IS IT TIME FOR AN INTERNATIONAL COURT OF ENVIRONMENTAL JUSTICE?

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Fifty years after the inauguration of the Charter of the United Nations ("Charter") and its adjunct, Statute of the International Court of Justice ("Statute"),1 environmental issues have come to the fore. If the emphasis of the United Nations in the fifties was on recovery from the devastating effect of the world war, the sixties on the era of the cold wars, the seventies the time when development issues came to the fore, the eighties the period of human rights and revolutions, the environment promises to engage its attention in the nineties.2 Interestingly, this trend coincides with the decade of the international law being celebrated by the United Nations, the theme being strengthening international law and international institutions.3 With this importance being given to international law governing the environment, increasingly strident calls have been made to institutionalise environmental protection and conservation by suitably amending the Charter if necessary.4

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1 Art. 92 of the Charter of the United Nations states that the International Court of Justice shall be the principal judicial organ of the Organisation, and shall be governed by the Statute that is annexed to the Charter ("Charter"), Art. 92.

2 An important aspect of this has been the Earth Summit at Rio de Janeiro, that was perhaps one of the largest gatherings of both official and non-governmental representatives ever held. Here, considerable progress was made in defining and consolidating legal norms that would help protect and conserve the environment. See, Rio Declaration on Environment and Development, U.N. Doc. A/Conf. 151/5/26 reprinted in 31 I.L.M. 74 (1992). See generally, Peter H. Sand, UNCED and the Development of International Environmental Law, 3 Y.B. Int'l. Env. L. 1 (1992); Mann, The Rio Declaration 86 Am. S. Int'l. L. Proc. 405. (1992). This coincided with the International Court of Justice being seized of two controversies that inter alia had major environmental issues involved, see infra n. 42-45, 53 and 57.

3 See, H.E. Professor Diogo Freitas do Amaral, President of the United General Assembly, Address at the Celebration of the Fiftieth Anniversary of the International Court of Justice (Apr 18, 1996), in ICJ Communiqué No. 96/15 (Apr 19, 1996).

4 Writing just before the Rio Summit, Sir Geoffrey Palmer, made out a strong case for institution building in relation to the environment. He lamented about the lack of any organised method by which negotiations relating to the environment were conducted and made elaborate suggestions for the framework of a proposed organisation in relation to the environment. Interestingly Palmer states:

"In truth, the United Nations lacks any coherent institutional mechanism for dealing effectively with environmental issues. Strengthening its capacity and structure should be high on the list of priorities for the 1992 Conference on Environment and Development. The Charter itself provides no environmental organ, an omission that would be certainly be rectified if it were being drafted today. In no respect is the Charter more a product of its times than in its disregard of the environment."

These calls are reflective of the general direction in which environmental law will logically proceed in the future, like all other concepts that have evolved in international law, towards greater institutionalism. There are obvious advantages from this development which include better monitoring mechanisms, avoidance of the ad hoc nature by which decisions are taken on a global level, provision of a platform for the conduct of future negotiations, and most of all the creation of an authority that will have the flexibility and perhaps even the impartiality that a State does not possess in being able to oversee operations and co-ordinate activities relating to the environment. In this regard, while some have suggested the creation of an International Environmental Organisation, others have preferred the revitalisation or transforming of existing bodies like the Trusteeship Council.

However, in the debate described above, there has been little or no focus on dispute resolution institutions relating to the environment. This is surprising for the potential for judicial or quasi-judicial involvement in international environmental matters is considerable. There are two indicators readily available in this regard. First, there are now in place several international treaties including the infamous GATT Final Act, that have the potential for conflicts in relation to the regulation of trade practices of nations that are necessary to protect the environment. These treaties have imposed many restrictions on nations policies that are bound to lead to disputes over interpretation and implementation. Second, among numerous institutions and supervisory mechanisms that have been created exclusively or primarily for environmental protection, the possibility for rival conflicting claims over enforcement and implementation is considerable.

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5 This is best reflected by the fact that out of some two hundred international legal instruments in the field of environmental protection, until the Rio Summit, more than forty create international bodies or entrust existing ones with secretarial, review or co-ordination functions. This trend became more pronounced in the eighties and the nineties, see, Kanen Sachariew, Promoting Compliance with International Environmental Legal Standards: Reflections on Monitoring and Reporting Mechanisms, 2 Y.B. Int’l. Env. L. 31 at 33 (1991).


7 Palmer, supra n. 4 at 283.


9 In discussing the various organs between whom, the Earth’s environmental responsibilities are shared, Palmer conspicuously avoids mentioning the International Court of Justice, supra n. 4 at 260-61.

in respect of spaces of authority is very real. But at the same time, the number of principles that have become part of the growing family of norms relating to international environmental law by virtue of judicial or arbitral decisions are comparatively few.

This article endeavours to examine whether the trend of increasing institutionalisation of environmental matters should extend to the creation of a judicial body for the environment. Part A will examine the principles of environmental law as gleaned from arbitral awards. Part B will highlight the pronouncements of the International Court of Justice ("ICJ") relating to the environment. Part C will look to the Nauru Case where the ICJ was deprived of an opportunity to decide important principles of environmental law. Part D focuses its attention on the Environmental Chamber of the ICJ and the case pending before it. Part E examines settling of environmental disputes under the GATT. Part F discusses the structure of the proposed International Environmental Court.

