STEP INTO THE FUTURE: REPOSITIONING ADJUDICATION AS A KEY ASPECT OF INTERNATIONAL ENVIRONMENTAL GOVERNANCE*

Abstract
The world is witness to the increase in ecological threats and crisis from diverse sources which has resulted in the decline of its biodiversity. Though international environmental governance seeks to address the issue, it is quite evident that existing international legal and governance mechanisms have not been potent enough to adequately address this decline. In light of contemporary reflections on international environmental law, it is vital to evaluate the place of international adjudication in environmental governance. By evaluating select environmental cases determined by extant international institutions in the past, the adjudicative role played by these institutions in environmental related disputes will be weighed against the backdrop of aspirations for an alteration in the current design for international environmental governance. Analysis of environmental disputes that have been subjected to international adjudication by extant international institutions highlight legal gaps that should be addressed for the purpose of establishing an effective international environmental governance regime.

Keywords: International environmental governance, adjudication, specialist court

1. Introduction

Environmental governance at the global level requires an extraordinary degree of cooperation among nations. It presents a difficult 'collective action' problem.[1]It is on account of these conflicts that adjudication is a fundamental aspect of environmental governance at international level. This is because so long as environmental needs remain at variance with economic interests, it will continue to be subject to dispute resolution before international institutions as courts and other adjudicative tribunals.

2. Impact of Select Cases on International Environmental Governance

This is an attempt to examine significant disputes that have been subject to international adjudication and how they contributed to the jurisprudence of international environmental law. The select cases are laid out to highlight the contributions and inadequacies of international adjudication in the current environmental governance regime.

Trail Smelter Case

Trail Smelter Case;[2] one of the most cited and fundamental cases for international environmental law; started as a local issue between two towns in different States, and one smelting plant. Northport is a town in Stevens County located in Washington, United States, while Trail is a town in British Columbia, Canada approximately twenty miles north of Northport across the border. Both towns sit along the Columbia River which runs from British Columbia into Oregon. The case involved a smelting plant in Trail which was quintessential to the economy of Trail, but the surrounding environment was bedeviled by waste emitted from the smelter. Consequently, it assumed economic and political influence that

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1 A collective action problem occurs when rational individual action by each of the members of a group would lead to a sub-optimal collective outcome. The most notable examples are in natural resource or global commons use where maximizing individual utility leads to a depletion and ultimate ruin of the resource. See for example, Hardin, Garret. 1968. The Tragedy of the Commons. *Science,* 13 December. Hardin citing the case of a common pasture where adding more cattle is a rational individual decision but results in the destruction of the shared natural resource and ultimately to negative economic consequences. The seminal work in collective action theory is Mancur Olson's 'The Logic of Collective Action: public goods and the theory of groups,' 1971.

2Arbitral Tribunal., 3 U.N. Report on International Arbitral Awards 1905 (1941)

allowed the smelter to pollute its surroundings, imposing environmental injury.[3] The waste emitted by the plant was hazardous fumes (sulfur dioxide), and it caused damage to plant life, forest trees, soil, and crop yields across the border in Washington State in the US. This led to the institution of a case by the United States against Canada for an injunction against further air pollution in the state of Washington by the Trail Smelter.[4]

Two principles arising from the *Trail smelter* case have been quite relevant to international environmental law. They are that the polluter pays and that states have a duty to prevent trans-boundary harm. Prior to the case, no dispute on air pollution had been determined by the Tribunal. Notwithstanding the challenge created by lack of precedence, that same year, a Convention established an arbitral tribunal which was aided by scientific experts appointed by the governments.[5] The case is key to this discourse because it establishes a significant point which is that states are more likely to take decisive action when difficult circumstances arise due to environmental conditions. In such instance, theses states will be forced to consider the environment in a sustainable perspective.

The Tribunal, relying more on international law principles rather than that of IEL determined that the duty to protect other states against harmful acts by individuals from within its jurisdiction at all times is the responsibility of a state. It concluded, with respect to future harm, that: 'no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence'. It is the responsibility of the State to protect other states against harmful act by individuals from within its jurisdiction at all times. *Trail Smelter* case is best remembered in the annals of the evolution of international environmental law as one in which the principles of state sovereignty and territorial integrity were not only highlighted, but also reaffirmed.
A significant legacy of *Trail Smelter Case* in North America is that it led to the establishment of a detailed regime to reduce the harmful impact of sulphur dioxide emitted from the smelter. At international level, the case represents the first application of the principle of respect for the territorial integrity of the states to issues relating to transboundary environmental damage as it signaled the end of the concept of absolute sovereignty and set the stage for the advent of international law which was concerned with balancing environmental interests of states.[6]

The case is nonetheless significant to advocacy for a specialist international environmental court as it brings to the limelight, issues that necessitate the call for an ICE. Certain aspects of the case, particularly those relating to statal interests (which are anthropocentric) were comprehensively addressed, but questions related to the environment were not cohesively addressed despite the presence of evidence and reference to them in the cause of the dispute resolution. The case reiterates the general notion that the foundations of environmental decision-making in international environmental law are primarily anthropocentric; hence the desirability of a specialist environmental court which will provide a balance by tending to environmental needs.

