

# International Courts and Tribunals – the New Environmental Sentinels in International Law

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**Abstract.** This study examines the role of international courts and tribunals (ICTs) as important agents for the peaceful settlement of international disputes through the instrumentality of law. The rapid upswing in the number of specialised international courts and tribunals (in areas such as trade, human rights, law of the sea, criminal justice and environment) can be perceived as an attempt by sovereign States to maintain the viability of ICTs in light of perplexity in international relations, growing recognition of peaceful co-existence, quest for institutionalised cooperation and emergence of some of the “common concerns of humankind”, as well as the “duty to cooperate”. The article has sought to make sense of the emergence of ICTs as the “New Environmental Sentinels” and what it portends for our common future. Do we need a specialised international environmental court?

**Keywords:** International courts and tribunals (ICTs), peaceful settlement of international disputes, common concerns of humankind, duty to cooperate, international environmental court

Throughout the history of international law, courts and tribunals have played a crucial role. In fact, they have developed alongside growth in the body of international law. Understanding the role of international courts and tribunals (ICTs) is important for peaceful settlement of international disputes through the instrumentality of law. The rapid upswing in the number of specialised ICTs (in areas such as trade, human rights, law of the sea, criminal justice and environment) can be perceived as an attempt by sovereign States to maintain the viability of ICTs in light of the complexity of international relations, growing recognition of the importance of peaceful co-existence, the quest for institutionalised cooperation and the emergence of some of the “common concerns of humankind”.<sup>1</sup>

As the gradual “greening” of international law has taken root, it could not but have affected existing dispute-settlement forums such as the International Court of Justice (ICJ), the Permanent Court of Arbitration, the World Trade Organization (WTO) Dispute Settlement Mechanism, the International Tribunal for the Law of the Sea (ITLOS) and others. In many of the cases, the ICTs have sought to balance competing developmental requirements and environmental considerations within the corpus of international environmental law. Several principles have emerged that include “no harm”, “strict liability”, “polluter pays”, “precautionary” and even “sustainable development”. Hence ICTs have gradually emerged, alongside the political processes of sovereign States, not only to make sense of the existing principles of international environmental law (*de lege lata*) but also to contribute to the development of these

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principles in the future (*de lege ferenda*) to address new environmental challenges. As a corollary, it is contended that ICTs “ensure the strength, quality, and longevity of environmental protection against other interests pursued by parties”.<sup>2</sup>

The process of institutionalised international cooperation has been an important factor in nurturing adaptability and change in international law. It is also a manifestation of the desire of sovereign States to forge closer links on institutional platforms. Since it reflects a *vertical* expansion of international law, the process can be said to form a basis for inter-State interactions. In this process, practice and pattern of addressing environment-specific problems, ICTs have emerged as important global actors in the support of environmental protection and the principle of sustainable development. Their advent, survival, growth, contribution to problem resolution and ultimate legitimacy are duly shaped by the vagaries of interests, concerns and political undercurrents of sovereign States.

## 1. International Law as an Institution

International law is often tested on the touchstone of its ability to address new challenges confronting humankind. The current body of international law itself may be regarded as an institution.<sup>3</sup> In a way, it now represents an amalgamation of inter-State practices of different civilisations over the centuries, though the phrase itself may claim its roots in 17th century Europe. Overcoming this “provincial” origin, international law has gradually expanded – both horizontally as well as vertically – to cover already existing States, which were regarded, especially during the colonial era, as mere objects of its protections, rather than subjects of its mandates. The emergence of international institutions to provide platforms for inter-State cooperation has only added credence to its relevance. It has now come to address new global problems, which were hitherto not envisaged. Intergovernmental efforts to grapple with global environmental issues have been a logical corollary to the expansion of international law to keep pace with the changing needs of international society.

In the post-decolonisation era, the shrinking of geographical distances and communications explosion have brought about a “substantial

transformation in the content and character of international law”.<sup>4</sup> In fact, concerted efforts to address global environmental problems have led to the gradual “greening” of international law and international institutions.

## 2. *Sui Generis* Law-making Process

The development of international environmental law is especially characterised by a sense of urgency in crafting necessary legal responses to the “swiftness and irrevocability”<sup>5</sup> of environmental problems on this fragile planet. This, in turn, has led to the *sui generis* process of legal regulation of State behaviour. As a result, current practice appears to have gradually institutionalised an overall “centralized legalization” approach to sectoral environmental problems. This trend has expanded and intensified, especially since the 1972 UN Conference on the Human Environment (Stockholm Conference), in the extent to which it covers environmental issues that were hitherto regulated at national and/or regional level.

The multilateral law-making process has worked in a piecemeal,<sup>6</sup> *ad hoc* and sporadic manner. It has, in turn, contributed to the growing web of treaties as the most important source of international environmental law. Multilateral environmental agreements (MEAs) have emerged as a unique technique that encompasses flexibility, pragmatism, and an in-built law-making mechanism as well as a step-by-step consensual approach to norm setting.<sup>7</sup> In fact it is a truism to state that:

*MEAs have emerged as one of the best ways of institutionalizing international (environmental) cooperation and triggering national action in the environmental sector...increasing number of treaties and secretariats responsible for their administration, coherence and coordination of efforts has emerged as a central issue for effective international environmental governance.*<sup>8</sup>

In joining MEA negotiations, States ostensibly claim to be acting in the “common” interest. The recent history of multilateral negotiations underscores the dilemma – “to treaty or not to treaty” – on each specific environmental problem. However, the precise nature of the instrument that could be desirable as well as its scope – global or

regional – falls within the domain of scholarly scrutiny.

Even if it can be said that MEAs have become a predominant method for addressing environmental issues, there are problems of coherence and efficiency linked to a growing “congestion” among the body of MEAs. Although the development of this architecture has brought positive advances, international environmental governance<sup>9</sup> is still often perceived to be fragmented, inconsistent and inefficient in its allocation of human and financial resources, thereby weakening the world’s capacity to address global environmental problems. Apart from this, the sheer complexity of environmental norms and obligations could heighten the risk where the environment becomes a trigger for conflict or rupture or dispute between sovereign States.

The UN Charter (1945) requires Member States to achieve international cooperation in solving international problems of an economic, social, cultural or humanitarian character. It also contains a general prohibition against “threat or use of force” (Article 2(4)). As a corollary, there is a commensurate obligation on Member States to cooperate to settle disputes by peaceful means (Article 2(3)).<sup>10</sup> In addition, Article 33 (Chapter VI) expressly lays down an obligation “to settle disputes which are likely to endanger international peace and security”. The Charter offers a range of methods (negotiation, mediation, conciliation, good offices and inquiry) to achieve peaceful settlement, but this paper will focus on settlement through courts and tribunals (*i.e.*, international adjudication and arbitration). Given the constraints of time and space, this paper will deal with inter-State disputes only.

The paper explores two parallel but very important developments. The first is the growth and proliferation of MEAs that address sectoral environmental issues as well as institutionalised forms of cooperation and dispute-settlement mechanisms (non-compliance procedures). The second is the surge in the number of ICTs that perform more specialised and diverse functions. The paper seeks especially to contextualise the role played by “new”<sup>11</sup> judicial institutions such as ITLOS, the Arbitral Tribunals established under Annex VII of the UN Convention on the Law of the Sea (UNCLOS) and a new approach being followed by the ICJ to push States that are party to MEAs to cooperate with each other, to give “due regard” and to perform obligations in “good faith”. This is a significant shift from the traditional role performed

by ICTs as mere dispute settlers. In turn, these ICTs pursue other goals such as advancing the development of international norms and maintaining cooperative international arrangements. This also negates a misplaced notion that judicial settlement is not the best way of resolving environmental disputes as it is adversarial in nature.

The current patterns of institutionalised environmental cooperation require closer scrutiny against a backdrop that includes a rapidly deteriorating global environment, the expectations of sovereign States, and questions regarding the re-invented role of ICTs as judicial institutions. The study aims to pinpoint and elaborate the “duty to cooperate” as laid down in some of the recent cases decided by the above-mentioned ICTs.

### 3. Global Cooperative Enterprise

In recent years, MEAs have emerged as important tools in institutionalised intergovernmental cooperation to address specific environmental issues. Many of the multilateral agreements in the environmental field could be regarded as *sui generis*. This is especially so since, barring some common aspects that could be regarded as part of a “pattern” (in terms of nomenclature, form, enabling provisions for in-built law-making processes and institutions such as plenary and subsidiary organs), each of these treaty-driven processes carries its own unique features to address its specific problem of concern. It is through these enormous treaty-making processes that the United Nations has become a part of a “major shift in the normative structure of international law”.<sup>12</sup>

*Prima facie*, all treaties are governed by international law. MEAs, however, embody certain uniquenesses, including the following: the trigger events for initiating such agreements; the specific issues needing to be addressed; the relatively short timescale within which they take shape; frequently, the level of scientific uncertainty surrounding the core issue at stake; the number of States participating (in the UNFCCC and UNCCD negotiations and processes, participation is almost universal); and, in many cases, the “soft” nature of such agreements (defying the common understanding of such treaties as “hard” instruments).<sup>13</sup> They stand apart from conventional treaties in another way as well: such a treaty is not a

“one-off affair”; each tends to become a process that comprises built-in law-making features. As a result, most MEAs could be regarded as works in progress that are generally initiated by international institutions (such as the United Nations Environment Programme (UNEP)) and taken over from them by the sovereign States. In many cases, these treaties arise due to some “trigger event”,<sup>14</sup> necessitating urgent negotiations to reach an agreement on regulation of a specific issue.