A. PRINCIPLES OF ENVIRONMENTAL PROTECTION IN ARBITRAL AWARDS

Perhaps the first legal pronouncement on international environmental law, came from a quasi judicial body, an arbitral panel that decided the Trail Smelter Case. A Canadian company had begun smelting lead and zinc on the Columbia River near the border with the United States of America ("USA"). Some of the fumes that were emitted from this process travelled into the USA and caused extensive damage. Though Canada admitted liability as established by a Joint Commission of the two nations in 1931, the plant continued its operations, which resulted in further detriment to the USA. The question of damages for losses thus suffered was referred to arbitration. Apart from awarding compensation, the Tribunal ruled with significance in relation to the norms of international law that were applicable then. There was practically no conception of an international environmental legal regime as exists today. It was held taking into account certain decisions of the United States Supreme Court that "under the principles of international law, as well as of the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the

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11 Sand gives the example of the Global Environmental Facility (GEF) created during the Rio Summit. As originally envisaged while being created, the GEF was to be directed by a participants assembly with regard to the utilisation of its funds. Yet, when the Climate Change and Biodiversity Convention designed the GEF to operate its financial mechanism, it also provided that the GEF would function under the guidance or under the authority of the respective inter-governmental conferences of the parties to the Conventions, Sand, supra n. 2 at 13.


13 By judicial body I also mean arbitral institutions that are created for the purpose of resolving international disputes such as the one discussed in text accompanying notes.

territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence. Thus, the Tribunal found Canada responsible to pay for the damage that had been incurred by the United States. The Trail Smelter Case was important in the development of international environmental law in many respects. It laid the foundation of the modern prohibitions with regard to air and water pollution and state responsibility thereof. It was also the first categoric pronouncement in relation to the responsibility of a State not to cause injury to another by the escape of noxious fumes.

The principle expounded by the case has been improved upon particularly after the Stockholm Conference. Apart from this pronouncement, there have been no significant decisions in relation to environmental law from international judicial or quasi-judicial bodies other than the International Court of Justice.


17 The Lake Lanoux Arbitration is sometimes cited as an example whereby international environmental principles could have been perhaps invoked. Here, Spain complained that France had violated a treaty by diverting a river in French Territory before it entered Spain. The Tribunal found no violation of the Treaty because Spain could not show that the effect of the diversion had been detrimental to it in any way. The Tribunal however stated in obiter that “It could have been argued that that the works would bring about an ultimate pollution of the waters or that the returned waters would have a chemical composition or a temperature or some characteristic which could injure Spanish interests”, see, Lake Lanoux Arbitration, (Spain v. France). 24 I.L.R. 101 at 123 (1957); see generally, John G. Laylin & Rinaldo L. Bianchi, The Role of Adjudication in International River Disputes, 53 Am. J. Int'l. L. 30 at 37-41 (1959).

Palmer argues that though the case turned on the interpretation of a particular treaty, “it may establish the principle that a State has the duty to give notice when its actions may impair the environmental enjoyment of another state. A nation is not entitled to ignore the interests of another”, see, supra n. 2 at 265. In the Gut Dam arbitration, proceedings were limited to estimating the quantum of damages after the Canadian Government had expressly acknowledged its obligations to indemnify U.S. citizens for any damage incurred as a result of the construction or operation of a dam. see, 8 ILM 188 (1969).

There have been even fewer cases of municipal courts that have settled international environmental disputes, though decisions in domestic matters may be taken as precedent for an international arbitral or judicial body to render a decision. According to Petersmann, supra n. 12, the potential for the settlement of international environmental disputes has increased since the adoption of the OECD recommendation that recognizes right of an actual or potential victim of transitional pollution to have recourse, for purposes of both prevention and compensation, to the authorities exercising jurisdiction over the polluters concerned, see, Organisation for Economic Co-opera-
B. THE ENVIRONMENTAL JURISPRUDENCE OF THE WORLD COURT

It would be appropriate to visit the role and the record of the ICJ in relation to developing new norms of international environmental law. Though many of its pronouncements have contained only indirect references to principles of environmental law, nonetheless, the Court’s contribution is not negligible or minuscule. In the Corfu Channel Case,18 the Court ruled that every state has a duty to refrain from knowingly allowing its territory to be used for acts contrary to the rights of other states. It also stated that elementary considerations of mankind could not be disregarded by the actions of a nation. These principles, though rather broadly stated are significant in respect of their potential to serve the cause of protecting the environment. Palmer suggests that they could be applied to a nation that allowed the unlimited manufacture and use of chlorofluorocarbons, to the detriment of the ozone layer, even though the nation had not adhered to any of the pacts that seek to protect this fragile part of the atmosphere.19

