among the first international agreement in which a specific non-compliance procedure was established. In addition to the Montreal Protocol, NCP have been setup under the Convention on Long-Range Transboundary Air Pollution (LRTAP Convention), the Convention on environmental Impact Assessment in a Transboundary context, the Kyoto Protocol to the UN Framework Convention on Climate Change, the Basel Convention on the Control of Transboundary Movements of hazardous wastes and Their Disposal, the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters(Aarhus Convention), the Cartagena Protocol on Biosafety, and the Convention on Protection of Alps. Moreover, such procedures are being negotiated for some other agreements, including the Convention on Prior Informed Consent Procedure for certain hazardous Chemicals and Pesticides, the Stockholm Convention on Persistent Organic Pollutants, and the international Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA).

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[48] See note 356, p. 95 at p. 207. See also Farhana Yamin and Joanna Depledge (2004), *The International Climate Change Regime: A Guide to Rules, Institution and Procedures*, Cambridge, UK: Cambridge University Press, pp. 379-382; Redgewell, Catherine, "Non-Compliance Procedure and the Climate Change Convention", [Online: web] Access on 15 April, 2010, URL: http://www.geic.or.jp/climgov/03.pdf, pp. 13-17. See UNEP (2006), *Manuel on Compliance with and Enforcement of MEAs*, Nairobi, Kenya, p. 144-145 for guidelines on "Non-Compliance Procedure".

[49] Jan Klabbers (2007), "Compliance Procedure", in Daniel Bodansky (eds.) The Oxford Handbook of International Environmental Law, New York: oxford University Press, p. 998.

[50] See note 382, p. 97.

[51] For detailed discussion see note 326, p. 83 at pp. 25-97.

However, under various regimes, the constitution of compliance procedure differs in terms of trigger body and decision making body (see Table 4.2). Here trigger body refers to initiation of NCP by any member, secretariat on any other, while, decision making body may be COP/MOP or committee established under compliance mechanism.

Table: 4.2. Multilateral Non-Compliance Response Procedures

Convention	Procedure		Trigger Body			Decision-Making Body	
	Established	Pending	Any Member	Secretariat	Other	COP	Committee
Ramsar	✓			✓		✓	
World Heritage	✓		✓	✓	✓	✓	
CITES	✓		✓	✓	✓	✓	✓
CMS	✓		✓	✓		✓	
CBD							
UNCCD		✓					
ITPGRFA		✓					
Basel	✓		✓	✓		✓	✓
PIC							
Biosafety	✓		✓			✓	✓
POPs		✓					
Vienna							
Montreal Protocol	✓		✓	✓		✓	✓
UNFCCC	✓		✓	✓		✓	✓
Kyoto Protocol	✓		✓	✓	✓	✓	✓
Whaling							
London							
UNCLOS							
Fish Stocks							

SOURCE: UNEP REPORT ON COMPLIANCE MECHANISMS UNDER SELECTED MULTILATERAL ENVIRONMENTAL AGREEMENTS, 2006.

NCP require administration by a body established under the MEA, and that body is usually COP/MOP, but it may be assisted by a specialised compliance committee that the COP/Mop has established by resolution for that purpose.[52] In fact, most compliance committee usually composed of a limited number of parties (eight to fifteen) to the underlying MEA and reporting back to the plenary body set up by that agreement (COP/MOP).[53] In this sense final decisions are taken by COP/MOP. Submission regarding non-compliance can usually be brought either by the non-complying party themselves, or by the other contracting parties (but this is rarely done), or can be initiated by the secretariat established the agreement in question.[54] In this regard Aarhus Convention is more flexible, allows for actions to be initiated by member of public, including non-governmental organisation and private citizens.[55]

There are some uncertainties about the binding nature of compliance procedure, scope and legality. The spirit behind NCP suggests that final outcome would be recommendatory in nature.[56] By contrast, the procedure itself is best seen as being compulsory in nature- once a state is faced with a submission made against it, it is expected to cooperate.[57] The scope of NCP seems to cover almost all cases of compliance whether due to intentional or due to lack of capacity to implement obligations. The question of legality is also central to the overall debate of NCP. For example, NCP under Kyoto Protocol, the most elaborate procedure devised to date, looks, in part, like judicial procedure, complete with conditions relating to the admissibility of complaints (Article VII), procedural guarantees (Article VIII), the possibility of appeal (Article XI), and possible consequences attached to a finding of non-compliance (Article XV). An almost judicial element is also envisaged in Article 21 of the ITPGRFA which provides the basis upon which a non-compliance procedure will be setup, and it provides for 'legal advice or legal assistance' to states involved in a non-compliance procedure. This process suggests formalisation or judicalisation of the non-compliance procedure.