Gabcikovo-Nagymaros Project (Hungary v Slovakia)[7]

The Gabcikovo-Nagymaros Project (Hungary. v. Slovakia)[8] was a dispute that revolved around whether or not to build certain barrages on the Danube River shared by Hungary and Czechoslovakia. On 2 July 1993, the Governments of the Republic of Hungary and of the Slovak Republic notified jointly to the

3 Catherine Prunella, 'An International Environmental Law Case Study: The Trail Smelter Arbitration', (2014) 335, *International Pollution Issues, Journal of Geography* Students Hunter College, City University of New York <https://intlpollution.commons.gc.cuny.edu/> accessed 26 March 2018

4 See https://www.informea.org/sites/default/files/court-decisions/Trail%20Smelter%20Case.pdf accessed 20 February 2018

5In its first decision, 1938, the Tribunal concluded that harm had occurred and ordered the payment of an indemnity of $78,000 as the 'complete and final indemnity and compensation for all damage which occurred between the cited dates. The Tribunal's second decision (1941) was concerned with the final three questions presented by the 1935 Convention, namely, responsibility for, and the appropriate mitigation and indemnification of, future harm.

6. Cesare Romano, *The Peaceful Settlement of International Environmental Disputes: A Pragmatic Approach* (Kluwer Law International, 2000) 219-232.

7 1997 I.C.J. 3 (Sept. 25), reprinted in 37 I.L.M. 162 (1998).

8 1997 I.C.J. 3 (Sept. 25), reprinted in 37 I.L.M. 162 (1998).

Registry of the Court a Special Agreement, signed at Brussels on 7 April 1993, for the submission to the Court of certain issues arising out of differences which had existed between the Republic of Hungary, the Czech and Slovak Federal Republic regarding the implementation and the termination of the Budapest Treaty of 16 September 1977 on the Construction and Operation of the Gabčíkovo-Nagymaros Barrage System and on the construction and operation of the 'provisional solution'.[9] The ICJ was asked to determine:
(a) Whether the Republic of Hungary was entitled to suspend and subsequently abandon, in 1989, the works on the Nagymaros project and on that part of the Gabčíkovo project for which the Treaty attributed responsibility to the Republic of Hungary;
(b) Whether the Czech and Slovak Federal Republic was entitled to proceed, in November 1991, to the 'provisional solution' and to put into operation from October 1992 this system (the damming up of the Danube at river kilometre 1,851.7 on Czechoslovak territory and the resulting consequences for the water and navigation course) ; and
(c) What were the legal effects of the notification, on 19 May 1992, of the termination of the Treaty by the Republic of Hungary?

The Court was also requested to determine the legal consequences, including the rights and obligations for the Parties, arising from its Judgment on the above-mentioned questions. The two countries had agreed to build two barrages in a place where the dam project (which was the subject matter in dispute), if completed, would have resulted in the destruction of some of Hungary's natural environment. Construction began in the early 1980s and proceeded slowly. In the mid-1980s, political opposition in Hungary focused on the environmental aspects of the barrages as a means of achieving broader political change. Public pressure led Hungary to suspend work on large parts of the project as Hungary claimed that as a consequence of the operation of the upper dam at Gabcikovo, the level of groundwater would fall and its quality would be seriously impaired. Hungary also argued that as to surface water, the dam was expected to bring about eutrophication, and in the absence of a sufficient supply of water, the region's unique flora and fauna would be threatened, resulting in loss to the region's biodiversity. The two countries tried to reach an agreement as to how to proceed, but both were obstinate on their respective positions. While Czechoslovakia took the view that the barrages posed no threat to the environment, Hungary maintained that they would.[10]

The ICJ found that Hungary was not entitled to suspend or terminate work on the joint project solely on environmental grounds. Though the court agreed that indeed there existed a principle of 'ecological necessity' which permits a state to seek to be precluded from responsibility for otherwise wrongful acts by invoking the law of state responsibility. It however held that in determining whether a state of 'ecological necessity' exists, there must be proven a real, grave, and imminent peril at the time it is invoked, and that the measures taken are the only possible response to avoid that peril.[11] In reaching its decision, the court glossed over a critical aspect of international environmental law, that of integrating into its test for 'ecological necessity'; the precautionary principle.[12] Also, though mindful of the dynamic nature of international environmental law and its implications in the evaluation of environmental risk, the court equally fell short of explicitly mentioning 'environmental impact assessment'. Rather, it opined that in evaluating environmental risk, new environmental norms and standards that have been developed should be taken into consideration and given proper weight not only when states contemplate new activities, but also when addressing ongoing activities begun in the past.[13]