Once the States are fully engaged in the negotiations, the relevant catalyst institution (such as UNEP) tends to take a back seat. The MEA’s process may continue to operate as a regulatory process, which, although triggered by a specific event/crisis, is flexible enough to allow the Parties to adopt technically feasible solutions (*e.g.*, gradual phase-outs and the designation of substitutes) designed as per the socio-economic and political conditions of participating States.

The Minamata Convention on Mercury was the last major treaty to address a specific threat.<sup>15</sup> However, the global COVID-19 pandemic in 2020 clearly raises a specific health-environment challenge. Will it propel the global community and WHO to bring in a new regulatory instrument on the environmental effects of such global pandemics? Do we need to further strengthen International Health Regulations 2005?<sup>16</sup>

In essence, these MEA practices reflect a constructive process akin to “codification”. The basic legal underpinnings of such a process are derived from the fundamental principles of State responsibility under international law. The level of effort necessary to work out multilateral treaties on even routine issues of international cooperation, quite apart from dealing with common concerns, has been the advent of an intricate mosaic of treaties at bilateral, regional and global levels.<sup>17</sup>

These treaties seem to have become cornerstones of the multilateral regulatory enterprise. This *sui generis* law-making process has started making inroads into the cherished domain of the sovereign jurisdiction of States. The increasing need for institutionalised international cooperation has propelled States to come together on common platforms. As a corollary to it, the notion of “sharing sovereignties in common” (as described by the German Constitutional Court) to address some of the global problems (described as “common concerns of humankind”) has come to be institutionalised. In this organic process, sovereign

States have sought to create and, in turn, rely upon institutional mechanisms – as a fulcrum – to serve specific purposes.

#### 4. Problem-driven Norm-setting

One of the significant issues in international law in general and environmental law in particular is compliance control – the international monitoring and supervision of State Parties’ implementation of and compliance with treaty-based obligations.<sup>18</sup> There are multiple factors that make compliance control a matter of special concern in the context of international environmental law.

For example, as international environmental regulations become more technical and detailed, and therefore more complex, they entail a commensurately greater need for international control of individual States’ compliance. Similarly, as the economic cost of compliance with such environmental regulation rises, States have an increased interest in making sure that other States, subject to the same international regulations, live up to their obligations, thereby ensuring competition on a level playing field. Perhaps most significantly, normative changes within environmental treaty regimes tend to be frequent and often the result of informal steps taken by the conferences of the Parties (COPs) and are thus apt to give rise to questions about the scope, if not the very existence, of the obligations at stake. In such situations, compliance control serves not just to verify that a State is abiding by its obligations, but also – preliminarily – to ascertain the existence of the norm(s) potentially in dispute, as well as the exact nature and scope of the individual State’s obligations flowing therefrom.<sup>19</sup>

Presently, a number of MEAs include a non-compliance procedure (NCP).<sup>20</sup> These procedures address compliance problems in a targeted, responsive and non-confrontational manner as compared to traditional dispute-settlement mechanisms. One of the primary objectives of NCPs is to encourage States within a multilateral context to comply with treaty obligations. In the event of non-compliance, NCPs seek to provide a “softer” compliance system than that afforded by traditional dispute-settlement procedures under general international law.<sup>21</sup>

Nonetheless recent MEAs still do not eschew traditional international legal mechanisms. There is a growing trend found in MEAs where NCPs function alongside traditional dispute-settlement mechanisms.<sup>22</sup> However, some argue that

*this duality is possible if one views NCPs as located within a wider category of non-confrontational dispute avoidance procedures which combine classical methods which have their roots in the dispute settlement mechanisms developed under general international law, with innovative procedures for enhancing compliance with, and responding to non-performance of international obligations.*<sup>23</sup>

Thus, there seems to be a choice between using the “new” non-compliance procedures and the “traditional” dispute-settlement provisions. There are two schools of thought that could help in understanding the current debate taking place around these two techniques.

The first views the international environmental law-making process (especially after the 1972 Stockholm Conference) through MEAs as a process that favours prevention of environmental harm as well as conservation of the natural resources and ecosystems of the whole biosphere. A regulatory regime of this dimension necessitates a more sophisticated approach to enforcement and compliance than one based primarily on the award of damages or a third-party adjudication of claims to resources.<sup>24</sup> A perspective that contends only for the rights of “injured States” would likely be inadequate for the purpose of protecting common interests, common property or the interests of future generations of both humans and other species. In this context, the web of institutional machinery could include a compliance committee and meeting of the States Parties to coordinate policy, develop the law, supervise implementation, resolve conflicts of interest and impose community pressure on individual States. Cumulatively, they could work more effectively than traditional bilateral forms of dispute settlement. Hence, it appears, bilateral dispute settlement may be inappropriate due to the polycentric character of environmental problems involving a range of actors and a multiplicity of complex inter-related issues.<sup>25</sup>

The second line of thought argues that it is an oversimplification to state that dispute-avoidance procedures are preventive in character, and that

dispute settlement is only applicable *post factum* when the damage to the environment has been done. Indeed, some say that the mere existence of dispute-settlement mechanisms has a preventive effect since decision-makers will bear in mind the possibility that the injured State may have recourse to such mechanisms. Further, it could be argued that since the “new” regime relies on consent, the possibility of community pressure may lack real enforcement power. Moreover, the political character of the process may dilute the force of legal standards.

This category of dispute settlement bodies suffers from an inherent weakness – inability to reach an agreement on difficult issues or to ensure full participation of all the concerned States. Even in a case where adequate participation is achieved, such bodies are often open to the criticism that their decisions represent only the lowest common denominator among all of the parties. NCPs might well contribute to a “softening” of the individual rules and regulations of the relevant MEA, as States Parties could possibly perceive that compliance with obligations might be negotiable.

A lot of discussion has taken place in scholarly and in policy-making circles about the relationship between compliance mechanisms and dispute-settlement mechanisms.<sup>26</sup> For instance, is there any hierarchy in the application of these systems or are they mutually exclusive? Due to their parallel existence, a defaulting State could find itself subject to both regimes.

## 5. The Interplay of Law and Institutions

The growth of the law and institutions has been complementary. In fact, they go hand in hand, keeping in view the changing needs of the society. Thomas Jefferson, one of the philosophers and architects of the American Revolution, made a very pertinent observation about the adaptability of institutions to societal requirements:

*(L)aws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths discovered and manners and opinions change, with the change of circumstances, institutions must advance also to keep pace with the times.*<sup>27</sup>

In a way, institutions have been connected to the law with an umbilical cord. At the same time, institutions have acted as catalysts for developing the law. In fact, the birth of cooperative institutional forms at the international level has been a remarkable development in view of the attendant surrender of State sovereignty for the purpose. It has been a manifestation of efforts to “organize” cooperation among members of the international community. The concerted efforts for this purpose began sometime around the middle of the 19th century. The role of these institutions has been aptly described thus by Brierly:

*These institutions operate by organizing co-operation between the national governments and not by superseding or dictating to them, and they are, therefore, probably not so much the beginnings of an international ‘government,’ though the term is often convenient, as a substitute for one. Their consideration, however, invites the same questions as those which arise in the study of any other legal system, and it is proper to ask how far and in what manner they perform for international law the functions which governmental institutions perform for the law of a state, that is to say, the functions of legislation, of execution and administration, and of judicature.*<sup>28</sup>

The rise of such institutions, assigned with specialised administrative functions, was essentially a product of the “compelling force of circumstances”<sup>29</sup> or “evident need”<sup>30</sup> arising from international intercourse as compared to other idealistic notions.

Throughout the history of international law, ICTs, as international institutions, have played a crucial role in the international legal system. They have developed alongside growth in the body of international law, together becoming one of the deepest and most puzzling forms of institutionalised cooperation in the international system.<sup>31</sup> This is so because States try to safeguard their sovereignty to the fullest extent.