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[52] See note 326, at p. 110.

[53] See note 373, at p. 998.

[54] *Ibid.*

[55] *Ibid.*

[56] *Ibid.*

[57] *Ibid.*

The notion of NCP raises few complex legal issues. Jan Klabbers identified the following two legal issues:[58]

1. The question of the voluntary nature of the procedure or their outcomes- what if a state refuses to cooperate, gives every impression of not taking the procedure very seriously, or ignores the recommendations resulting from the non-compliance procedure?
2. How the non-compliance procedures relate to international law's general enforcement mechanisms?

Considering the first issue first, he suggested standard formula that non-compliance procedure is 'without prejudice' to existing mechanisms. Further, non-compliance procedure is an addition to the existing framework, and the existing framework may simply be general international law or, seldom a specifically designed adversarial procedure. While considering the first question it may be observed that refusal to accept recommendation or to cooperate should invite compulsory and binding settlement procedure. Inclusion of such procedure may detract non-observing from non-cooperation. Indeed, these issues, in future, require more elaborate and careful considerations.

Significance of Non-Compliance Procedure

The essence of modern non-compliance approaches is that procedure to address compliance in a proactive, non-confrontational and preventive manner are established by the treaty body (such as COP) which are then overseen by a specialised institutions comprising state representatives from across the political spectrum.[59] With the inclusion of NCP, as Farhana Yamin and Joanna Depledge noted,

> "the emphasis is shifted from individual states seeking recourse to legal proceedings to the multilateral oversight of compliance problems by international institution which seek to facilitate compliance by providing incentives, such as the provisions of advice and financial assistance, and, where non-compliance occurs, to enforce commitments by imposing consequences aimed at bringing the state concerned back into compliance."[60]

The most important virtue of NCP is that it provides for an alternative to the traditional dispute settlement procedures. The settlements of issues by resorting to NCP, many times termed as 'soft settlement'[61], are best perceived as dispute avoidance measures. However,

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[58] See note 373, p. 98.

[59] See note 382, p. 387.

[60] *Ibid*, at pp. 378-379.

[61] See note 356, p. 95; see also note 373, pp. 1000-1003.

their soft nature, separated from traditional enforcement considerations and justifications suggest disillusionment with law. In overall analysis, inclusion of NCP suggest following justifications:

1. Compliance (on non-compliance) procedures are usually said to exist, and be necessary, in international environmental protection because the environment cannot, for a number of reasons, be entrusted to the working of traditional international law.[62]
2. Traditional mechanisms of enforcement of international legal norms visualises adversarial procedure which are confrontational in character between two parties, while environmental protection involve more than two parties, therefore, require multilateral response.
3. The traditional system of remedy through fixing state responsibility has not been proved effective.

There is considerable merit in designing a process for securing compliance which is multilateral in character and which allows all parties, as well as, NGO's, to ensures that all interests are adequately represented.[63] The flexibility of non-compliance approach should, ideally be surrounded by procedural guarantees and clear and lucid standards, which, in turn, would render the procedures indistinguishable from standard judicial procedures. It seems that to enhance the effectiveness of NCP, it should be less complex, less cumbersome, devoid of complex legal and procedural formalities, and more flexible and strive towards capacity building.

Non-Compliance Response Measures

These response measures can be classified into two categories: Incentives- technical and financial assistance to support improved implementation; and Disincentives-sanction and penalties such as stricter requirement for performance review information.[64]

Incentives

Incentives are the usual response and include enhanced international cooperation with the non-compliant Party in support of implementation, such as supply of technical or financial assistance.[65] These incentives are generally provide for implementation through enhanced

[62] See note 32, at p. 208.

[63] *Ibid.*

[64] See note 58, at p. 31.