91997 I.C.J. 3 (Sept. 25), reprinted in 37 I.L.M. 162 (1998) <http://www.icj-cij.org/en/case/92> accessed 12 April, 2018.
10.Gabcykovo-Nagymaros Judgment, 1997 I.C.J. at 30, 37 I.L.M. at 182.
11. ibid
12.The precautionary principle concerns the role of scientific uncertainty in environmental decision making. Its fundamentals are enshrined in the provisions of the Rio Declaration, precisely, Principle 15 which provides that '[w]here there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.' See Rio Declaration, *supra* note 47, at 879; see PRINCIPLES, supra note 7, at 208-13.
13. Philippe Sands, International Environmental Litigation and Its Future, 32 *U. Rich. L. Rev*. 1619 (1999). http://scholarship.richmond.edu/lawreview/vol32/iss5/7. accessed 01 April 2018.

From the ICJ's approach to this case, it can be inferred that the court proved a point; that of its incapacity to address environmental issues holistically due to the lack of environmental and scientific knowledge. This handicap was observed and emphasized in the joint dissenting opinion of ICJ Judges Al-Khasawneh and Simma , who noted a number of inadequacies in the judgment, including: the manner in which the ICJ evaluated scientific evidence was flawed; the court failed to appoint scientific experts, and so, missed a 'golden opportunity' to 'demonstrate its ability to approach scientifically complex disputes in a state-of-the art manner. Poignantly, they stated that the Court had before it a case on international environmental law of an exemplary nature—a textbook example, so to speak, of alleged transfrontier pollution—yet, the Court approached it in a way that increased doubts in the international legal community whether it, as an institution, is well-placed to tackle complex scientific questions relating to the environment.[14]

In assessing the adjudicatory mandate exercised by the ICJ in *Gabcykovo-Nagymaros* case, the observation of Phillip Sands is of critical importance as it clarifies the whole idea of proposing for a specialist environmental court. According to him, the question arises as to whether the ICJ has missed an opportunity to indicate a real willingness to show its environmental credentials? This is not to say that environmental concerns should have trumped all others. Certainly, the Court demonstrated an understanding of the unique difficulties presented by environmental issues, of the existence of various standards to be applied, and of an indication as to how these could be applied to the facts. And certainly, the three decisions of the ICJ have taken a step toward bringing environmental considerations into the mainstream of international law. The decisions, however, do not completely fill the gaps left by treaty negotiators and do not contribute to the much-needed development of the law by way of judicial insight. No doubt, the latest judgment will lead to renewed calls for the creation of a specialized international environmental tribunal.

***Shrimp/ Turtle* Case**

Shrimp/Turtle case [15] is often cited as proof that the WTO does not suffice as a body with adjudicatory mandate over environmental disputes because it dispenses with environmental interests to promote liberalized trade.[16] The Appellate Body interpreted the rules of the General Agreement on Trade and Tariffs (GATT) narrowly. While finding that the United States applied its ban on shrimp imports discriminatorily, it also imposed interpretative hurdles that make it virtually impossible for a WTO Member to impose trade measures to protect the environment or natural resources. In the case, several Asian countries complained that Section 609 of the Endangered Species Act constituted an impermissible restriction on trade under the GATT.[17]The United States posited that it adopted the programme to promote the conservation of sea turtles, which are endangered species. The programme included a requirement that U.S. trawlers use turtle excluder devices (TEDs) to conserve and protect sea turtles while harvesting shrimps. Section 609 and its implementing regulations prohibited the importation of shrimp into the United States unless a country's programme require shrimpers to use turtle excluder devices (TEDs) comparable in effectiveness to those used in the United States and the said country has in place a credible enforcement effort. Following this position, shrimp were not to be imported into the United States unless U.S. officials certified that the importing nation implemented a turtle conservation program that was 'comparable' to U.S. restrictions.[18] Under Section 609, however, the United States regulated shrimp differently based on the way they were caught, not based on any physical differences in the shrimp itself. Just as in *Tuna/Dolphin*, *Shrimp/Turtle* found that the United

14. N.227 above

15.WTO, United States: Import Prohibition of Certain Shrimp and Shrimp Products—Report of the Appellate Body (1998) WT/DS58/AB/R and Art 21.5 Report (2001) WT/DS58/AB/RW

16.Chris Wold and Glenn Fullilove, Analysis of the WTO Appellate Body's Decision in Shrimp/Turtle (2000) <https://law.lclark.edu/clinics/international_environmental_law_project/our_work/trade_and_environment/turtle_briefing.php> accessed 1 December 2020

17S. 609 of Public Law 101-162,5 is a U.S. statute that the U.S. Court of International Trade had interpreted as a ban on shrimp imports from countries not certified by the United States as having adopted 'a regulatory program governing the incidental taking of ... sea turtles ... that is comparable to that of the United States.'