One of the important aspects of exercising State sovereignty is a reluctance to engage a third party in the settlement of disputes. There are genuine fears regarding third-party adjudication, especially due to their uncertainty about the legal validity of the case and about the expected outcome. Where the law is so uncertain, the parties often consider it problematic to give consent to refer the dispute to

either a special or general body for adjudication.<sup>32</sup> A declaration accepting compulsory jurisdiction could expose a State to broad categories of disputes involving uncertain and contested principles of customary international law.<sup>33</sup> These issues, sometimes, can whip up nationalistic fervour and create a highly charged atmosphere (*e.g.*, the controversies that arose over the Suez Canal, the Falkland Islands, Diego Garcia and Crimea). Nevertheless, there are cases where States have overcome their fears and possibly consider judicial settlement as preferable to the use of force. They have, in effect, jettisoned reservations concerning sovereignty and chosen to refer contentious cases for international adjudication. In an effort to understand the shift in the behaviour of States, some scholars have opined that often the ICTs serve as a functional solution to cooperation dilemmas between States.<sup>34</sup> As a corollary, States create ICTs to overcome “collective action problems, signal their credibility, and reduce transaction costs”.<sup>35</sup>

The role of ICTs as institutions had been modest in the past.<sup>36</sup> The result was that many international disputes remained unresolved, numerous international law norms and doctrines remained underdeveloped, and international law, in general, remained under-enforced. This period witnessed an absence of robust judicial institutions giving rise to an institutional vacuum.<sup>37</sup>

Nevertheless, the last two decades have witnessed a wave of new ICTs established to address a broad variety of issues.<sup>38</sup> This increasing number of ICTs that has produced a growing stream of decisions appears to be one of the dominant features of the international legal order in the post-UN Charter period. Hence, understanding these ICTs, as institutions, is important for the peaceful settlement of international disputes through the instrumentality of law.

Notwithstanding this, some basic questions do arise. If there is no hierarchy, how do international courts work? Why do States create them and yield jurisdiction to them? Why do States obey them, if they do? What explains their workability, popularity and their fragmentation? These questions have perennially plagued the international legal system. The behaviour of States, particularly in the vastly complex field of international relations in the modern world, paradoxically indicates their belief in, and reliance on (even if reluctantly), the very idea of “institution” of international law. In this context – in spite of a widely perceived

misconception that States break the law more often than they respect it – it is significant that they genuinely feel the need to abide by the law and think it necessary to justify their actions to remain within the limits of the law as it exists.<sup>39</sup> Due to a series of factors including constant hammering by the so-called “new States” and the important contribution of the UN system, international law has gradually proved to be a stronger, widely accepted and more complete system.<sup>40</sup>

With the passage of time, ICTs have become more diverse and specialised. Interestingly, almost all of the new judicial and quasi-judicial institutions created in recent decades were invested with compulsory powers of jurisdiction (in the sense that the jurisdiction of the new courts could be invoked unilaterally against parties to their constitutive instruments).<sup>41</sup> Apart from it, jurisdiction is also parcelled out to coequal institutions with no higher appellate authority to resolve jurisdictional conflicts.<sup>42</sup> Increasing use of these institutions suggests that the growth of ICTs has not remained a mere “bubble, fragile and ephemeral”.<sup>43</sup> The cumulative effect of these developments underscores that “international adjudication (which was once the exception to the rule – diplomatic settlement) is becoming the default dispute-settlement mechanism in some areas of international relations”.<sup>44</sup>

In fact, these institutions have become the fulcrum for global governance.<sup>45</sup> The exponential rise in the number of ICTs and expansion of their powers can be primarily understood as a change in the attitude and aspirations underlying the functions of these institutions. With the changing times, these institutions are reinventing and revitalising themselves by moving beyond the role of dispute settlers.<sup>46</sup> Bogdandy and Venzke contend that “[i]nternational courts stabilize normative expectations, which includes the reassertion of international law’s validity and its enforcement; they develop normative expectations and thus make law; and they control and legitimate the authority exercised by others”.<sup>47</sup> In a sense, international judicial institutions must consider how their decisions will be understood not only by today’s litigants, but also by potential litigants in future and other legal actors. In an effort to redefine them, ICTs seem to be maintaining “co-operative international arrangements”.<sup>48</sup> It is especially applicable to ICTs based on specific legal regimes such as the WTO, ITLOS, *etc.* These new ICTs not

only promote the goals of their overarching regimes but also help to maintain the “political, economic and legal equilibrium”.<sup>49</sup> It seems this serves as a lubricant around which ICTs are established, work as cooperative institutions and an overwhelming number of States respect them being part of international regimes.

## 6. New Environmental Sentinels

Environmental issues constitute a unique class of international problems having larger ramifications comprising humans, other species and natural resources. In turn, they require sensitivity, distinct approaches and collaborative methods of solutions. They appear to have gradually crystallised as significant factors in the whole structure of international relations. In fact, the whole notion of security – traditionally understood in terms of political and military threats to national sovereignty – is being expanded to include the growing impacts of environmental stress.<sup>50</sup>

Environmental factors have been increasingly acknowledged to be a potential high-voltage source of international tension and disputes. These considerations seem to justify heightened attention to the prevention and settlement of environmental disputes. The perennial quest for resources such as water, oil, gas and minerals, habitats is already grounds for friction, diplomatic posturing and high-profile negotiations. It has become a matter of concern for international organisations, civil society and scholars. The growing demand and need for access to natural resources, coupled with a limited or at least shrinking resource base, has already triggered disputes among sovereign States.<sup>51</sup>

The nature and extent of international environmental obligations has increased enormously as States assume broader and deeper commitments in a wide variety of areas of development activities. These, in turn, provide fertile ground for legal issues of State responsibility for breach of a treaty or another international legal obligation. The thickening web of MEAs and norms increases the possibilities that disputes might arise as regards interpretation of these obligations. As these international environmental obligations affect national interests and impose large (administrative, economic and political) costs, sovereign States that do not comply with these obligations are perceived to gain an unfair competitive advantage. Thus, it

seems, in an increasingly globalising world, States are likely to be dragged into international disputes due to environmental harm resulting from activities of their nationals within the country or even when they make investments in industrial activities (such as coal mines or nuclear power plants) in other countries.

There are various adjudicative bodies that presently operate in the field of international environmental law, and ICTs are an essential part of the larger mosaic of international environmental governance.<sup>52</sup> The existing architecture of adjudication is thought to be confrontational and adversarial, and it is contended that it could end up providing inconsistent outcomes. It also involves a limited number of parties, and can only deal with a narrow range of issues.<sup>53</sup>

Adjudication also has some positive aspects in the context of settling international environmental disputes as it helps in insulating the matter from political processes. It may also involve third parties in the dispute-settlement process – judges who must adhere to high standards of independence and impartiality as well as adjudicate claims advanced on the basis of reasoned arguments and render judgment based upon relevant legal principles.<sup>54</sup> Hence, international adjudication seems to be a rational procedure for environmental dispute settlement, one that can draw trust and give effect to the wishes of the parties. The process could in fact help in upholding applicable environmental or other public values embodied in legal norms.<sup>55</sup> These attributes, cumulatively, could make ICTs dealing with environmental cases unique among international environmental institutions, to the extent that they independently and authoritatively recognise the concerns of a larger community.

As already noted, the late 20th century has seen an exponential proliferation and diversification of international judicial institutions.<sup>56</sup> This seems to have given new character to international adjudication. Through this perceived “judicialisation”<sup>57</sup> of some areas of international law, the concept of adjudication seems to have shifted from being a device exclusively designed for promoting international peace to being a means for responding to new governance challenges such as the protection of human rights, the imposition of individual international criminal responsibility and the resolution of complex commercial disputes. It reflects a substantial increase in international litigation on environmental issues in courts of

general jurisdiction, in courts and tribunals specialising in non-environmental issues and in specialised environmental dispute-settlement forums.<sup>58</sup> In parallel to these developments, as noted above, a growing corpus of international environmental law has witnessed an interesting pattern of NCPs under the “thickening web of multilateral environmental agreements”.<sup>59</sup> Notwithstanding some scholarly concerns regarding their fairness and “legitimacy”,<sup>60</sup> NCPs are designed to facilitate greater levels of institutionalised cooperation and coordination among States in responding to complex environmental challenges.

These developments appear to be pulling the institutional rubric of international environmental governance in two different directions. Firstly, the relevance of courts and tribunals in some regimes signals a preference for a more confrontational, enforcement-oriented method of environmental dispute settlement. On the other hand, the use of NCPs (and other treaty bodies) indicates a preference for a more cooperative and supervisory approach to grappling with questions of ensuring compliance with treaty-centric legal obligations of State Parties. In many of the recent MEAs, one can find simultaneous (but separate) provisions for dispute-settlement and compliance mechanisms.<sup>61</sup> It does raise an important question of the relationship between the two (as already discussed in the preceding section on compliance). There appears to be a pressing need to appraise the working of the existing courts and tribunals that deal with environmental issues. Are these existing (non-specialised) ICTs adequately equipped to address the peculiarities of international environmental dispute settlement? Do we need a specialised international environment court (IEC)?