The Nuclear Tests Cases20 where actions brought by Australia and New Zealand against France complaining of the detrimental effect of the latter’s atmospheric testing of nuclear weapons in the South Pacific, the World Court in an unusual decision, referred these nations to the statements made by French leaders to the effect that they would not conduct any more nuclear tests. According to the Court this was legally binding on France and constituted a unilateral declaration of the intent of that nation not to carry out any more tests.21 This hope was belied when in the very next year, France conducted two tests in the South Pacific. Since then it has conducted more than one hundred and forty seven tests till date.22

In para 63 of its judgment the Court stated that the if the basis for its judgment were to be affected, the Applicant could request an examination of the situation in accordance with the provisions of the Statute”. This was used as the basis for New Zealand to recommence proceedings against France in 1995 albeit in respect of the

19 Palmer, supra n. 4 at 265.
21 For a critique of the juristic method that the Court adopted in deciding these cases, see, Thomas M. Franck, The Decision of the ICJ in the Nuclear Tests Cases, 69 Am. J. Int’l L. 612 (1975).
latter's underground testing of nuclear weapons. The Court declined to pass any order on this request for it found that its verdict in 1974 had been in respect of the atmospheric testing and therefore it could not entertain the request for it was with respect to underground testing. But nonetheless the Court stated that its order was without prejudice to the obligations of States to respect and protect the natural environment, obligations to which both New Zealand and France had reaffirmed their commitment.

In the recent decision of the International Court of Justice in the Legality of Nuclear Weapons Cases, environmental issues again came to the fore. Here, the Court was asked both by the General Assembly of the United Nations and the World Health Assembly of the World Health Organization to decide whether the use of nuclear weapons was legal. The Court while refusing to oblige the latter with an answer citing its lack of competence to make such a query, could not avoid the General Assembly in this regard. It stated that while generally the threat or use of nuclear weapons would be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law, it could not conclude definitively whether the threat or use of nuclear weapons would be unlawful in an extreme situation in which the very survival of a State would be at stake.

23 See, New Zealand's Request for an Examination of the Situation in accordance with Paragraph 63 of the Court's 1973 Judgment on the Nuclear Tests Case (New Zealand v. France), 1995 ICJ 288 at para 64.

24 Judge Weeramantry appended a sterling dissent to the order of the Court where he stated that though admittedly the Court's verdict was on the technicality with respect to the nuclear testing conducted in the atmosphere, the cause of New Zealand's complaint against underground testing was very much the same. The damage was the same being radioactive contamination. The only difference was that the weapons were being detonated underground. Ibid, (separate opinion of Judge Weeramantry).

25 Judge Weeramantry stated that important principles of environmental law were involved in the case, such as the precautionary principle, the principle that the burden of proving safety lies on the author of the act complained of, and the intergenerational principle relating to the rights of future generations. He regretted that the Court had not availed itself of the opportunity to consider these principles, see, supra n. 22 at 342.

26 Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, 1996 ICJ - ("Opinion on WHO Request"); Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 ICJ - ("Opinion General Assembly Request") (Jul. 8 1996). As the official published version of the Court's opinions was not available at the time of writing, the paragraph numbers in this article refer to a non consecutively paginated unofficial version on electronic database (on file with the author). A comprehensive summary of the salient features of the judgments, including the dissents and separate opinions are available in an unofficial communique of the Court, prepared by its Registry for the use of the press. See, ICJ Communique, Nos. 96/22 and 96/23 (Jul. 8, 1996) (on file at the Library, National Law School of India University).

27 Para 105 (E). It is important to note that this important conclusion bitterly divided the Court, seven to seven, a schism that was resolved by the casting second vote of the President of the Court. For comment on this decision, see, Mike Moore, The World Court says mostly no to Nuclear Weapons, Bull. Atom. Sci 'ts. 39 (Sep-Oct, 1996); Peter Weiss, And now, Abolition at 42; Jeremy J. Stone, Less than meets the Eye, Ibid. at 43; Michael Krepon, The Counter-Revolution, at 45.; Kathleen Bailey, So What, Id. at 46; V.S. Mani, Nuclear Arms & the World Court, The Hindu, Oct. 23, 1996, Bangalore; Vikram Raghavan, The Nuclear Weapons Cases: The ICJ sits on the Fence. N.L.S.J. (1996).
In arriving at this conclusion the Court referred to several principles of international environmental law. States had made averments before the Court that the use of the weapons would be unlawful by reference to the existing norms relating to the safeguarding and protection of the environment. This meant invocation of several international instruments that related to the environment to suggest that the provisions that they contained would be violated by the use of nuclear weapons whose consequences would be widespread and result in transborder effects. These contentions were countered by other states that insisted that these instruments were meant not to regulate nuclear weapons as nuclear warfare was not mentioned anywhere in the relevant texts.