18ibid

States was impermissibly regulating shrimp from countries that use TEDs differently from countries that did not use them.

The Appellate Body ruled that treating all Members the same constitutes discrimination and that this discrimination is unjustifiable and arbitrary.[19] On the other hand, however, the Appellate Body ruled that treating Members differently also constitutes unjustifiable and arbitrary discrimination. It ruled that the failure of the United States to reach an international agreement with the complaining WTO Members was 'unjustifiable discrimination,' because the United States completed an agreement to protect sea turtles with Latin American countries.[20] The Appellate Body concluded that the 'failure to have prior consistent recourse to diplomacy as an instrument of environmental protection policy ... produces discriminatory impacts on countries exporting shrimp to the United States with which no international agreements are reached or even seriously attempted.'[21] Though it is conceded that the WTO Appellate Body issued an important ruling on the status of environmental trade measures under the General Agreement on Tariffs and Trade (GATT) in the 'shrimp-turtle' dispute, it is argued that a close examination of the decision reveals very little prospects for environmental trade measures under the GATT. Indeed, the 1998 Appellate Body ruling continues the tradition of trade jurisprudence that has almost completely closed off the policy space Article XX should leave open for national trade measures designed to protect the environment.'[22] The Appellate Body's decision proves that the WTO is unwilling to tolerate any unilateral use of trade leverage to further environmental protection objectives reaching beyond national boundaries.[23]

3. Limitations of Extant International Institutions

Permanent Court of Arbitration (PCA)

The first international tribunal with capacity to adjudicate over environmental cases is the Permanent Court of Arbitration. Established at The Hague in 1899 by inter-governmental agreement, the PCA is an organization tasked with facilitating arbitration and other modes of dispute resolution between states, state entities, intergovernmental organizations, and private parties.[24] The PCA is one of the international adjudicatory institutions in which only member states may file suit against one another.[25] However, depending on the nature of the relationship between the state and non-state actors at national level, individuals and groups with environmental interests they wish to pursue through judicial means may explore the available domestic political power to ensure an ongoing albeit indirect role in both the decision to initiate proceedings and the resulting argumentation. Thus, individuals and groups are able to wield some influence in an international environmental dispute via the available domestic means.

19 While treating all foreign and U.S. shrimpers the same may be unfair, it cannot be called discriminatory. In trade, 'discrimination' is the failure to treat all products alike. Black's Law Dictionary, page 467 (6th ed. 1999) defines 'discrimination' to mean 'to make a clear distinction'). The Appellate Body makes clear that the United States must inquire into the 'appropriateness of the regulatory program for the conditions prevailing in those exporting countries.' See Appellate Body Decision, para. 165.

20Appellate Body Decision, Para 171- 172

21Appellate Body Decision, para. 167

22 See Sanford Gaines, The WTO's Reading of the GATT Article XX Chapeau: A Disguised Restriction on Environmental Measures, 22 U. PA. J. INT'L EeON. L. 739, 784-90 (2001) in Howard F. Chang, Environmental Trade Measures, the Shrimp-Turtle Rulings, and the Ordinary Meaning of the Text of the GATT8 Chapman. Law.Review<(2005)https://www.law.upenn.edu/cf/faculty/hchang3/workingpapers/b8%20Chap.%20L.%20Rev.%2025%20(2005).pdf> accessed 02. 10.2020

23 ibid

24Tamar Meshel**,**The Permanent Court of Arbitration and the Peaceful Resolution of Trans-boundary Freshwater Disputes, European Society of International Law (ESIL) Reflections 5 (1) 2016, p. 3 <http://www.esil-sedi.eu/sites/default/files/ESIL%20Reflection%20Tamar%20Meshel_0.pdf>accessed 20 March 2018

25 R. Keohane, A. Moravcsik, and A. Slaughter, Legalized Dispute Resolution: Interstate and Transnational, International Organization 54, 3, (2000) p. 461 https://www.princeton.edu/~slaughtr/Articles/IOdispute.pdf accessed 04.04.2018

International Court of Justice (ICJ)