[65] *Ibid.*

capacity building. However, 'non-compliance response assistance must be distinguished from regular cooperative assistance.

Financial assistance: financial assistance revolves around positive economic measures[66] to induce implementation. Financial assistance often comes in the form of a Trust fund or a financial mechanisms from which the Parties provide funding for relevant projects, and in this regard one of the most important financial mechanism is the Global Environmental Facility[67] which provides funding to projects falling within the categories of biological diversity, climate change, international waters, ozone layer depletion, land degradation and persistant organic pollutants (PoPs).

Technical assistance: technical assistance includes capacity-building mechanisms in the form of training and workshops, which address issues relating to lack of human resources and know-how; technical transfer and exchange of information mechanisms to address issues relating to the lack of materials; and financial provisions to address resource issues.[68]

Disincentives

In case of severe violations or continued non-compliance, disincentives may be imposed. The disincentives measures can be classified into two categories: additional, stringent and customised performance review information obligation on a non-compliant party and the direction that the information provided be subject to verification; warning; and penalties.[69] Penalties may include: warning; suspension of privileges; trade sanctions; and liability. Warning can be considered as the first along a spectrum of severity in the penalties that may be applied. Some MEAs provided for suspension of Parties' rights and privileges, remarkably in voting or committees (for example in CITES, World Heritage Convention and the Montreal Protocol).[70] The imposition of 'sanction' in case of non-compliance remains problematic. J. Combacau observed that, 'the concept of sanctions lies at the centre of the

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[66] P. K. Rao (2002), *International Environmental Law and Economics*, Massachusetts USA and UK: Blackwell Publishers, p. 299-300.

[67] See www.thegef.org/Sites/thegef.og/files/publications/GEF-Fact-Sheets-Jne09.pdf

[68] See note 32 at p. 32.

[69] *Ibid*

[70] *Ibid.*

debate on the effectiveness or even the existence of international law'.[71] He preferred the term "countermeasures" instead. Peter H. Sand noted that the UN Charter does not use the term 'sanction', and simply of 'measures' in Chapter II. The same is true for all MEAs.

Besides, the 2002 UNEP Guidelines and the 2003 UNECE Guidelines on Compliance and enforcement/Implementation of MEAs refers to "potential measures". Consequently MEAs avoid the term "sanction". Peter H. Sand further observed that,

> "one of the reasons why international lawyers- including international environmental lawyers- sound so apologetic about enforcement and sanction language apparently is their belief that there are no enforceable sanctions in existing multilateral treaties."[72]

Finally, the imposition of liability requires non-compliant parties to compensate for their non-compliance, and the liability may take two forms: greater burdens in meeting the MEA obligations or reparation for any damage caused.

Coordination and Interlinkages

Interlinking and coordination in the context of separate compliance mechanism of individual MEAs is the construction of relationship between them.[73] More than seven hundreds MEAs are in existence and each requires fulfilling particular obligations. Many states find it difficult to harmonies and update relevant information sharing; and facing difficulties in case of conflicting of norms. This lack of coordination between independent institutional arrangements inevitably detracts from the effective implementation of the treaty and international treaty regime that they support.[74] Reasons for this includes the following: lack of coordination hinders information exchange, which is particularly important between the various treaty regimes that refers to similar issues and areas; inefficient use of funds allocated for capacity building in developing countries due to unnecessary and high administrative costs related to the functioning of each separate unrelated institutional arrangements, fund that could be invested in actual target programmes; slow bureaucratic procedure; and lack of

[71] See for detailed discussion Peter H. Sand (2005), "Sanctions in case of Non-Compliance and State Responsibilty: Pacta Sunt Servanda- or else?" in Durwood Zaelke *et al.* (eds.) *Making Law Work: Environmental Compliance and Sustainable Development* Vol. I, London: Cameron May ltd., pp. 259-271.

[72] *Ibid.*

[73] *Ibid,* at p. 21.