During the 20th century, many international forums have emerged as successful players in resolving global disputes. Third-party dispute-settlement forums have markedly increased not only internationally but regionally as well.<sup>62</sup> In this context, the existing international forums include the ICJ, the Permanent Court of Arbitration, ITLOS and the WTO [as shown in Fig. 1]. The respective competences and jurisdictions of these ICTs vary greatly but all of them may consider environmental disputes. Yet despite this confluence of alternatives, each of these forums falls short of providing an effective option for the settlement of international environmental disputes.



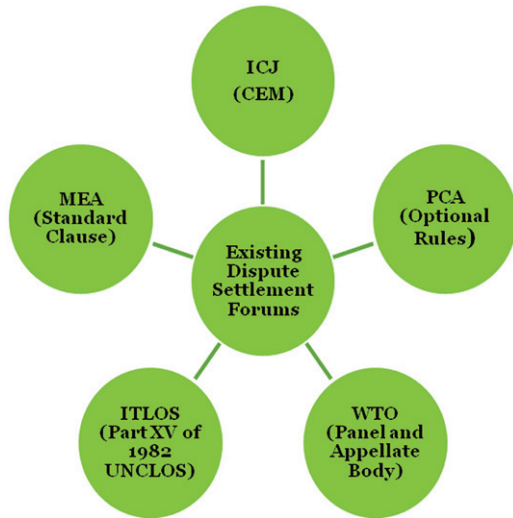


Fig. 1. Existing forums for international environmental dispute settlement. [*“Standard clause”* refers to the standard dispute settlement clauses found in many MEAs; *“CEM”* refers to the ICJ’s Chamber for Environmental Matters. Ed.]

It seems the impact of the decisions of ICTs is quite discernible. Therefore, as noted by one of the writers:

*[T]heir most obvious normative importance has been in articulating directly applicable rules and principles. A secondary impact has been in illustrating potential environmental problems, and identifying (if not necessarily addressing) the range of legal issues that are implicated. The factual scenarios encountered in some cases therefore provide a template against which the efficacy of subsequent legislative developments can be measured. A third important, yet also indirect, influence has been in highlighting gaps in the international legal framework as it applies to environmental matters and thereby catalyzing further developments to address these deficiencies.*<sup>63</sup>

Thus, ICTs have emerged as important legal actors as they help through innovative judicial interpretation even as the law-making process itself is witnessing great upheavals due to the very nature of the environmental challenges that States are grappling with.

## 7. Panorama of Duty to Cooperate

ICTs are increasingly assuming the task of securing the functioning of the “global network”.<sup>64</sup> Its emergence is in part attributable to a recalibration

of the ambitions and reach of international judicial institutions. The shift coincides with a more general change in international law from the law of co-existence to the law of cooperation.<sup>65</sup> It involves “proactively working together, serving objectives that cannot be attained by single actor”.<sup>66</sup>

A general inter-State duty to cooperate in all fields was asserted by the 1970 Friendly Relations Declaration.<sup>67</sup> The duty of cooperation plays an important role in international environmental law, even though it has taken many different forms. In this context, Wolfrum has sought to distinguish between a general obligation to cooperate (which has fairly limited support as a norm of customary international law) and the obligation to cooperate in the specific areas of international law (especially as to spaces beyond national jurisdiction, international environmental law, the protection of human rights and international economic law).<sup>68</sup>

The Group of Experts convened in 1995 by the Commission on Sustainable Development to identify principles of international environmental law distinguished between the duty to cooperate “in spirit of global partnership” and a duty to cooperate in a “transboundary context”.<sup>69</sup> The first encompasses the relation among States with respect to the “global commons” and it has crystallised into principles and concepts such as “common concern of humankind”, “the common heritage of mankind” and “common but differentiated responsibility and respective capabilities”. The duty to cooperate appears to be comprised of some minimal requirements of cooperation in a transboundary context, expressed through norms such as the principle of reasonable and equitable use of shared resources, duty of notification and consultation as well as the principle of prior informed consent (with States potentially affected by an activity/event having consequences on the environment having an obligation to conduct an environmental impact assessment).

Interestingly, “cooperation” remains an obligation of conduct whose specific manifestation depends upon what could be expected from a State acting in “good faith”.<sup>70</sup> Due to the relatively vague nature of “duty”, there are several ways in which it can be spelled out. However, it is generally perceived that a State’s “good faith” can be “objectively assessed by international courts and tribunals when reviewing the State’s domestic decision-making processes in accordance with international standards”.<sup>71</sup> In some cases, the content of duty has been defined by the

ICTs. In fact, duties of States to cooperate within environmental regimes (such as UNCLOS, the International Convention for the Regulation of Whaling (the Whaling Convention), the Convention on Biological Diversity and several other MEAs) have become part of specific institutional, administrative and procedural mechanisms that are now gaining greater prominence in the jurisprudence of the ICTs. It allows them to deal closely with institutional aspects that formerly received less judicial attention. Thus, in an advisory opinion of 7 February 2018, the Inter-American Court of Human Rights (IACHR) has sought to juxtapose a sovereign State's basic obligations under two areas of international law – environment and human rights – specifically in the transboundary context.<sup>72</sup> It is claimed to be the “first ruling ever by an international human rights court that truly examines environmental law as a systemic whole”.<sup>73</sup> It underscores the role and value of new normative benchmarks that can be set by inter-regional courts too.

The concerns about the evolution of underlying legal obligations through a pronounced duty to cooperate remain real and justified, however, because the so-called duty to cooperate is highly dependent upon specifics of the relevant regimes. Nevertheless, a few ICTs are proactive in the application of this obligation. For example, in the 2001 *MOX Plant* case,<sup>74</sup> ITLOS declined to issue provisional measures requested by Ireland on the ground that there was insufficient urgency to justify their prescription. This dispute arose between Ireland and the UK concerning establishment of a mixed oxide fuel (MOX) plant at the Sellafield nuclear processing facility located on the Irish Sea. Ireland strongly objected to the plant on health and environmental grounds. It sought provisional measures in ITLOS for the suspension of authorisation of the plant pending constitution of a tribunal to determine its claims. Nonetheless, the tribunal ordered a provisional measure that was not requested and observed,

*[T]he duty to cooperate is a fundamental principle in the prevention of pollution of the marine environment under Part XII of the Convention and general international law and that rights arise there from which the Tribunal may consider appropriate to preserve under article 290 of the Convention... [E]ach party is required to submit to the Tribunal a report and*

*information on compliance with any provisional measures prescribed.*<sup>75</sup>

The case advanced development of the current understanding of the broad contours of the “duty to cooperate”.

Similarly, in the *Land Reclamation* case (2003) between Malaysia and Singapore,<sup>76</sup> a Tribunal issued orders relating to land reclamation activities carried out by Singapore in and adjacent to the Straits of Johor, as follows:

Malaysia and Singapore shall cooperate and shall, for this purpose, enter into consultations forthwith in order to:

- (a) *establish promptly a group of independent experts with the mandate*
  - (i) *to conduct a study, on terms of reference to be agreed by Malaysia and Singapore, to determine, within a period not exceeding one year from the date of this Order, the effects of Singapore's land reclamation and to propose, as appropriate, measures to deal with any adverse effects of such land reclamation;*
  - (ii) *to prepare, as soon as possible, an interim report on the subject of infilling works in Area D at Pulau Tekong;*
- (b) *exchange, on a regular basis, information on, and assess risks or effects of, Singapore's land reclamation works;*
- (c) *implement the commitments noted in this Order and avoid any action incompatible with their effective implementation, and, without prejudice to their positions on any issue before the Annex VII arbitral tribunal, consult with a view to reaching a prompt agreement on such temporary measures with respect to Area D at Pulau Tekong, including suspension or adjustment, as may be found necessary to ensure that the infilling operations pending completion of the study referred to in subparagraph (a)(i) with respect to that area do not prejudice Singapore's ability to implement the commitments referred to in paragraphs 85 to 87.*

The duty enunciated in the *MOX Plant* case was recently applied by the Tribunal in its advisory opinion concerning the *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)*.<sup>77</sup>

The application of the obligation was further explored by the arbitral tribunal constituted under UNCLOS in the *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*.<sup>78</sup> It ruled on alleged failures by the UK in consulting and cooperating with Mauritius (obligation to exchange views under Article 283 of UNCLOS) in establishing a marine protected area (MPA) around the Chagos Archipelago. In their scathing joint dissenting and concurring opinion, Judges Wolfrum and Kateka expressed their opinion that the UK acted to promote an ulterior motive in the declaration of the MPA and, in so doing, violated the standard of good faith.<sup>79</sup> Going a step further, the judges saw in the UK's conduct a similar disregard for the rights of Mauritius that had continued from the colonial period. This view was reaffirmed in the ICJ Advisory Opinion on the Chagos dispute, delivered on 25 February 2019, as the Court concluded that "the process of decolonization of Mauritius was not lawfully completed when that country acceded to independence" and that "the United Kingdom is under an obligation to bring to an end its administration of the Chagos Archipelago as rapidly as possible".<sup>80</sup>

The obligation of duty to cooperate is being extensively used by an overarching dispute-settlement mechanism (e.g., ITLOS or the UNCLOS Annex VII Tribunals). Its application beyond UNCLOS could help in understanding its precise meaning and defining its contours. Such an occasion arose when the ICJ dealt with a whaling dispute between Australia and Japan.<sup>81</sup> In this case Australia had claimed breach of the Whaling Convention by a Japanese programme that involved the killing of whales in the Antarctic known as "JARPA II".<sup>82</sup> In its 2014 final decision, by 12 votes to 4, the Court found that the special permits granted by Japan in connection with JARPA II did not fall within the category of "scientific whaling" (permitted under Article VIII.1 of the Convention).