In its judgment, the Court “recognised that the environment is under daily threat and that the use of nuclear weapons could constitute a catastrophe for the environment”. The Court also recognised that the environment was not an abstraction but represented the living space, the quality of life and the very health of human beings, including generations unborn. It also reaffirmed the existence of a general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control. The Court then went on to add that it could not rule that the instruments in question would have intended to deprive a State of the exercise of the right of self-defence under international law, but it also appended a caveat to this controversial proposition by stating “[n]onetheless, states must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives”. Respect for the environment according to the Court was one of the elements that go to assess whether an action is in conformity with the principles of necessity and proportionality. Considering the effect of the Additional Protocols to the Geneva Conventions, the Court was of the opinion that the provisions embodied a general obligation to protect the natural environment against widespread, long term and severe environmental damage; the prohibition of methods and means of warfare which were intended or could be expected, to cause such damage; and the prohibition of attacks against the natural environment by way of reprisals. The Court also evinced ‘interest’ in a General Assembly Resolution on the Protection of the Environment during Armed Conflict which it stated

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28 Opinion on the General Assembly Request at para. 27.
30 Opinion on the General Assembly Request at para. 28.
31 Ibid. at para 29.
32 Ibid. at para 30.
33 In this context the Court cited Principle 24 of the Rio Declaration, supra n. 2.
34 Ibid. at 31.
affirmed the general view that environmental considerations constituted one of the elements to be taken into account in the implementation of the principles of the law applicable in armed conflict. The Court also recalled its pronouncement in 1995 on the French Nuclear Tests. It then ruled that while the existing international law relating to the protection and safeguarding of the environment did not specifically prohibit the use of nuclear weapons, it indicated important environmental factors that are properly to be taken into account in the context of the implementation of the principles and rules of law applicable in armed conflict.

The Court stated in perhaps the first international decision which has recognised the principles of intergenerational equity that “the use of nuclear weapons would be serious danger to future generations. Ionising radiation had the potential to damage future environment, food and marine ecosystems, and to cause genetic defects and illness in future generations (emphasis added).

The decision of the Court in the Legality of Nuclear Weapons Case led to sharply worded dissents, especially by Judges Weeramantry and Koroma. Both referred to environmental damage caused to justify their conclusion that nuclear weapons were illegal. Even President Bedjaoui, whose vote made all the difference stated that “[e]xistence of nuclear weapons is therefore a challenge to the very existence of humanitarian law, not to mention their long-term effects of damage to the human environment, in respect to which the right to life can be exercised”.

The Case has therefore considerable significance in relation to international environmental law.

C. NAURU: A MISSED OPPORTUNITY FOR THE WORLD COURT TO DECLARE PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW

In an unprecedented action, Nauru, a tiny Pacific island, initiated proceedings in the ICJ against Australia, its former administering authority, for violation of its rights during the time when it was under the latter’s mandate and tutelage between 1919 and 1967. The complaint of Nauru was that through the reckless and wanton

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36 Supra n. 30 at para. 32.
38 Supra n. 30 at para 33.
39 Ibid. at para 35. Judge Weeramantry referred to this principle in his dissent in the 1995 decision on the French Nuclear Tests, supra n. 24. The Rights of Future Generations or the concept of Intergenerational Equity has been a device that has been used by international environmental scholars to demonstrate a legal imperative for environmental protection, by vesting in posterity the right to inherit Planet Earth in a state that is no worse off or perhaps even an improvement from that being enjoyed by current generations. For an analysis of the doctrine in jurisprudence and international law, see, Vikram Raghavan, The Environment, Future Generations and Intergenerational Equity: Our Duties to our Posterity, (on file with The Delhi Law Review).
40 Ibid. (separate opinion of Judges Weeramantry and Koroma).
41 Ibid. (declaration of President Bedjaoui).
mining of the rich deposits of the phosphate that was conducted by Australia, Great Britain and New Zealand, under the aegis of an entity called the Phosphate Commissioners, their obligations under the Charter as well as under general international law stood violated for they failed to rehabilitate land from which phosphate was extracted. The environmental issue was central to the question of these breached obligations. Vast quantities of phosphate had been mined making the island virtually uninhabitable. The environment on practically two-thirds of the island had been all but destroyed. To establish legal cause for proceeding against Australia, Nauru assembled a large variety of contentions based on concrete and evolving principles of international environmental law. They included violation of the due diligence principle, polluter pays principle, intergenerational equity, the rights of people to permanent sovereignty over their natural resources etc. This was to be a case with “important implications for international law on matters relating to the environment”.44

Australia countered the Nauru pleas with a battery of preliminary objections, both in relation to the jurisdiction of the Court as well as admissibility, including the fact that the independence of Nauru precluded it from raising such questions and that Nauru through its conduct had waived the right to damages etc. However, none of these objections were allowed by the Court and in 1992 it pronounced a judgment that rejected the objections to it having entertained the case and proceeded towards the merits. However, the ICJ was deprived of an opportunity of pronouncing on the important questions that Nauru had raised since the parties reached a settlement to the value of Australian $107 million, by which Australia agreed to fund rehabilitation programmes in Nauru and a whole host of other measures designed to mitigate the effects of its sordid past on the island. Nonetheless the issues that the matter raised were very crucial ones and the settlement can be seen as a vindication of the fact that nations can no longer oblivious to the legal effect and consequences which even nascent norms of environmental law can have vis-a-vis state responsibility.47 Furthermore, the case has laid down an important principle that is likely


43 For an elaborate discussion of these principles and the assessment of environmental damage recorded in Nauru, see, Weeramantry, Nauru: Environmental Damage under Trusteeship (1992). Weeramantry who played an important part in building up a formidable case for Nauru was made a Justice of the ICJ in 1990. But in accordance with Art. 17 (2) of the Statute, he did not participate in hearing the Nauru Case.