[74] Zovko, Ivana (2005), International Law Making for the Environment: A question of effectiveness, in Marko Berglund (eds.) International environmental Law-Making and Diplomacy Review, Finland: University of Joensuu-UNEP Course Series2, p. 125.

knowhow. UNEP's Report, 2006 finds potential interlinkages and coordination at various phases, from performance review information to dispute settlement procedure to enhance synergies. Summary of suggestions is mentioned as follows:

(a) PRI: Potential interlinkages inter Linkages in PRI can be worked out between MEAs deals with related activities.[75] For example, within groups or clusters. In relation to self reporting, the inter linkages can be created by harmonization of reporting formats and joint MEA reporting by a party. For example, where MEAs regulate overlapping sites, species, substances, there are more chances for coordination. It is important to note that, mostly these efforts have been undertaken under the bio-diversity-related clusters of MEAs. Further, in relation to monitoring and verification, potential inter Linkages May be crafted by harmonization the third party monitoring and verification.

(b) NCPs: The report noted that potential for inter linkages between NCPs is slight as each MEA is specific to the sensitive balance struck during its negotiation process, however, closer coordination between MEA secretariats could enhance their capacity to trigger NCPs. Further, protocol for coordination of performance information between secretariats could enable them to be more effective in triggering their respective NCPs.

(c) NCRM: In case of NCRM, the interlinkages may be worked out on both fronts: Incentives and disincentives. For effective compliance the various means of incentives-technology and fund- can be coordinated to be cost, time and managerial efficacy. Further, in case of incentives, the coordinated imposition of penalties against a serially non-complaint party would have deterrent impact than ad-hoc penalties.[76]

(d) DSP: In case of dispute settlement procedure potential linkages are feasible in respect of common dispute resolution bodies, particularly within dusters, which could specify within their respective conciliation or arbitration annexes the nomination of standing ponds of Experts. However, as dispute settlement mechanisms are little in use or not used at all, these inter linkages may prove worthless.

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[75] See note 83.

[76] *Ibid.*

The report noted that the primary multi-sectoral international organization engaged in promoting inter linkages are the United Nations Environment Programme, United Nations Development Programme, United Nations University, The World Conservation Monitoring Centre and The World Customs Organisation.[77] In 1997, UNDP Convened an Expert Meeting on Synergies in National Implementation between the Rio Agreements to inquire paths to create synergies for the Implementation of the CBP, UNFCCE, UNCCP and the Forest Principles at the national level.[78]

The UNEP Division of Environmental Conventions was established in 1999 to identify synergies between MEAs at the global, national and regional levels, and to promote increased cooperation between UNEP and MEAs, harmonized information systems and coordinated approaches to capacity building.[79] In order to find linkages at the secretariat level, in 2001, a Joint Liaison Group (JLG) between the CBD, UNCCD and UNFCCC was established with the aim of exchanging information as well as exploring synergies and opportunities for cooperation between the conventions.[80]

To conclude, Synergies between various MEAs and IERs must go beyond cooperation on the scientific level, and ought to in involve simplifying the existing institutional arrangements and creating solid institutional linkages between different treaty regimes, thus avoiding and resolving potential overlap between them.

Compliance Mechanism and Developing Countries

The problem of compliance is severe in the developing countries which often lack required legal and administrative framework to implement and enforce international environmental obligations. The most challenging issue in the developing countries regarding the improving environmental performance is related with developmental aspects. In the words of the then Prime Minister, India Gandhi at the 1972 Stockholm Conference,

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[77] *See note 2.*

[78] *Ibid.*

[79] *Ibid.* at pp. 127-128.

[80] *Ibid.* at p. 128.

> "the Environmental problem of developing countries are not side effects of excessive industrialization but reflect inadequacy of development."[81]

Further, E. Fouere observed that,

> "present development trends in the developing countries, many of which stem from consumption patterns as well as Economic and trade policies of the industrialized North, are placing unbearable strains on the natural resource base and threatening the Environmental security of these countries. Because they often lack the infrastructure and capacity to Evaluates as well as a sufficiently acute awareness of, Environmental priorities, these countries are increasingly at the receiving end of goods and products whose use is either prohibited or severely restricted in the Exporting country."[82]

The above observation highlights the socio-economic scenario of developing countries which are often at the receiving ends of the dictates of the developed West. Moreover, there is a notion prevailing in developing countries among private as well as public sector that improving *environmental performance* will have only negative effects on the countries' ability to improve competitiveness.[83]

Implementation of international environmental obligation in developing countries implies a great number of challenges. These challenges include:

1. There lack of administrative, technological and financial capacities; efficient regulatory framework and; lack of trained human resources.
2. Involvement of heavy Economic cost in terms of both: regarding compliance and enforcement; and economic incompetitiveness due to "sound" Environmental regulations.
3. International Environmental guidelines which are crafted considering the need and status of developed countries prove alien and inconsistent in developing countries.