Meanwhile, the striking feature of the decision handed down by the ICJ was pronounced as "duty to cooperate". The Court's articulation of a duty of States to cooperate comes from the convention-based obligation that a State Party granting a permit for whaling must immediately report it to the International Whaling Commission (IWC). In this context, it noted Japan's duty to cooperate with the IWC and its Scientific Committee, a duty that it had failed to perform. The obligation was given a detailed treatment by Judge

*ad hoc* Hilary Charlesworth in her separate opinion, succinctly describing the duty to cooperate in the environmental context as follows:

*The concept of a duty of co-operation is the foundation of legal regimes dealing (inter alia) with shared resources and with the environment. It derives from the principle that the conservation and management of shared resources and the environment must be based on shared interests, rather than interests of one party. Moreover, the decision envisaged that "[s]tates may not take a narrow or formalistic approach to the duty of cooperation. It is a substantive duty to consider the views of the IWC and the Scientific Committee and to co-operate with the international scientific community in any research on whales".*<sup>83</sup>

The Court's formulation of duty to cooperate has significant implications for the role of States and international organisations in a fragmented legal order. It is so, especially in the context of complex MEAs (which give high priority to scientific uncertainty and technical issues), which increasingly form the legal basis under which their State Parties seek relief. A series of recent judicial opinions and decisions have opened up new vistas for judicial innovations. For example, the IACHR advisory opinion of 7 February 2018<sup>84</sup> spelled out legal consequences for transboundary environmental harm. The ICJ's ground-breaking judgements in *Costa Rica v. Nicaragua* demonstrated the calculation of compensation<sup>85</sup> and the decision in *Bolivia v. Chile*<sup>86</sup> clarified the difference between "willingness to negotiate" and "obligation to negotiate" on the basis of acquiescence. Can we decipher meanings and content of a new "duty to cooperate" from the scattered legal views of these judicial-environmental sentinels in cases of transboundary environmental harm?

## 8. Towards an International Environment Court?

In the context of the role of ICTs as environmental sentinels, there has been concerted scholarly discourse for some time on the need for an IEC. It appears to be the product of a needs-based response technique that the international community

has been pursuing from time to time in various areas of international law. It is reminiscent of a similar quest for adjudication of criminal matters through a specialised International Criminal Court. Therefore, it seems pertinent to briefly examine the rationale for a similar special court for international environmental disputes. The proposal for a new specialised court was made as early as in the Hague Declaration on the Environment (1989).<sup>87</sup> The concrete steps for the establishment of an IEC were in the form of a Draft Convention and a Draft Treaty. In 2002, the UNEP Global Judges Symposium<sup>88</sup> also examined the need for an independent credible judicial forum that could help resolve environmental disputes.

Several arguments have been advanced to justify the establishment of an IEC. These include

- the number of pressing environmental problems that humans are facing and the need for a specialised adjudicatory bench comprising experts in international environmental law to consider them;
- the need to enable international organisations to be parties to disputes related to the protection of environment;
- the need for individuals and groups to have access to environmental justice at the international level; and
- the need for dispute-settlement procedures that enable the common interest in the environment to be addressed.<sup>89</sup>

The cases dealt with by ICTs illustrate the difficulties involved in defining an international environmental dispute. While these cases can all be defined in terms of environmental law and thus potentially could have been brought before an international environmental court, if it had existed, they have another common element. The cases in question also can and have been defined in terms of several other areas of international law.

Genuine concern has been expressed regarding the ICJ's role and ability as potential global environmental watchdog. For example, in the *Gabcikovo-Nagymaros case*,<sup>90</sup> the ICJ had to deal with international water law and international environmental law in general, as well as the law of State succession and the law of treaties. Thereafter, it was contended that the "environmental track record of the ICJ is rather unimpressive, since environmental concerns and well-established international norms with regard to the environment

have played almost no role in cases such as the *Gabcikovo-Nagymaros Project case*".<sup>91</sup> More recently, in another context, it was stated that the "ICJ is actually a highly conservative tribunal...avoiding politically contentious cases as it did in France's nuclear testing".<sup>92</sup>

In the wake of recent judicial decisions and arbitral awards pertaining to environmental issues and the rather grim scenario for international environmental adjudication, it is legitimate to invite scholarly interest as regards the possibility of a specialised IEC as an "ideal". Although this article cannot provide a detailed legal analysis and justification for an IEC, that justification will be seen in the authors' forthcoming (2020)<sup>93</sup> work.

## 9. Conclusion

In the era of institutionalised international environment cooperation, an effort to carve out robust institutions for governance of the environment appears to be the need of the hour. The simmering global environmental challenges envisage new patterns of law-making in the field. International environmental law has come a long way from "limited/utilitarian concerns" to "common concerns of humankind", entrenching a new perspective that has changed the attitude of sovereign States towards environmental protection, as evidenced by the smooth adoption of the UN General Assembly's 2030 Sustainable Development Goals.<sup>94</sup> It has resulted in the coming together of sovereign States on an institutionalised platform as well as the laying down of a consensual threshold for their environmental behaviour. The proliferation and development of MEAs has apparently been accepted as a consensual, cooperative method for dealing with global environmental problems. The existence of it is determined by the political will of the contracting States.

The Sustainable Development Goals will now provide a new axis around which States address issues such as climate change, forests, biodiversity and desertification. They also reflect a strong sense of multilateralism at work in addressing some of the common concerns that States consider necessary to regulate through these instrumentalities in which the lines between "hard" law and "soft" law begin to blur. In this new context, the ICTs have a strong new role as the "new sentinels" for the protection of the global environment.

In the meantime, due to the rise in their number and the specialised treaty-based regimes wherein these judicial institutions are located, ICTs have come to play an important role. The concurrent growth in MEAs and ICTs and their work within an adversarial system are significant, particularly in disabusing States of the misplaced notion that ICTs were not suitable mechanisms for implementing international environmental law. It is noted, however, that the new ICTs are attempting to bring about global cooperation through tools and techniques that are *sui generis* in the environmental field.

As a corollary to this robust trend, we can expect more innovative approaches to be adopted by the ICTs to address the problem-specific environmental disputes of the 21st century. Notwithstanding this important role, a lingering question still haunts us as regards the need for a specialised IEC (like the International Criminal Court that was brought about through the 1998 Rome Statute).<sup>95</sup> Will such an IEC emerge in our hour of need as humankind faces a crisis of survival on planet Earth? If so, its creation and nature are still hidden in the womb of the future. The sovereign States – as “united nations” – shall again (like the advent of the UN Charter in 1945) have to rise to the occasion before it is too late.

## Endnotes

<sup>1</sup> The term “common concern” appears, for example, in UN General Assembly Resolution 43/53, UN Doc. A/RES/43/53 (adopted 6 December 1988); available at <https://www.ipcc.ch/site/assets/uploads/2019/02/UNGA43-53.pdf>. For its invocation in the current environmental challenge of plastics pollution, see Sidhu, B.K. and Desai, B.H. 2018. “Plastics Pollution: A New Common Concern of Humankind?” *Environmental Policy and Law* 48(5): 252–255.

<sup>2</sup> Voigt, C. 2019. “International Courts and the Environment: The Quest for Legitimacy”. In: Voigt, C. (Ed.) *International Judicial Practice on the Environment: Questions of Legitimacy*, at 1. Cambridge: Cambridge University Press. Available at <https://www.cambridge.org/core/books/international-judicial-practice-on-the-environment/DD4BDB3E58370FBF6846D5917207963B>.

<sup>3</sup> Brierly, J.L. 1963. *The Law of Nations: An Introduction to the International Law of Peace*, at v. Sixth edition. Oxford: Clarendon Press.

<sup>4</sup> In a telling comment on this issue, at the turn of the 20th century, when Mohandas K. Gandhi - the leader of India’s freedom struggle - was asked if he would like free India to become like Great Britain, pithily remarked: “Certainly not. If it took Britain half the resources of the globe to be what it is today, how many globes would India need?” See Tolba, M.K. and Rummel-Bulska, I. 1998. *Global Environmental Diplomacy:*

*Negotiating Environmental Agreements for the World 1973–1992*, at 1. Cambridge MA: MIT Press.