Since its establishment, the ICJ has played significant role in the resolution of environmental disputes.[26] For instance, the legal status of the principle of no-harm[27] was unclear for decades until the ICJ in 1996 confirmed that the principle does form part of general international law and is therefore binding on all states. Indeed, institutions like the ICJ do not just solve disputes based on what the parties to a case have argued are the right and wrong interpretations of the law and the facts of the case.[28] When the ICJ adjudicates disputes and delivers the reasons for its decisions, it is also contributing more generally to change in international law and politics rather than simply applying in a neutral way a set of rules to the facts before it.[29] For instance, the ICJ's 1996 Nuclear Weapons Advisory Opinion highlighted the potential, catastrophic effects of nuclear weapons on the natural environment and recognised that, 'the environment […] represents the living space, the quality of life and the very health of human beings, including generations unborn.'[30] This Opinion was followed up with the seminal cases of Gabcikovo and Pulp Mills. In the former, the ICJ recognised the principle of 'ecological necessity' and that environmental matters could count as an 'essential interest' to a state. In Pulp Mills case, the ICJ recognised that as part of customary international law, states are under an obligation to undertake environmental impact assessments where the, 'proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource.'[31] The role of the ICJ in international environmental governance is equally gleaned from the case involving Tuvalu and the United States. In 2002, after the United States of America and Australia refused to ratify the Kyoto Protocol to the *United Nations Framework Convention on Climate Change*, the Pacific Island-State of Tuvalu threatened to take action in the ICJ against countries that failed to ratify the treaty.

International Criminal Court (ICC)

In a Policy paper on case selection and prioritization published by the office of the ICC Prosecutor, the ICC has extended its mandate to include a focus on the prosecution of individuals for human atrocities that are committed by destroying the environment.[32]These will include the illegal exploitation of natural resources, cases of environmental destruction, and 'land grabbing', where investors buy up vast areas of poor countries. Notwithstanding the ICC's bias for environmental crimes, it is important to distinguish a potential ICE from the ICC. Article 7 of the Rome Statute, which governs crimes against humanity, is broad and may provide redress for environmental destruction, but explicit reference to redress for environmental issues in the Rome Statute (which is the founding treaty and primary legal source of the ICC) is sparse. Reference to the environment is only found in the provision governing war crimes under which the Court can hold an individual criminally liable for an attack committed during an international armed conflict that causes 'widespread, long-term and severe damage to the natural environment'.[33] It is submitted that the ICC's venture into prosecution of cases relating to destruction

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[26] *Eliseus W. Obilor & Ikenga K. E. Oraegbunam*, 'The Victims in International Environmental Criminal Law', *International Journal of Comparative Law and Legal Philosophy, Vol. 2(1) January 2020, 19-27.*

27. The principle binds states in general to prevent trans-boundary pollution (including pollution caused to areas beyond the jurisdiction of any state). This principle of no-harm is expressed in several global environmental treaties and in the declarations of the Stockholm (1972) and Rio (1992) UN conferences on the environment. It provides as follows: 'States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental (and developmental) policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction'. The legal status of this principle was for a long time unclear, but the ICJ in 1996 confirmed that it does form part of general international law and is therefore binding on all the states of the world.

28.AfshinAkhtarkhavari, Power, Environmental Principles and the International Court of Justice

29. ibid

30. See <http://www.icj-cij.org/docket/files/95/7495.pdf 10> accessed 26 March 2018

31.See <http://www.icj-cij.org/docket/files/135/15877.pdf 11> accessed 3 February 2018

32.See Tara Smith, Why the International Criminal Court is Right to Focus on the Environment, http://theconversation.com/why-the-international-criminal-court-is-right-to-focus-on-the-environment-65920> accessed 7/ 11/2020.

33.See 1998 Rome Statute of the International Criminal Court, 2187 UNTS 90, Art. 8(2)(b)(iv) [hereinafter Rome Statute]. Ibid., Art. 7(1)(k). The international community's commitment towards crimes against humanity is enshrined in Art. 7 of the Rome Statute which states that for the purpose of this Statute 'crime against humanity' means 'any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) Murder; (b) Extermination;(c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual

of natural resources and land grabbing does not translate to environmental dispute resolution in its entire ramification. The Policy document has not changed the law applied by the ICC. Instead, it sets out the types of cases that the court will now select and prioritise for prosecution.[34] Though there is a high-profile campaign to add 'ecocide' to the list of crimes which are within the jurisdiction of the court, at the moment there is no provision on the crime of ecocide.[35]