Joyeeta Gupta observed that,

> "the process of regulatory competition aggravates the Existing problems of developing countries", as it increases the burden because the costs of implementation for them well be

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[81] Erwan Fouere (1988), "Emerging Trends in International Environmental Agreements", in John E. Caroll (eds.) *International Environmental Diplomacy*, Cambridge and NY: Cambridge University Press. p. 39.

[82] *Ibid.*

[83] Lawrence Pratt and Carolina Mauri, (2005) "Environmental Enforcement and Compliance and Its Role in Enhancing Competitivenes in Developing Countries, p. 481. In Durwood Zaelke *et al. Making Law Work: Environmental Compliance and Sustainable Development* (eds.) Vol. 2. : Cameron May International Law Policy.

higher since the instruments proposed are often different from those instruments that the countries are familiar with."[84]

Highly technical and modern solution being proposed in multilateral treaties seems to be inappropriate solution because of the one-way direction of the process.[85] In this regard, the most relevant strategy is to develop compliance strategy suited to needs and circumstances of each developing and least developed countries, besides coordinated efforts focused on capacity building.

India's Position

India is a signatory to practically all international conferences and international Environmental Conventions. It has drafted wide legal instrument touching almost every aspects of the Environment.[86] It is significant to note that, as early as 1970s, India took note of integrating Environmental factors cite planning during the course of formulation of its fourth plan (1969-74). The plan document lay down:

> "Planning for harmonious development recognizes the unity of nature and man. Such planning is possible only on the basis of a comprehensive appraisal of environmental issues. There are instances in which timely, specialised advice on environmental aspects could have helped in projects design and in averting subsequent adverse effect on the environment leading to loss of invested resources. It is necessary, therefore, to introduce environmental aspects into our planning and development."[87]

Consequently, a National Committee on Environment Planning and Coordination was set up, as a high advisory body to recommend government.

Indian Constitution under Article 48-A states that 'The State shall endeavour to protect and improve the environment and to safeguard the forests and wildlife of the country'. Similarly, Article 51-A in Part IV-A was adopted relating to fundamental duties. It states that it shall be

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[84] Joyeeta Gupta (2006), "Regulatory Competition and Developing Countries and the Challenges for Compliance Push and Pull Measures", in Gred Winter (eds.) *Multilateral Governance of Global Enviornmental Challenge: Perspective from Scientific, Sociology and the Law*, Cambridge: Cambridge University Press, p.469.

[85] *Ibid.*

[86] For example, Wild Life Protection Act, 1972-86; Water Pollution Cess Act, 1977 amended in 1991; Forest Conservation Act, 1980; Air (Prevention and Control of Pollution) Act, 1981 amended in 1987; Water (Prevention and Control of Pollution) Act, amended in 1988; Environment (Protection) Act, 1986; Public Liability Insurance Act, 1991; National Environmental Tribunal Act 1995 and National Environmental Appellate Authority Act, 1997.

[87] Cited in Diwan, Paras (1992), "Environmental Protection: Issues and Problems", in Paras Diwan (eds.) *Environment and Administration: Law and Judicial Attitude*, New Delhi: Deep and Deep Publications, p.16.

duty of all citizens "to protect and improve the national environments, including forests, lakes, rivers and wildlife, and to have compassion of living creatures." Moreover, Supreme Court of India declared right to healthy environment as a part of fundamental rights under Article 21 (right to life and personal liberty) under many cases[88].