44 See, supra n. 55.


46 See, infra n. 55 at 484-85.

to have crucial relevance in establishing the liability of a state in international environmental law to the effect that states can be subject to both joint and several liability in relation to the damage that they cause. One state may be sued alone in respect of a breach of an international legal obligation. Moreover, the possibility that attributing responsibility to one state might have implications for the legal situation of other states concerned does not establish a bar to proceedings being brought against that one state.48

D. THE ENVIRONMENTAL CHAMBER OF THE ICJ

The ICJ is empowered by its Statute to meet “from time to time” in chambers, composed of three or more judges as the Court may determine for dealing with particular categories of cases; like labour cases and cases relating to transit and communications".49 A judgment of a Chamber shall be considered to be a judgment of the Court,50 moreover these chambers need not meet at the Hague.51 The ICJ resorted to this practise of using the chamber from 1984, though the matters were mainly boundary disputes.52 With International law relating to the environment gaining currency, there grew strident demands that the Court constitute a chamber to hear environmental cases. Furthermore, with the Court being asked to decide on important disputes that involved seminal issues relating to the environment, the need for a specialised chamber became pronounced.53 Yet ICJ President Robert Jennings, addressing the Earth Summit at Rio, while reaffirming the vital role of the Court in the development and elaboration of new rules of international environmental law and in regard to enforcing them, did not think that the time was opportune to create a chamber of the Court although he did not reject such an idea outrightly. The Judge was of the view that the full court which had evolved certain techniques and kept in mind the points of view of developed and developing countries and thus had an important role to play and should be at the centre of the environmental question.54 Nonetheless, the very next year a chamber of the ICJ was constituted for environmental matters, by stating that “[i]n view of the developments in the field of environmental law and protection which have taken place in the last few years, and considering that it should be prepared to the fullest extent to deal with

50 Ibid., Art. 27.
51 Ibid., Art. 28.
53 By 1992, both the Nauru and the Gabčíková Cases were in the Court’s docket.
any environmental case falling within its jurisdiction".\(^{55}\) This was further extended upto 1995.\(^{56}\)

With the Nauru Case being withdrawn from the docket of the Court, and the advisory opinions in the Legality Cases having been delivered, at the time of writing, the ICJ is left with only one important case with a substantial bearing on environmental law. This concerns the case that was originally brought by Hungary, later replaced by a comprimis through which the parties agreed on modalities to facilitate settlement of the dispute by the ICJ.\(^{57}\) The dispute primarily concerns a 1977 treaty that provides for the construction and the joint operation of the Gabcikovo-Nagymaros Barrage System according to which Hungary and the Czech and Slovak Republics agreed to build the Dana Kilisi dam and reservoir, a barrage system including two hydro-electric powers stations (one on the Czech-Slovak territory at Gabcikovo and one on Hungarian territory at Nagymaros) and a twenty-five kilometre by-pass canal for diverting the Danube from its original course.\(^{58}\)

In 1988 as a result of public pressure, the Hungarian Parliament resolved that the ecological interests must have priority and ordered a re-evaluation of the project and stopped construction. Negotiations between the governments were of no avail and Czech-Slovak government refused to stop work on the project. Following this Hungary went to the Court, though later a comprimis was reached by which Slovakia consented to the jurisdiction of the ICJ.\(^{59}\) The Hungarian complaint has much basis in international environmental law. It alleges irreversible damage to the ecology and the environment of the region if the project is allowed to go ahead in its present form. Furthermore, Hungary warns that the drinking water of the region as well as its vegetation and fauna will be considerably impaired. The decision of the Court in this matter is still awaited.

**E. RESOLVING ENVIRONMENTAL DISPUTES UNDER GATT**

The GATT dispute settlement system has been used for the settlement of international disputes over national environmental measures more frequently than other mechanisms in this regard.\(^{60}\) Under its structure a panel is constituted if a party makes a complaint against another, alleging that measures taken by it are in violation of GATT rules for non-discriminatory environmental policy. The rulings of a GATT panel are binding only on the parties to the proceedings. But they are

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55 ICJ Communique, No. 93/20 (Jul, 19, 1993). Seven Justices were elected for a six month term to serve on the chamber. *See also*, Phillippe Sands, Reports from International Courts and Tribunals, 4 Y.B. Intl. Env. L. 484 (1993)

56 ICJ Communique, No. 94/10 (Mar 14, 1994).


58 *See, supra* n. 48.

59 *Ibid*.

60 Petersmann, *supra* n. at 12.
regularly adopted by consensus decisions of the GATT Council and are subsequently confirmed by the annual plenary conferences of the GATT contracting parties.\textsuperscript{61} Since 1980, five panel rulings have emerged in relation to the environment. They concerned the use of environmental taxes, labelling requirements and import or export restrictions for environmental purposes. There have been other disputes that have however not been resolved through formal dispute settlement measures.