<sup>5</sup> Lachs, M. 1990. “The Challenge of the Environment”. *International and Comparative Law Quarterly* 39(3): 663–667.

<sup>6</sup> There is a debate over the “fragmentation” that arises due to such a piecemeal approach. See *e.g.*, UNEP. 2011. “Fragmentation of Environmental Pillar and its Impact on Efficiency and Effectiveness”. Issues Brief No.2. The Environmental Dimension of IFSD. Nairobi: UNEP/DELIC.

<sup>7</sup> See Desai, B.H. 2010. *Multilateral Environmental Agreements: Legal Status of the Secretariats*. New York: Cambridge University Press.

<sup>8</sup> *Ibid.*, at 3.

<sup>9</sup> For detailed discussion and exposition on the overarching subject of international environmental governance, see Desai, B.H. 2014. *International Environmental Governance: Towards UNEPO*. Boston MA: Brill Nijhoff.

<sup>10</sup> See Article 2(3) of the UN Charter that requires that all Members “shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered”. Available at <https://treaties.un.org/doc/publication/ctc/uncharter.pdf>.

<sup>11</sup> These include old courts and tribunals that have redefined their role as per the changing needs of the international system. For details, see *supra*, note 7.

<sup>12</sup> For a detailed exposition on this phenomenon reflecting the role of the UN, see Chesterman, S. *et al.* (Eds) 2019. *The Oxford Handbook of the United Nations Treaties*, at 1. New York: Oxford University Press.

<sup>13</sup> For details, see *supra*, note 7.

<sup>14</sup> Examples of “trigger events” include, for example, the evidence released by the British Antarctic expedition on stratospheric ozone-layer depletion; increasing cases of unregulated dumping of hazardous wastes posing threat to humans and the environment; or scientific reports on the accumulation of greenhouse gases in the atmosphere contributing to global climatic changes. In each of these cases, the trigger provided by these reports/incidents led UNEP on its own or in collaboration with agencies such as the World Maritime Organization to initiate negotiating processes that culminated in the following respective global treaties: 1985 Vienna Convention on Depletion of the Ozone Layer; 1989 Basel Convention on Transboundary Movements of Hazardous Wastes and their Disposal; and 1992 UN Framework Convention on Climate Change.

<sup>15</sup> Minamata Convention on Mercury, 11 October 2013. Available at <http://www.mercuryconvention.org/Portals/11/documents/publications/MinamataConventiontextEn.pdf>. The agreement is a response to the realisation that mercury pollution is a global problem that no one country can solve alone. The threat is not recent in origin or recognition, however. In 1956, the first case of mercury poisoning was diagnosed in the Japanese city of Minamata, due to heavy industrial dumping of methylmercury waste by the Chisso Corporation in the Minamata Bay. The problem became so widespread that it came to be called Minamata disease. See Ministry of the Environment, Japan. 2013. “Lessons from Minamata Disease and Mercury Management in Japan”. Available at [http://www.env.go.jp/chemi/tmms/pr-m/mat01/en\\_full.pdf](http://www.env.go.jp/chemi/tmms/pr-m/mat01/en_full.pdf). Decades after this dumping ceased, thousands of survivors of these incidents are still suffering from a host of neurological symptoms, including

tremors, dizziness, headaches, memory loss, and vision and hearing problems; the most severe cases also involve developmental disabilities, cognitive and motor dysfunction, and physical abnormalities; see, Kessler, R. 2013. "The Minamata Convention on Mercury: A First Step toward Protecting Future Generations". *Environmental Health Perspectives* 121(10). Available at <http://ehp.niehs.nih.gov/121-a304/>.

<sup>16</sup> World Health Organization. 2005. *International Health Regulations (2005)*. Available at <https://www.who.int/ihr/publications/9789241580496/en/>. (For a detailed discussion on the development of international law to address specific regulatory matters, see, Desai, B.H. 2018. "Making Sense of International Environmental Law-making Process at Time of Perplexity". *Yearbook of International Environmental Law* 29: 3–32. Available at <https://academic.oup.com/yielaw/article/doi/10.1093/yiel/yvz063/5699263>).

<sup>17</sup> For more information on global and regional treaties, see United Nations Information Portal on Multilateral Environmental Agreements [InforMEA]. Available at <http://www.informea.org/treaties/>.

<sup>18</sup> Handl, G. 1997. "Compliance Control Mechanisms and International Environmental Obligations". *Tulane Journal of International and Comparative Law* 5: 29–49, at 30. In general, it might be appropriate to differentiate between "implementation" as the first step towards rendering an international obligation effective domestically, and (subsequent) "compliance" with, or abidance by, the international obligation concerned. Thus, at UNCED, the wording of subparagraph (a) of what was then chapter 39, paragraph 7 of Agenda 21 ("Implementation Mechanism") initially included a reference to "compliance with international legal instruments". However, that reference was deleted and replaced by "effective, full and prompt implementation" as the larger overarching concept. *Ibid.*

<sup>19</sup> Handl, *ibid.*, at 31, 32.

<sup>20</sup> 1987 Montreal Protocol to the 1985 Vienna Convention on the Protection of the Ozone Layer [(1987) 25 *ILM* 1529]; the 1992 Convention for the Protection of the Marine Environment of the North-East Atlantic [(1993) 32 *ILM* 1069]; 1997 Kyoto Protocol to the 1992 UN Framework Convention on Climate Change [(1998) 37 *ILM* 22] and more recent examples include the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters; and the Cartagena Protocol on Biosafety to the 1992 Convention on Biological Diversity.

<sup>21</sup> Fitzmaurice, M.A. and Redgwell, C. 2000. "Environmental Non-Compliance Procedures and International Law". *Netherlands Yearbook of International Law* 31: 35–65, at 39. These objectives are confirmed by the conclusions of the Group of Legal Experts under the Montreal Protocol which state that an NCP "allows and encourages the parties to assist each other in the implementation of the control measures agreed by them and to a certain degree to prevent them from referring cases of breaches of the Protocol directly to confrontational settlement of dispute procedure". Carola Bjorklund, the first President of the Montreal Protocol Non-compliance Implementation Committee, described the Montreal Protocol NCP "as an assisting rather than dispute solving body which is to act as a new forum of settling disputes outside the traditional judicial framework". *Ibid.*

<sup>22</sup> For instance, Article 27 of the 1992 Convention on Biological Diversity provides for traditional dispute settlement, namely, negotiation, good offices, mediation, arbitration and/or the ICJ or conciliation.

<sup>23</sup> Fitzmaurice and Redgwell, *supra*, note 21, at 37. Also see, Adede, A.O. 1995. "Avoidance, Prevention and Settlement of International Disputes". In: Lin, S. and Kurukulasuriya, L. *et al.* (Eds) *UNEP's New Way Forward: Environmental Law and Sustainable Development*. Nairobi: UNEP/Earthprint Publication.

<sup>24</sup> Boyle, A.E. 1991. "Saving the World? Implementation and Enforcement of International Environmental Law through International Institutions". *Journal of Environmental Law* 3: 229–245, at 230.

<sup>25</sup> Brunnee, J. 2006. "Multilateral Environmental Agreements and the Compliance Continuum", at 14.

<sup>26</sup> The relationship between compliance mechanisms and dispute-settlement mechanisms has never been discussed and analysed in detail during any of the negotiations leading to the adoption of compliance procedures and mechanisms. One of the main reasons for this might be that the traditional dispute mechanisms have only been used to a limited extent and therefore the question has never arisen in practice. The only exception would appear to be the triggering by Ireland of the OSPAR Convention's dispute-settlement procedure in the context of its differences with the UK in relation to British nuclear installations on the Irish Sea. See, OSPAR Arbitration (2003) 42 *ILM* 1118. Available at <https://pca-cpa.org/en/cases/34/>.

<sup>27</sup> Excerpt from Thomas Jefferson's letter to Samuel Kercheval, 12 July 1816. Inscribed on the wall of Thomas Jefferson Memorial, Washington DC, USA.

<sup>28</sup> Briery, J.L. 1949. *The Law of Nations: An Introduction to the International Law of Peace*, at 86. 4th edition. Oxford: Clarendon Press.

<sup>29</sup> *Ibid.*, at 94.

<sup>30</sup> Bowett, D.W. 1982. *The Law of International Institutions*, at 1. 4th edition. London: Stevens & Sons.

<sup>31</sup> See Alter, K.J. 2011. "The Evolving International Judiciary". *Annual Review of Law & Social Science* 7: 387–415. Available at [http://faculty.wcas.northwestern.edu/~kal438/KarenJAlter2/International\\_Regime\\_Complexity\\_files/AlterEvolvingInternationalJudiciary2011.pdf](http://faculty.wcas.northwestern.edu/~kal438/KarenJAlter2/International_Regime_Complexity_files/AlterEvolvingInternationalJudiciary2011.pdf).