Recently Manmohan Singh released India's first National Action Plan on Climate change (NAPCC) which lays down existing and future policies and programmes addressing climate initiation and adaptation.[89] The plan identifies eight core National Missions. The primary institutions responsible for the formulation and enforcement of Environmental acts and rules include the Ministry of Environment and Forests (MoEF), the central pollution control Board (CPCB), State Departments of Environment, State Pollution Control Boards (SPCBs) and Municipal Corporations[90].India's concerns and challenges on compliance and enforcement are similar to other developing and emerging economies. OECD report identifies the following key challenges:

1) The lack of civil administrative authority and over reliance on judiciary.[91]
2) Insufficient coordination between the CPCB and SPCBs due to double sub-ordination of SPCBs (and the administrative influence of state governments) as well as to the lack of comprehensive standard compliance and enforcement policies and procedures.[92]

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[88] See notably: right to healthy environment- *M. C. Mehta v. Union of India*, AIR 1987 SC 1086 (1090): (1987) 1 SCC 395; pollution free water and air- *B.L. Wadhera v. Union of India*, AIR 1996 SC 2969: (1996) 2 SCC 594 and *Indian council for Enviro-legal Action v. Union of India*, AIR, 1996 SC 1446; protection against hazardous industries – *Vellore Citizens Welfare Forum v. Union of India*, AIR 1996 SC 2715: (1996) 5 SCC 647; protection of tiger reserve- *Animal and Environment Legal defence Fund v. Union of India*, (1997) 3 SCC 549; ecology and "Public Trust" Doctrine- *M.C. Mehta v. Kamal Nath*, (1997) 1 SCC 388; Precautionary principles- *M.C. Mehta v. Union of India*, (1997) 3 SCC 715.

[88] See K.C. Agrawal (2000), *Environmental Laws: Indian perspectives*, Bikaner: Nidhi Publishers, pp. 100-133. See also Raghav Sharma (2008), "Green Courts in India: Strengthening Environmental Governance?", 4/1 *Law, Environment and Development Journal*, pp. 52-71, available at http://www.lead-journal.org/content/08050.pdf.

[89] Available at http://pmindia.nic.in/climate_change.htm

[90] OECD (2006), *Environmental Compliance and Enforcement in India: Rapid Assessment*, OECD Programmne of Environmental Cooperation with Asia and the OECD Work on Environmental Compliance in Non-Member Countries, New Delhi, p. 13; see also Shyam Saran (2008), "Multilateral Negotiation", *Yozna*, New Delhi, June 2008, pp. 5-7.

[91] See note 99, p. 119 at p. 14.

[92] *Ibid*, at p. 15.

3) Significant human and technical capacity constraints, the impact of which felt on execution of all compliance and enforcement functions at the central, state and local levels.[93]

4) The lack of nationwide implementing guidance on permitting from the CPCB on such issues as definition of compliance, consent conditions, comporting format, sampling requirement, as well as interpretation of different regulations.[94]

5) The lack of regulatory loots and flexibility to provide proportionate enforcement response with appropriate deterrent effect against violations.[95]

6) Serious resource limitation to deal effectively with citizen's complaints as their number has gave over a thousand per year in some states.[96]

The problem lies in our refusal to take into account the local reality, our submission to international accommodation and our failure to set our own agenda.[97] Further, India's reality calls for regional research, local solutions and national perspectives rather than subservience to international approaches, which do not priorities India's need.[98] This requires intensive area wise and interdisciplinary research considering special socio-economic conditions of India. India's conditions with regard to development are almost similar to other emerging economies. Therefore, countries placed in similar socio-economic conditions may formulate regional approach for effective environmental protection.

Conclusion

This chapter analyses the various aspects of compliance mechanisms. It seems that most of the time non-compliance is not intentional and take place due to lack of capacity: financial, administrative, legal, technical as well as financial. This proposition is particularly true in respect of developing countries and least developed countries. Design and strategies which are taking cognizance of peculiar conditions of developing countries and least developing countries is more likely to be followed and respected. The need here is to take note of case based studies regarding each and every country, considering its peculiar socio-economic

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[93] See note 99 at p.15.

[94] *Ibid*, at p. 18.

[95] *Ibid*, at p. 19.

[96] *Ibid*, at p. 26.

[97] K.S. Jacob (2010), "Infectious diseases and the colonised mind", *The Hindu*, New Delhi, 25 March 2010.

[98] *Ibid.*

conditions and administrative and legal capacities. Disincentives which are directed to penalties and more severe obligations, however not frequently resorted, may also not prove helpful as the legality of these disincentives may be question marked and may not be complied with. Potential interlinkages and coordination among groups and clusters of MEAs, appears to be the right choice at various level of compliance: ranging from reporting to incentives and disincentives.