The GATT panel rulings have been very significant in the realm of environmental protection, especially in the \textit{Tuna Case}. Here, Canada complained to the GATT that prohibitions that were imposed on its tuna imports by the United States ostensibly under the U.S. Fishery Conservation and Management Act were in violation of the GATT principles. The United States contended that these measures were necessary for the conservation of its natural resources. The GATT panel constituted found that the import restrictions were in violation of GATT principles, for though the United States was justified in trying to protect its natural resources, since it had not imposed any domestic restrictions on tuna fishing the measures could not be upheld.\textsuperscript{62} Other GATT rulings have concerned the imposition of US taxes on petroleum and certain imported substances, Canada's restrictions on exports of unprocessed herring and salmon, Thailand's restrictions on importation and internal taxes on cigarettes and further restrictions that the US placed on the import of tuna.\textsuperscript{63} GATT panel rulings have generally been complied with and are an important source of international law relating to the environment. According to Peterson, the GATT dispute settlement proceedings confirm that general, prohibitive framework rules tend to be more justiciable than result-oriented regulations and offer more effective remedies for those adversely affected by environmental measures. This observation will not lose its force with the greater institutionalisation of resolution of international trade disputes after the inauguration of the World Trade Organisation ("WTO") in 1995. The dispute settlement mechanism for international trade disputes including those with consequences of the environment has become far more elaborate than before.\textsuperscript{64}

\textbf{F. THE STRUCTURE OF A FUTURE INTERNATIONAL COURT FOR ENVIRONMENTAL JUSTICE}

An International Court of Environmental Justice must be seriously contemplated as an option given the increasing institutionalisation of environmental norms. However details regarding its composition, structure and procedure are likely to be hotly contested. The environmental Chamber of the ICJ while welcome will be

\textsuperscript{61} Id.

\textsuperscript{62} Panel Report on U.S. Prohibition of Imports of Tuna and Tuna Products from Canada, BISD 29 S/91.

\textsuperscript{63} See, Petersmann, supra n. 12 at 54-58.

\textsuperscript{64} See, Palitha T. B. Kohona, Dispute Resolution under the WTO an Overview, 28 J. World Trade, 23 (No. 2, 1994).
stunted because of the inherent difficulties in the ICJ getting jurisdiction in a case as it works exclusively on the principle of consent. Further only states can be parties to it. Moreover, since environmental matters are likely to be complex and technical which call for deep scientific insight into a problem, the Justices trained in law and jurisprudence may perhaps be ill suited to make appropriate determinations, single-handedly. Of course it is possible to say that they could be guided and assisted by experts. But the real question is that whether this assistance can be better than the expert participating in the decision itself that is not possible under the present circumstances in relation to the ICJ. The question is also bound to arise as to whether an international arbitral body should be created instead for the resolution of environmental disputes rather than a court, or should the new institution be a halfway house between the two, something on the lines of the Iran-US Claims Tribunal. While there are several advantages with the arbitral process such as flexibility, availability of expertise etc., the rather ad hoc nature of most arbitral proceedings which depend heavily on the agreement of parties to refer their disputes to arbitration, makes one favour setting up a permanent institution of judicial character. The details that could be involved in this process are discussed below.

**Composition**

The Charter of the United Nations may have to be amended to allow for the creation of a new judicial wing and as to whether it would in relation to environmental matters displace the ICJ must be speculated upon. While such a radical change in the UN Charter has not taken place till date, on several occasions the General Assembly has set up international institutions that have since functioned admirably. This is done through art. 22 of the Charter which declares that the General Assembly has the power to establish “such subsidiary organs as it deems necessary for the performance of its functions”. It has in exercising this prerogative set-up a great variety of subsidiary organs, differing in function, membership, duration and other respects. Most are established by a resolution of the Assembly itself though in certain cases the Secretary General has been requested to establish the organ.

However the creation of an international judicial organ by the General Assembly itself may be require an inquiry into its competence to do so. Though the general principle of speciality that is applicable to international organisations will allow the UN to act only within a defined field that is allotted to it by its constituent

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65 The Tribunal that has adopted the UNCITRAL Arbitration Rules to deal with matters that are brought before it, see, Alan Redfren & Martin Hunter, *Law and Practise of International Commercial Arbitration* 50-51 (2nd ed. 1991).


67 *Ibid.* at 55-57

document in this case, the Charter,69 there are also inherent powers that an organisation possesses.70 It can also act in order to promote its objects which *inter alia* encompass respect for the environment that is inherent in the question of higher standards of living that the UN has to promote. Furthermore, the ICJ has upheld the competence of the General Assembly to establish an Administrative Tribunal with the power to render judgements binding on the UN, even though no specific power to that effect was given in the Charter.71 The General Assembly can therefore constitute validly an International Environmental Court.