<sup>32</sup> Helfer, L. and Slaughter, A.M. 1997. "Toward a Theory of Effective Supranational Adjudication". *Yale Law Journal* 107(2): 273–391, at 274. See, generally, Merrills, J.G. 2006. "New Horizons for International Adjudication". *The Global Community Yearbook of International Law and Jurisprudence* 1:47-74.

<sup>33</sup> Kelly, P. 1987. "The International Court of Justice". *Yale Journal of International Law* 12: 342–374.

<sup>34</sup> See, *e.g.*, Tiba, F.K. 2006. "What Caused the Multiplicity of International Courts and Tribunals?" *Gonzaga Journal of International Law* 10: 202–225 (stating that "this proliferation of international courts and tribunals has to be seen as a part of the greater picture of the proliferation of international organizations. This in turn needs to be seen in the context of a growing interdependence between countries and international cooperation that necessitates an institutional mechanism to regulate these new areas of cooperation"). Moreover, it has been contended that "there is one fundamental overarching explanation that is usually summarized in catch words such as globalization and interdependence" and which effectively means that "an increasing number of state functions can no longer be performed in splendid isolation"); and Blokker, N.M. 2001. "Proliferation of International Organizations: An Exploratory Introduction", at 1, 11. In: Blokker, N.M. and Schermers, H.G. (Eds) *Proliferation of International Organizations. Legal issues*. The Hague: Kluwer.

<sup>35</sup> See Helfer, L. and Slaughter, A.M. 2005. "Why States Create International Tribunals: A Response to Professors Posner and Yoo". *California Law Review* 93: 3–57, at 16. As put by the authors, "a marked increase in state recognition of the jurisdiction of both new and existing independent courts and tribunals. Such recognition takes two principal forms. First, states are increasingly ratifying treaties that require dispute resolution in international courts. Rising ratification rates are especially pronounced in the case of the World Trade Organization Agreement, the ICC statute, and regional tribunals. Second, states are recognizing the jurisdiction of independent courts and tribunals even where the decision to do so is optional".

<sup>36</sup> As succinctly put by Shany, Y. 2009. "No Longer a Weak Department of Power? Reflections on the Emergence of a New International Judiciary". *European Journal of International Law* 20(1): 73–91, at 74: "Whilst the ICJ and other courts may serve a useful purpose by offering a non-violent outlet for the resolution of simmering low-level and mid-level international conflicts, their contribution to the resolution of the most dramatic conflicts of the post-World War Two era (such as cold war, decolonization, the Middle East conflict, and the war on terror) has been modest".

<sup>37</sup> In the context of the ICJ, it was argued on the behalf of third world nations that "the Court's composition does not reflect the reality of the modern world and is not representative of the international community of today. They have further argued that the Court is limited to implementing a legal order to the creation of which many new States have not contributed". In: Guillaume, G. 1995. "The Future of International Judicial Institutions". *International and Comparative Law Quarterly* 44: 848–862, at 852.

<sup>38</sup> On 21<sup>st</sup> century transnational judicial order, see *supra*, note 31.

<sup>39</sup> Ginsburg, T. and McAdams, R.H. 2004. "Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution". *William and Mary Law Review* 45: 1229–1340, at 1241. See also, Martineau, A.C. 2009. "The Normalizing of Adjudication in Complex International Governance Regimes: Patterns, Possibilities and Problems: The Politics of Normalization". *New York University Journal of International Law and Politics* 41: 823–836.

<sup>40</sup> Petersmann, E.U. 1999. "Constitutionalism and International Adjudication: How to Constitutionalize the U.N. Dispute Settlement System?" *New York University Journal of International Law and Politics* 31: 753–790, at 754–755.

<sup>41</sup> For a discussion, see Shany, Y. 2003. *The Competing Jurisdictions of International Courts & Tribunals*, at 4–7. Oxford: Oxford University Press.

<sup>42</sup> Charney, J. 1998. "Is International Law Threatened by Multiple International Tribunals?" *Recueil des Cours* 271: 101–382, at 102. Also, see Reisman, M. 1996. "The Supervisory Jurisdiction of the International Court of Justice: International Arbitration and International Adjudication". *Recueil des Cours* 258: 9.

<sup>43</sup> See Schabas, W.A. 2014. *International Courts and Tribunals*. Cheltenham: Edward Elgar.

<sup>44</sup> *Supra*, note 36, at 76.

<sup>45</sup> On the increasing authority of international judicial institutions, see von Bogdandy, A. and Venzke, I. 2013. "On the Functions of International Courts: An Appraisal in Light of their Burgeoning Public Authority". *Leiden Journal of International Law* 26: 49–72; and Venzke, I. 2013. "Understanding the

Authority of International Courts and Tribunals: On Delegation and Discursive Construction". *Theoretical Inquiries in Law* 14: 381–409.

<sup>46</sup> For detailed discussion, see von Bogdandy, A. and Venzke, I. 2011. "Beyond Dispute: International Judicial Institutions as Law Makers". *German Law Journal* 12(5): 979–1003.

<sup>47</sup> Bogdandy and Venzke, *supra*, note 45, at 50.

<sup>48</sup> *Supra*, note 36, at 76.

<sup>49</sup> *Ibid.*, at 82.

<sup>50</sup> Desai, B.H. 1992. "Threats to the World Eco-System: A Role for Social Scientists". *Social Science & Medicine* 35(2): 589–596, at 589.

<sup>51</sup> Romano, C.P.R. 2000. *The Peaceful Settlement of International Environmental Disputes: A Pragmatic Approach*, at 163. The Hague: Kluwer Law International. See generally on environmental dispute settlement, Okowa, P.N. 1998. "Environmental Dispute Settlement: Some Reflections on Recent Developments". In: Evans, M.D. (Ed.) *Remedies in International Law: The Institutional Dilemma*. Oxford: Hart Publishing; Craik, A.N. 1998. "Recalcitrant Reality and Chosen Ideals: The Public Function of Dispute Settlement in International Environmental Law". *Georgetown International Environmental Law Review* 10: 551–580; Koskenniemi, M. 1991. "Peaceful Settlement of Environmental Disputes". *Nordic Journal of International Law* 60: 73–92; Hunter, D. *et al.* 2002. *International Environmental Law and Policy*. New York: New York Foundation Press; and Birnie, P. 1988. "The Role of International Law in Solving Certain Environmental Conflicts". In: Carroll, J.E. (Ed.) *International Environmental Diplomacy: The Management and Resolution of Transfrontier Environmental Problems*. New York: Cambridge University Press.

<sup>52</sup> *Supra*, note 8.

<sup>53</sup> See, generally, Bilder, R. 1982. "Some Limitations of Adjudication as an International Dispute Settlement Technique". *Virginia Journal of International Law* 23(1): 1–12. Also see, Fuller, L.L. 1978. "The Forms and Limits of Adjudication". *Harvard Law Review* 92: 353–409; Gillroy, J.M. 2006. "Adjudication Norms, Dispute Settlement Regimes and International Tribunals: The Status of Environmental Sustainability in International Jurisprudence". *Stanford Journal of International Law* 42(1): 1–52; and Wolfrum, R. 2008. "The Protection of Environment through International Courts and Tribunals". In: Fischer-Lescano, A. *et al.* *Peace in Liberty: Essays in the honor of Michael Bothe*. Baden-Baden: Nomos Publication.

<sup>54</sup> *Ibid.*

<sup>55</sup> Craik, *supra*, note 51, at 563.

<sup>56</sup> On the proliferation of the courts and tribunals, generally, see Spelliscy, S. 2001. "The Proliferation of International Tribunals: A Chink in the Armor". *Columbia Journal of Transnational Law* 40: 143–175; Jennings, Sir R.Y. 1995. "The Proliferation of Adjudicatory Bodies: Dangers and Possible Answers". *American Society of International Law* 9: 2–7; Abi-Saab, G. 1999. "Fragmentation or Unification: Some Concluding Remarks". *New York University Journal of International Law and Politics* 31: 919–933; Charney, *supra*, note 42, at 115; and Stephens, T. 2006. "Multiple International Courts and 'Fragmentation' of International Environmental Law". *The Australian Yearbook of International Law* 25: 227.

<sup>57</sup> The term "judicialization" has been described as "the process through which a dispute-resolution mechanism appears, stabilizes and develops authority over the normative structure

governing exchange in a given community. The judicialisation of politics is the process by which triadic lawmaking progressively shapes the strategic behavior of political actors engaged in interactions with one another"; see Stephens, T. 2009. *International Courts and Environmental Protection*", at 9. New York: Cambridge University Press. Also see Stone, A. 1999. "Judicialisation and the Construction of Governance". *Comparative Political Studies* 32: 147–184. Hence, while the term "proliferation" is used to describe the quantitative increase in the number and type of international courts, "judicialization" captures the idea that there has been a qualitative expansion in the role of international courts in some areas of international relations and law.