CHAPTER - V

CONCLUSIONS

The traditional confrontational means of enforcing international environmental agreements have been of limited utility in international practice. Therefore, in recent times MEAs have ushered in new era of institutionalization of international environmental law. These new mechanisms are aimed at responding to compliance deficits in a non-adversarial manner. In this work an effort is made to study the current framework of MEAs as well as various means of dispute settlement provided in these treaties.

The inference favours the inclusion of more exhaustive dispute avoidance mechanisms rather than more exhaustive, centralised and binding third party adjudicatory means of clarification and interpretation. It is so because states are not readily accepting third party decision making, therefore, diplomatic means of solution and capacity building can be incorporated into MEAs in order to ensure effective and efficient compliance and implementation.

Chapter one highlights long and chequered history of environmental disputes settlement. Earlier the resolution of environmental disputes was based on claim of state responsibility which was basically inter-state. Though, this means not proved effective due to several disadvantages attached to it. Gradually more and more environmental rules and principles were developed and in this regard international institutional mechanisms played very important roles. Several judgements establish important principles, most notable among them which establishes that 'it is obligation of every state that not to use its territory detrimental to interest and rights of other states.'

In 1972, the Stockholm Conference was held which recognised the concerns of environmental heath most prominently more than any earlier steps. The next important landmark in the history of international environmental law United Nations Conference on Environment and Development (Earth Summit), held in 1992. This Summit paid more attention towards the concept of sustainable development. Earth Summit included tried to reconcile the conflict of environment and trade, one of the most important features of the

environmental disputes. With the growing awareness of environmental problems and increasing knowledge the field of scientific, more stringent rules were developed and incorporated in the form of Multilateral Environmental Agreements, which emerged as a the most important method to control state behaviour, replacing the development of customary norms of environmental regulation.

At present, more than seven hundreds MEAs are in existence touching various aspects of the environment ranging from nature to atmosphere, pollution, climate, biodiversity, hazardous wastes and pollutions, forests, industrial accidents, desertification, wetland and endangered species. The growth of international environmental law in the form MEAs has not been present fragmented and sectoral growth. This is mainly because absence of centralised law-making and development followed by sudden scientific findings. These MEAs reflects the emerging trend the in the field of International environmental law, gradually, incorporating more stringent provisions to control and guide states' behaviour towards sustainable living. These provisions to regulate state behaviour saw tremendous change from Stockholm Conference to first decade of 21th century. Earlier, compliance mechanism was either absent or only in the form of reporting requirements, with non-binding dispute settlement provisions. Interestingly, even today provisions for binding dispute settlement are avoided. Several reasons may be attributed to it, among which the most important is requirement of the consent of the states and their reluctances to submit for binding settlement. Now the main focus of compliance mechanism is on strengthening the non-compliance procedures and non-compliance response measures.

At international level mechanisms for international settlement of disputes offers wide range of institutional means and procedures. However, these were developed according to particular situations, time and subject matter. The work highlights that effectiveness of formal and institutional means, like ICJ and PCA, cannot be examined due to its non-use. Discontinuance of election of Environmental Chamber of ICJ after 2006 and non-existence of World Environment Court is the evidence of the fact that formal means are not suited to disputes related with environment and natural resources. Only UNCLOS constitute an exception among other MEAs. It mentions provisions of compulsory dispute settlement, however, with certain exceptions and limitations. It also overtures exhaustive provisions for

effective marine environment which in future may prove effective. It is contended that provisions for biding dispute settlement under UNCLOS are mainly provided due to 'trade' reasons. On the other hand it can be counter argued that if this is true for UNCLOS, then it may also be reliable for other branches of IEL.

In this context, alternative means of dispute settlement, viz. negotiation, consultation, mediation, conciliation, fact-finding commissions and non-compliance procedure offer more votive role due to its unique characteristics. ADR provides more flexibility to the state parties and accommodate the concerns of non-state actors as well. Flexibility in procedure, greater control over proceeding and outcome, accommodation of scientific analysis, accommodations of non-state actors and individuals places ADR in unique position with regard to environmental dispute settlement.