Assuming but not conceding that the frontiers of ICC's jurisdiction are widened to include ecocide, the court's remit relates to the prosecution of particular individuals in extremely grave cases. Therefore, it is submitted that in the event of an expansion of the ICC's jurisdiction to include crimes against the environment, the court still remains limited in the exercise of its authority. This is because the ICC lacks power to adjudicate upon wider issues involving private individuals, the corporate sector or national governments.[36] In essence, the jurisdiction of the ICC is on its own part, limited to claims against natural persons. It is thus practically impossible therefore, to find an organization or state liable for environmental crimes in connection with such claims. Similarly, the ICC does not provide for occasions of conflict resulting in damages that breach the ICC's definition of an environmental war crime which occur prior to and after the inception of the ICC.[37] Such situations remain outside the court's jurisdiction as relevant states had not ratified the ICC's statute at the time and the court is precluded from prosecuting cases retroactively. For purposes of enhancing international governance, the ICE can be established to operate alongside and in parallel with the ICC, and other extant international bodies. In such circumstance, neither institution is a substitute for the other.

World Trade Organisation (WTO)

There is a singular thread that runs through the narrative on the operation, and mandate of all extant international institutions exercising adjudicatory mandate over aspects of environmental disputes: each body is essentially driven towards satisfaction of their primary interests. The WTO is not different. As a body, it is driven toward disputes that are primarily trade-based in nature. Though a number of WTO disputes have involved questions about the interaction of international trade law and international environmental law, the WTO has consistently shown through its decisions that it is predominantly concerned with issues affecting trade and the economy; delimiting the policy space available to states with respect to environmental protection measures. International environmental law may be relevant to solving disputes that flow from their respective laws but that does not make the GATT or any of the WTO covered agreements, environmental treaties nor does it confer the WTO with exclusive mandate to adjudicate over environmental matters. Yet, the WTO founded by the inter-governmental conference in 1994 have exercised jurisdiction over matters relating to the environment at different times in history. Although the Appellate Body in WTO dispute settlement has made attempts to consider environmental issues, the problem is structural. The dispute settlement panels and Appellate Body of the WTO generally interpret intergovernmental disputes primarily from the point of view of promoting free trade. Environmental protection is permissible, but it is an exception from the main rule and as such is

slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) Enforced disappearance of persons; (j) The crime of apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health'. In a recent paper on the ICC Prosecution's policy on case selection and prioritization, the Prosecutor noted that her office 'will give particular consideration to prosecuting Rome Statute crimes that are committed by means of, or that result in, *inter alia*, the destruction of the environment, the illegal exploitation of natural resources or the illegal dispossession of land'. See

34. Office Of The Prosecutor Policy Paper On Case Selection and Prioritisation. <https://www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf>accessed 11 November 2020.

35.British lawyer and advocate, Polly Higgins has since 2016 led campaigns for the inclusion of ecocide to the list of issues under the ICC's jurisdiction.

36. Stephen Hockman, 'The Case for an International Court for the Environment', *Effectius Newsletter* Issue 14 (2011)

37.In the early 1990s, for example, then President of Libya, Saddam Hussein (of blessed memory) diverted the giant Tigris and Euphrates rivers so as to drain the Mesopotamian marshes in southern Iraq, a place widely regarded as the location of the Garden of Eden. Hussein wanted to destroy the community of Marsh Arabs that lived there, in reprisal for attempting an uprising against him.

interpreted narrowly.[38] This friction will likely increase the pressure to unify the fragmented field of international environmental law. The best example is the *Shrimp-Turtle* case, where the WTO Appellate Body interpreted Article XX(g) of the GATT with reference to the Convention on International Trade in Endangered Species, the Convention on Biological Diversity, the Convention on Migratory Species, UNCLOS, and Agenda 21 of the Rio Conference on Environment and Development which are all instruments of international environmental law.The *Shrimp-Turtle* and other WTO cases cannot be exactly classified as disputes about environmental treaties, nor environmental law, but they interpret and define the limits of the WTO treaty regime, whose principal aim is to further economic liberalization.

4. Conclusion

There are diverse perspectives on the role of adjudication, taking two basic approaches. First is the 'minimalist' view, which claims that the function of an international court is to settle only the narrow issues presented by a given dispute.[39] In other words, the proper function is to bring the parties to a solution that is effective and sustainable over the long term without necessarily paying regard to the broader policy implications of any judgment for the development of the law. The second approach is described as the 'policy approach', and it perceives an international court as not only a body to assist in resolving the matter before it, but also to contribute to the development of the law more generally. In this light, an international court for the environment may be perceived as a body that will use the exercise of adjudicatory mandate in a dispute before it to cover legislative gaps which ultimately will result in the enhancement of environmental governance considering that incoherence; fragmentation of law plagues international environmental law presently.[40]