<sup>58</sup> Sands, P. 1998. "International Environmental Litigation: What Future?" *Review of European Community and International Environmental Law* 7(1): 1–3, at 1.

<sup>59</sup> Desai, B.H. 2006. *Creeping Institutionalization: Multilateral Environmental Agreements and Human Security*, at 13. Bonn: UNU-EHS.

<sup>60</sup> For some theoretical and practical concerns on legitimacy, see Savasan, Z. 2019. "Legitimacy Questions of Non-Compliance Procedures: Examples from the Kyoto and Montreal Protocols", at 364. In: Voigt (Ed.), *supra*, note 2.

<sup>61</sup> For instance, the 1997 Kyoto Protocol to the UN Framework Convention on Climate Change (1992) comprises a full-fledged compliance mechanism apart from a standard dispute-settlement clause.

<sup>62</sup> Romano, *supra*, note 51.

<sup>63</sup> Stephens, *supra*, note 57, at 13.

<sup>64</sup> Peters, A. 2002. "Cooperation in International Dispute Settlement", at 110. In: Delbruck, J. (Ed.) *International Law of Cooperation and State Sovereignty*. Berlin: Duncker & Humboldt. Also see Peters, A. 2003. "International Dispute Settlement: A Network of Cooperational Duties". *European Journal of International Law* 14(1): 1–34.

<sup>65</sup> For instance, see Friedman, W. 1964. *The Changing Structure of International Law*. New York: Columbia University Press.

<sup>66</sup> The author offers the following as a definition of cooperation in this context: "the voluntary coordinated action of two or more States which takes place under a legal regime and serves a specific objective"; Wolfrum, R. 2010. "International Law of Cooperation". *Max Planck Encyclopedia of Public International Law* V: 828–832, para. 50.

<sup>67</sup> Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations, G.A. Res. 2625(XXV) of October 24, 1970, U.N.G.A. Off. Rec. 25th Session, Supp. No. 28 (A/8028) at 121.

<sup>68</sup> *Supra*, note 66, paras 57–63.

<sup>69</sup> Report of the Expert Group Meeting on Identification of Principles of International Law for Sustainable Development, Geneva, Switzerland, 26–28 September 1995; available at <https://digitallibrary.un.org/record/212979?ln=en>.

<sup>70</sup> See *Nuclear Tests Case (Australia v. France)*, ICJ Reports (1974) 253, at 268, para. 46: "One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international cooperation, in particular in an age when this cooperation in many fields is becoming increasingly essential" (emphasis added).

<sup>71</sup> See Hagiwara, K. 2019. "Sustainable Development before International Courts and Tribunals: Duty to Cooperate and States' Good Faith". In: Voigt (Ed.), *supra*, note 2, at 167.

<sup>72</sup> [IACHR, Advisory Opinion OC-23/17 of November 15, 2017. Requested by the Republic of Colombia: The Environment and Human Rights. Available at <https://elaw.org/system/files/attachments/publicresource/English%20version%20of%20AdvOp%20OC-23.pdf>. Ed.]

<sup>73</sup> This IACHR Advisory Opinion, seeking to reaffirm and extrapolate the ratio of the *Trail Smelter Arbitration*, observed: "As regards transboundary harms, a person is under the jurisdiction of the State of origin if there is a causal relationship between the event that occurred in its territory and the affectation of the human rights of persons outside its territory. The exercise of jurisdiction arises when the State of origin exercises effective control over the activities carried out that caused the harm and consequent violation of human rights"; see Feria-Tinta, M. and Milnes, S. 2018. "The Rise of Environmental Law in International Dispute Resolution: Inter-American Court of Human Rights issues Landmark Advisory Opinion on Environment and Human Rights", at 1, 5. *EJIL:Talk!*, 26 February. Available at <https://www.ejiltalk.org/the-rise-of-environmental-law-in-international-dispute-resolution-inter-american-court-of-human-rights-issues-landmark-advisory-opinion-on-environment-and-human-rights/>.

<sup>74</sup> *Mox Plant case (Ireland v. United Kingdom)*, Provisional Measures, Order of 3 December 2001, ITLOS No. 10.

<sup>75</sup> *Ibid.*, paras 82 and 86. The provisional measure order given by the Tribunal on 3 December 2001 underscored: "Ireland and the United Kingdom shall cooperate and shall, for this purpose, enter into consultations forthwith with three objectives:

(a) To exchange further information with regard to possible consequences for the Irish Sea arising out of the commissioning of the MOX plant;

(b) To monitor risks or the effects of the operation of the MOX plant for the Irish Sea; and

(c) To devise, as appropriate, measures to prevent pollution of the marine environment which might result from the operation of the MOX plant".

<sup>76</sup> *Case Concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore)*, Provisional Measures, Order of 8 October 2003, ITLOS No. 12.

<sup>77</sup> ITLOS, Case no. 21, 2 April 2015, para. 140.

<sup>78</sup> Award in the Arbitration regarding the Chagos Marine Protected Area between Mauritius and the United Kingdom of Great Britain and Northern Ireland, 18 March 2015. Available at [https://legal.un.org/riaa/cases/vol\\_XXXI/359-606.pdf](https://legal.un.org/riaa/cases/vol_XXXI/359-606.pdf).

<sup>79</sup> *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Dissenting and Concurring Opinion of Judge Wolfrum and Judge Kateka, para. 90; available at [https://legal.un.org/riaa/cases/vol\\_XXXI/359-606.pdf](https://legal.un.org/riaa/cases/vol_XXXI/359-606.pdf).

<sup>80</sup> *ICJ Advisory Opinion on the Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, 25 February 2019; Operative Paragraph 183 (3) and (4), at 13. Available at <https://www.icj-cij.org/files/case-related/169/169-20190225-01-00-EN.pdf>; see also *supra*, notes 78 and 79.

<sup>81</sup> *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*, case judgment of 31 March 2014. Available at <https://www.icj-cij.org/en/case/148/judgments>.

<sup>82</sup> *Ibid.*



<sup>83</sup> *Supra*, note 70; and see separate opinion of Judge ad-hoc Hilary Charlesworth at 235; available at <https://www.icj-cij.org/en/case/148/judgments>.

<sup>84</sup> *Supra*, note 72.

<sup>85</sup> *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, 2 February 2018, at 41; available at <https://www.icj-cij.org/files/case-related/150/150-20180202-JUD-01-00-EN.pdf>. Costa Rica was ultimately awarded the sum of US \$ 378,890.59.

<sup>86</sup> *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, 1 October 2018, at 54; available at <https://www.icj-cij.org/files/case-related/153/153-20181001-JUD-01-00-EN.pdf>.

<sup>87</sup> See, Hague Declaration on the Protection of the Atmosphere (sometimes known as the Hague Declaration on the Environment). 11 March 1989. 28 ILM 1308. (“Without prejudice to the international obligations of each State, the signatories acknowledge and will promote the following principles:… (c) The principle of appropriate measures to promote the effective implementation of and compliance with the decisions of the new institutional authority, decisions which will be subject”).

<sup>88</sup> Report of the Global Judges Symposium on Sustainable Development and the Role of Law, 12 November 2002, UN Doc. UNEP/GC.22/INF/24; available at <https://digitallibrary.un.org/record/484610?ln=en>.

<sup>89</sup> Hey, E. 2000. *Reflections on an International Environmental Court*, at 3. The Hague: Kluwer Law International.

<sup>90</sup> *Gabcikovo-Nagymaros Project (Hungary v. Slovakia)*, ICJ Reports 1997, at 7.

<sup>91</sup> Schuppert, F. 2014. “Beyond the national resource privilege: towards an International Court of the Environment”. *International Theory* 6(1): 68–97, at 88.

<sup>92</sup> Ratner, S. 2013. “Ethics and International Law: Integrating the Global Justice Project(s)”. *International Theory* 5(1): 1–34, at 17.

<sup>93</sup> Desai, B.H. and Sidhu, B.K. 2020. *International Environment Court: A Legal Study of an Ideal*. Boston MA: Brill Nijhoff [forthcoming].

<sup>94</sup> On 25 September 2015, the UN General Assembly, after three years of marathon negotiations, adopted the Sustainable Development Goals, towards the overall objectives of ending poverty, protecting the planet, and ensuring prosperity for all. Each goal has specific targets to be achieved over the next 15 years. For details see <http://www.un.org/sustainable-development/sustainable-development-goals/>.

<sup>95</sup> The Rome Statute of the International Criminal Court. UNTS *Volume 2187*: No. 38544. Rome, 1998, in force as of 1 July 2002. Available at <https://treaties.un.org/doc/Publication/UNTS/Volume%202187/v2187.pdf>.