As far as institutional means are concerned, at international level, there are three important institutions: PCA, ICJ and ITLOS. PCA provides huge opportunity in terms of environmental disputes in both ways: institutional and procedural. Many MEAs lack such framework. MEAs may utilise the facilities of PCA establishing contacts with its secretariats. MEAs may also provide express provisions of PCA in dispute settlement clause, however, so far, this practice has been rare. ICJ never dealt fully with any 'environmental dispute' although got opportunity to deal with some aspects of the environment. Nearly all MEAs provide provisions to settle disputes regarding the interpretation and application of the treaty, but, depend upon the consent of the states. ITLOS established under UNCLOS has been used frequently because of one or other reasons. In fact, UNCLOS is the only convention which provides very exhaustive provisions on marine environmental management and dispute settlement with certain exception on compulsory procedures. Its full potential, however, is yet to be realized.

The settlement of environmental disputes through Human Rights Courts added new dimensions to the environmental protection and management. At international level, as such, there is no World Human Right Court which would deal with the cases of human-environment rights cases. Regional courts, especially ECHR, however, through some its recent decision showed hope in the right direction. Role of national judiciary has been more

active in declaring and incorporating several important principles related to protection of the environment, for example, precautionary principles.

The pattern of inclusion of dispute settlement procedures under MEAs presents chequered history and non-uniform practice. Recent trend shows that current practice is to incorporate more exhaustive dispute settlement clauses with considerable innovations. These are also tending toward the inclusion of 'more' binding and compulsory dispute settlement procedures. However, the basic issue of sovereignty of the states remain the major constraint. Almost all means available at international level are incorporated into the MEAs to ensure effective compliance. Comparative analysis of DSM under MEAs shows that non-binding forms remain binding, while institutional procedures like ICJ, PCA etc. require express consent of the states. And states have been reluctant to use these mechanisms, preferring more the non-binding mechanisms in which they could maintain greater control in both terms: process and outcome.

But the contentious issues what if states are not using the compulsory and formal dispute settlement mechanism? or why we need DSM under MEAs to protects the narrow rights and obligations of states? Or for the protection global environmental protection and preventing it from further degradation. In fact, the role of conflict resolution systems lies where compliance mechanisms have failed. The question of compliance with and the enforcement of international environmental obligations go deeper into the finding causes of states behaviour. Several theories have emerged analysing various aspects of compliance and non-compliance, are concentrating on "interest led compliance". Many times the causes of non-compliance are not intentional, especially considering the conditions of developing countries and least developed countries. It lacks the essential requirements of capacity building such as administrative, financial, legal, technical, educational and empowerment and democratic system of rule making. In this regard, recently established non-compliance procedures and non compliance response measures offer more promising role than formal and institutional dispute settlement mechanisms, specially considering interest, need and socio-economic circumstances of developing and least developed country.

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Mea-Specific Web Sites

www.basel.int

www.biodiv.org

www.ccamlr.org

www.cites.org

www.cms.int

www.iisd.ca/climate/other.html

www.imo/Convention/contents.asp?doc_id=678&topic_id=258

www.londonconvention.org/main.htm

www.pic.int

www.pops.int

www.ramsar.org

www.un.org/depts/los/index.htm

www.un.org/law/ilc/texts/nnavfra.htm

www.unccd.int

www.unep.fr/ozoneaction

www.unep.org/ozone

www.unfccc.int/

General Internet Resources

http://pmindia.nic.in/climate_change.htm

www.ecolex.org

www.eisil.org/index.php?id=479972656&t=sub_pages&catt=18

www.faolex.fao.org/faolex/

www.greenyearbook.org/about/ab-ind.htm#Websites

www.unece.org/env/

www.unep.net

www.unep.org/SEC/reg3.htm

www.untreaty.un.orgg/

Web Sites Focussed on Compliance, Enforcement and Dispute Settlement

http://mediate.com/article/young1.fm#

http://www.icj-cij.org/

http://www.pca-cpa.org/upload/files/ENVIRONMENTAL(1).pdf

http://www.un.org/depts/los/convention_agreemnt/convention_overview_fish_stocks.htm .

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www.europa.eu.int/comm/environment/impel

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