There are existing gaps in international environmental dispute adjudications. [41] However, the place of an international court for the environment in closing the gaps posed by international adjudication remains a challenge, particularly in the environmental law realm. While some scholars argue that the jurisdiction of a specialist court for the environment must be limited to just filling existing gaps in international environmental dispute adjudications of other international courts and tribunals,[42] other proponents call for the establishment of a court on account of institutional challenges which they perceive as hindrance to the exponential growth of international environmental law.[43] Whichever perspective is taken on the relevance of a specialist court for the improvement of international environmental governance, for the purpose of understanding the role of adjudication, this essay argues that a challenge may lie in delineating the parameters of an international environmental dispute. Most extant international treaties on the environment address multiple objectives, some of which are not 'generally considered' to be environmental.[44] In most Treaties, the environmental provisions are only a small part of a larger whole. Perhaps, there are disputes under those provisions which might be environmental, but not all disputes about the provisions are environmental in nature.

Bilder in his classic article on the subject, suggest that a dispute is environmental when it relates to 'the alteration, through human intervention, of natural environmental systems'. In this context, there are some easily identified components; most of what is generally regard as 'environmental' concerns include

38. Timo Koivurova, *Introduction to International Environmental Law (2014 Routledge) p. 196.*

39Philippe Sands, International Environmental Litigation and Its Future, 32 University of Richmond Law Review p. 1637 (1999)<http://scholarship.richmond.edu/lawreview/vol32/iss5/7> accessed 01. April 2018.

40. Ibid, p.1638

41. See Ciappetta Nicholas (2003) 'Florida's Scarlet Letter Repealed: A Retrospective Analysis of the Constitutionality of the Florida Adoption Notification Provision and a Commentary on the Future of the Right to Privacy,' *Hofstra Law Review*: Vol. 32: Iss. 2, Article 4. http://scholarlycommons.law.hofstra.edu/hlr/vol32/iss2/4 accessed 23 March 2018

42. ibid

43. See Frank Biermann, The Case for a World Environment Organization, 42 *Environment*, Nov. 2000, p. 24.; Sean D. Murphy, Does the World Need a New International Environmental Court?, 32 *George Washington Journal of International and Economics.* 333, 343 (2000), CharlesQiong Wu, A Unified Forum? The New Arbitration Rules for Environmental Disputes Under the Permanent Court of Arbitration, 3 *CHI. J. INT'L L.* (2002) 263, 265.

44 See *Eliseus W. Obilor & Ikenga K. E. Oraegbunam,* 'International Environmental Crimes: Examining the Ontology, Typology and Ecology', *International Journal of Comparative Law and Legal Philosophy, Vol. 2(3) September 2020, 140-148.*

pollution of air, freshwater and oceans; climate change; unsustainable use of natural resources; loss of biodiversity, ecosystems and habitat; and conservation of endangered species and natural heritage. The *Gabčíkovo-Nagymaros Case* is a good example, as it was based largely on customary international law relating to transboundary pollution. The ICJ as the adjudicatory body in the case was on its part not able to define an environmental dispute. The ICJ's environmental record of accomplishment is in fact unimpressive with respect to environmental concerns. So far, well-established international norms relating to the environment have played almost no role in cases before it.[45]

Notwithstanding the challenges of adjudication as an aspect of international environmental governance, this essay suggests that there are potentials in the establishment of a specialist court for the environment. Such court could provide a centralised system of dispute settlement that is accessible to a range of actors, including individuals, corporations and civil society. A pool of dedicated scientific experts can be assembled to assist the judges and arbitrators, making room for a coordinated approach toward clarifying legal obligations relating to environmental law. This will in turn, harmonise international environmental law while complementing existing regimes, thereby increasing legal certainty and predictability. An International Court for the Environment (ICE) has the potential to encourage the use of preventative and, where necessary, injunctive measures to minimise ongoing environmental damage. A specialist court for the environment provides a pragmatic vehicle to standardise compliance and dispute settlement mechanism for environmental treaties, thereby reducing the financial and human resources burden associated with proliferation of treaty bodies.

Nonetheless, uniformity among environmental laws is a necessary component to effective international environmental adjudication, and this necessity advocates for a single international court, such as the ICE to adjudicate and develop international environmental law. Internationally a need exists for a specialist environmental court to establish legal uniformity and maximize access to environmental database information from a global judicial perspective. For example, the ICJ was introduced to respond to the need for an international court capable of exercising adjudicatory powers over a single body of international rules that would be met with universal international interpretation.