If the General Assembly lacks the competence to set up the court, then a plenary conference like the one held at Rio de Janeiro can accomplish the task. In whatever way that the Court is constituted it must have a definite structure. Justices of the Court can either be appointed by the General Assembly like they are in the case of the ICJ, or through a body that is composed of statesman, academics and prominent international lawyers that will evaluate potential candidates’ credentials for the job. But like the Justices of ICJ they must be of very high calibre and accomplishment. There can also be an understanding that the various geographical regions of the world must have a fair share in nominating persons to be elevated to the bench. A provision for the appointment of Justices with technical qualifications, with the capacity to comprehend the intricate arguments that might be advanced in many cases, in which scientific determination is likely to be crucial ought to be present. It would be prudent for the Court to have a permanent seat, though like in the case of the chambers of the ICJ, a provision could be made enabling the Court to meet elsewhere too. Furthermore, it must be endowed with the power to conduct spot inspections if it so thinks fit of the topography and other geographical factors that may be involved in a dispute. The Justices of the Court must also be guaranteed security of tenure as well as being barred from appearing in matters that before the Court or any other occupation of a professional nature like those of the ICJ.72

2. *Jurisdiction of the Court*

Perhaps the greatest drawback of the ICJ has been its functioning on the basis of consent of states that appear before it. The Court can get jurisdiction over a matter only if a party has agreed to it through a special agreement, by making a declaration of compulsory jurisdiction, or through a provision in a multilateral treaty that makes the Court the reference point for any dispute that arises out of it.73 More importantly the capacity of the ICJ to function as a real world court has

69 Opinion on WHO Request, *supra* n. 12.
71 *Effect of Awards of Compensation made by the UN Administrative Tribunal (Advisory Opinion)*, 1954 ICJ 47.
72 Statute, Arts. 16 & 17.
73 *Ibid.*, Art. 36(1) and (2).
considerably atrophied owing to the fact that only states can be parties before it. A new International Environmental Court must avoid these drawbacks. Given that the world has now been through considerable change since the setting up of the United Nations, the reality of the international law is that states are no longer its exclusive subjects, and a whole variety of other juristic entities including individuals have become the focus of international law. The new court must recognise this new trend in international law and allow non state actors such as individuals and non governmental organisations to approach it in order to vindicate any environmental matter. Non governmental organisations which are an increasing force in international law must be given equal status to approach the new International Environmental Court like States, after their bonafides have been verified. They may be permitted to institute cases or intervene as parties, serve as court or party appointed experts for fact finding or legal analysis, testify as witness, or participate in proceedings as amicus curiae.

The principle of state consent should be considerably watered down only to the extent that for jurisdiction, the parties need only be a member of the United Nations to be liable to be impleaded in any proceedings, without prejudice to the preliminary objections likely to be raised in relation to the admissibility of the claim. This is because a state admitted to the organisation only on the condition that it accepts the obligations of the United Nations, which include promotion of higher standards of living, which it can be argued is crucially linked to the concept of the environment. Individuals should also be given standing to

74 Ibid., art. 34(1) See also, Arts. 62 and 63 which give the right to intervene in proceedings only to states.
76 The European Court of Justice grants certain individuals and non state actors the right to approach the Court for certain types of cases, though neither the European Court of Human Rights nor the Inter-American Court of Human Rights permits petitioners to refer cases to them.
77 The International Labour Organisation allows the participation of groups of non state actors in its deliberations, see, F. Xingis Jr. International Organisations (1977). See also, Peter J. Spiro, New Global Communities in International Decision- Making Institutions, 18 The Wash. Q. 45 (No. 1, 1994) (suggesting that international deliberating forum should include representatives from NGO groups); Ann Marie Clark, Non-Governmental Organisations and their Influence on International Society, 48 J. Int'l. Aff. 507 (1995) (examining the implications of granting recognition to NGO groups in international decision making).
78 See, Dinah Shelton, The Participation of Non-Governmental Organisation in International Judicial Proceedings, 86 Am. J. Int'l. L. 611 (1994) (arguing that the International Court of Justice expand its acceptance of submissions from non-governmental organisations in appropriate cases). Shelton suggests that the Gabčíkovs – Nagymaros Case before the World Court which raises important questions of international environmental law should be solved using amicus briefs from NGOs and experts since it involves technical issues of environmental risk and damage which need to be fully explored and presented to the Court by expert and independent bodies, ibid at 625-26.
79 For a distinction between the two concepts, see, Shabtai Rosenne, The Law and Practise of the International Court of Justice (1965).
bring actions against state violators and indeed other entities. There must be a provision for the granting of advisory opinions by the court to international organisations that might request it, for this no agreement needs to be concluded like in the case of the ICJ, where there is need for the General Assembly to confer the competence on the organisation concerned before it can make a request for an opinion.80 Further this advisory opinion should have definite legal effect with the capacity to bind parties through the legal declarations that it makes.81 There can also be a provision for the Court to entertain references made to it for advice or clarification on a point of law by a municipal court, which requires a categoric pronouncement on difficult or unsettled questions of international environmental law.82

3. The Development and Application of International Environmental Law

An important role that the Court that must play should be in the function of formulating new principles of international environmental law. The corpus of environmental law as demonstrated above owes very little to judicial precedent most of it being the creation of convention and treaty law. Therefore there is a very real need to ensure that a judicial institution that is designed to tackle problems relating to the environment should concentrate its effort on ensuring that appropriate norms are fashioned when it decides disputes.83 The Court can also rely on the sources of international law that are enumerated in the Statute of the ICJ, besides it can refer to other material such as proceedings, resolutions of international bodies.84 The Court must also be granted the power of deciding a matter ex aequo et bono like the ICJ, in which case, the parties will have considerable leeway in arriving at a just decision.

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83 In this context the observation of Judge Alvarez is worth mentioning in relation to the ICJ donning an active role in making new law. “It now happens that with greater frequency no applicable precepts to be found or that those which do exist present lacunae. In all such cases, the Court must develop the law of nations. New principles will have their origin in the legal conscience of the people..” Anglo Norwegian Fisheries Case (UK v. Norway). 1951 ICJ 116 at 145 (separate opinion of Judge Alvarez).

84 The ICJ has on very many occasions referred to general assembly resolutions being a source of international law, see, Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. US) (Merits), 1986 ICJ 14; Western Sahara Case (Advisory Opinion), 1975 ICJ 12 Kiss and Shelton argue that in deciding a dispute involving international environmental law a tribunal must have regard to the texts of resolutions of international organisations for this is a means of their expression.
4. Enforcement of Actions

The ICJ which has no purse or sword is assisted by the Security Council, in enforcing its judgments. While States have rarely refused to comply with the decisions of the ICJ, the Security Council is granted the power to decide as to what measures ought to be taken to bring to book the recalcitrant.\(^8\) This has been interpreted to mean even the use of force under Chapter VII of the Charter if necessary.\(^8\) For the new Court to be really effective it must also be assisted by an organisation with similar powers for the purpose of ensuring that its verdicts are obeyed. It would seem to be quite impractical to entrust it to the proposed international institution that is created for the environment, as any use of force or other coercive measures taken in the globe may be legally sanctioned according to the sacred text of the Charter only by the Security Council or for perhaps even the General Assembly. Furthermore a new institution is likely to lack the capacity to organise enforcement measures to assist the Court as it will itself be facing numerous teething problems. In these circumstances it is perhaps best that the Court is assisted by the Security Council as in the case of the ICJ. In proposing the nodal institution to deal with environmental affairs, Sir Geoffrey Palmer, suggested that there be a scheme of sanctions which should include the withholding of benefits by the organisation and of direct contacts with delinquent governments and the mobilisation of the politics of shame for disciplining nations that fail to fall in line.\(^8\) These measures can be adopted by a new organisation once it is in place as a prelude to the Security Council being approached to bring to book a contemner of the International Environmental Court.

5. Relation with the International Court of Justice

The interrelationship between the International Environmental Court and the ICJ needs to be examined too. Ideally since the ICJ is the principal judicial organ of the United Nations it must be the senior in hierarchy, but then the Environmental Court, is to be more broad based than the ICJ and a substitute for its chamber on the environment. The ICJ is also not a court of appeal and therefore there is no question on it being a forum of second instance to a party dissatisfied by the judgment of the Environmental Court. Ideally the two organs can exist separately, for any matter concerning the competence of the Environmental Court can be settled internally without need to refer the matter to the ICJ. Since the some of the Justices of the Court are likely to be scholars in international law, if any question arises in

\(^8\) Arguably these resolutions constitute a new source of international law not foreseen by the Statute of ICJ, or at least establish a new technique for creating international juridical norms. This technique is particularly effective in establishing law for new fields like the environment" supra n. 17 at 107.

85 Statute, Art. 94 (2).


87 Palmer, supra n. 4 at 281
relation to general international law, unconnected with the environment, it can be
answered by them without having to send the matter to the ICJ for advice. The wide
nature of jurisdiction that the Environmental Court will enjoy will result in the
natural remedy for an international dispute concerning the environment and there-
fore if a party dodges the Court and goes to the ICJ, the World Court will have no
hesitation in rejecting the application as other remedies had not been resorted to,
thereby implying that recourse should have been made to the Environmental
Court.

CONCLUSION

Like any other organisation of international stature, the creation of the
International Environmental Court is likely to be opposed by nations who have to
part with their sovereignty in order that powers may be delegated to these institu-
tions. Nonetheless, the need for such a judicial organ is an imperative need,
especially if any meaningful progress is to be made in the field of international
environmental law. The potential for conflict is tremendous and is likely to increase
as the environment rapidly becomes the guiding concern of policy and politics
among nations. The unique aspect of the new Court would be that its pronounc-
ment will have an intertemporal effect, which means to say that they cannot be static
and must necessarily have to take into account dynamic elements such as the rights
of the posterity. This is because most environmental disputes have consequences
that are not merely temporal and can effect the planet for centuries to come.
Therefore the Court will have to rule keeping the interests of future generations to
come. No single generation can be guide the destiny of our universe, and the
International Environmental Court will be the current generation’s contribution in
making the lives of those yet to inhabit planet earth a little more secure.

88 The ICJ has done so once in the past where it was shown that local remedies had not been
exhausted, see, Interhandel Case (Switzerland v. US), 1959 ICJ 6.