Another critical issue which a specialist court as the ICE is expected to decimate is that of the question of limited access to environmental justice and participation by non-state entities. Advocates of the ICE would do well to canvass for an entirely new institutional arrangement to be set up. Some of the extant institutions with jurisdiction over environmental disputes are constrained by the fact that such jurisdiction is limited to advisory opinions and disputes between state parties. Private individuals, TNCs, and Non- Governmental organizations (NGOs) do not have access to these institutions. Environmental interests and needs differ; statal interest is far different from that of private individuals who are in most cases, the primary victims of environmental harm. Civil society networks and NGOs are most likely to be the most committed supporters of environmental causes compared to States. Yet, NGOs lack legal standing before most of the extant international institutions vested with jurisdiction over disputes relating to the environment. A legal entity or natural person can only bring an action in such courts to review the legality of certain acts of a government in the given region if the act concerned is a decision addressed to that person or is of direct concern to it.'

A fundamental issue which affects the effective operation of extant international institutions is that of enforcement of its decisions. The basic procedure is that with respect to international environmental disputes, both parties need to agree to its jurisdiction before it will hear the case. After hearing the case, the major problem which extant institutions are confronted with, is that of enforcement of the judgment reached. Various national courts are equipped to rule on environmental disputes in individual countries.

45. Fabian Schuppert , Beyond the national resource privilege: towards an International Court of the Environment International Theory (2014), 6:1, 68–97 © Cambridge University Press, 2014 <http://intergenlaw.com/wp-content/uploads/2015/02/Beyond-the-national-resource-privilege-towards-an-International-Court-of-the Environment.pdf> accessed 10 February 2018. It is worthy to note however that the ICJ's advisory opinion was sought by the UN General Assembly in relation to the *Legality of the Treat or Use of Nuclear Weapon 35 ILM 809 and 1343 (1996).* The ICJ in delivering its opinion made reference to the duty of states' responsibilities not to cause environmental damage beyond their territories or to the global commons.

However, because states are legally equivalent on the international level, it is not acceptable in principle to place a coequal state in the diminished position of being subjected to the courts of another coequal state. This, therefore, makes it difficult for any state to enforce a judgment as against any other state on an international level

Mandatory jurisdiction is necessary to ensure adequate adjudication of environmental issues. Presently, existing MEAs are unable to satisfy the need for enforceability, as most of the treaties do not have enforcement authority against violators. That is why there have been calls for a Convention to be reached prior to the establishment of a specialist court as the ICE. It is envisaged that such Convention will include adequate provisions for enforcing decisions reached from the adjudicatory process. However, this position is likely to be a subject of intense criticism because at international level, the existence of Conventions is often determined by the acceptance and co-operation among States towards such agreement. The value of treaties rests, therefore, on voluntary compliance. It is unlikely that States will voluntarily accept to commit to a Convention that makes provisions for the enforcement of decisions over environmental matters that are contrary to its economic or sociopolitical interests.

Where the Convention makes provision for enforcement, state officials given the task of enforcing such international environmental treaties are likely to be more concerned with maintaining diplomatic ties with State parties to the dispute and their state's image on an international scale, rather than enforcement. Nonetheless, enforcement is key in the scheme of improving environmental governance through adjudication. Enforcement mechanisms are indispensable tools for ensuring compliance with international environmental agreements.[46] Without clear direction on enforcement mechanisms, establishing a specialist court as the ICE may be futile. A major weakness of international environmental treaties is that they do not possess effective enforcement mechanisms that would induce a state to follow the terms of the agreement. It is possible, and likely, that a difference could exist between the terms of the treaty and the actual practice of the parties to the treaty. Enforcement provisions are often absent from a treaty because nations are less likely to sign a treaty with strict terms for enforcement. Notwithstanding the issue of enforcement of judicial decisions reached by international adjudication of environmental disputes, the burgeoning body of international environmental law and accompanying governance institutions remains significant evidence of the importance and growth of international environmental law and governance.[47] Therefore, irrespective of the general lukewarm attitude towards enforcement of judicial decisions reached through international adjudication, enforcement remains a key mechanism for the emergence of significant change in human behaviour towards the environment across the globe. If the issues of fragmentation, incoherence and absence of expertise, which is synonymous with extant institutional frameworks saddled with the responsibility of assuming jurisdiction over disputes relating to IEL, can be tackled with the establishment of a specialist court, perhaps enforcement of judicial decisions will be less complex. Parties have less difficulty to surmount in the quest for environmental justice at international level, and as such, the question of enforcement is less complicated and complex for the court to handle.

46. Andrew Samaan, Note, *Enforcement of International Environmental Treaties: An Analysis,* 5 Fordham Envtl. L.J. 261, (1993) p. 273

47. Louis Kotze, *Arguing Global Environmental Constitutionalism - Transnational Environmental Law,* 1:1 (2012), pp 199-233