could cause Transboundary harm. More recently, similar considerations arose in the construction of a dam and the sharing of the River Danube in the Case Concerning the *Gabcikovo-Nagymaros Project*,[12] between Hungary and Slovakia on the basis of a treaty signed for sharing of waters.

B. Damage to 'international environment'

Situations that arise out of a bilateral agreement are easy to be disputed, adjudicated and even enforced. The same cannot be true when dealing with open spaces or global commons, as an element of '*erga omnes*' or an interest as against the whole international community is involved. In the *Nuclear Test Cases*,[13] Australia and New Zealand brought forth complaints that the nuclear tests conducted by France in the South Pacific created radioactive fallout affecting the whole region. The question that arose was whether Australia and New Zealand had a right to bring a claim 'erga omnes' on the basis of an obligation owed to the entire community. A similar claim of obligations of '*erga omnes*' came up before the ICJ in the Barcelona Traction Case.[14] The Court while recognizing the relationship between *actio popularis* and *erga omnes* stated that:

"An essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-a-vis another state in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection, they are obligation erga omnes".[15]

As outlined above, the concept of *actio popularis* and *erga omnes* become relevant in the context of protection of the

[12] ICJ Reports, 1997.

[13] ICJ Reports 1974, pp.253-270.

[14] (*Belgium V. Spain*) *ICJ Reports 1970.*

[15] Ibid., p.32.

global commons for present and future generations.[16] There can be *erga omnes* obligations to protect the areas suffering environmental damage beyond national jurisdiction, in addition to the recognized acts of genocide and protection of non-derogable fundamental human rights. Moreover Principle 21 of the Stockholm Declaration and Articles 192 and 235 of UNCLOS 1982 accord customary status to the international obligation of protecting and preserving the marine environment.

Besides publicists,[17] support for this view is seen in Part I, Article 19 on the Draft Articles on State Responsibility wherein 'massive pollution of the atmosphere or the seas', is characterized as an international crime. It is believed that environmental obligations associated with community interests and related to the concepts of common concern or common heritage of mankind, could be probable situations wherein *actio popularis* could be entertained. Be that as it may, sovereign States do not easily give in to assertions of legal rights on behalf of the international community. In some situations wherein States did try, on the basis of existing customary law, courts refused to entertain them on jurisdictional grounds.[18]

[16] For a pioneering work on planetary obligations, intra-generational and inter-generational equity see, E. B. Weiss, *In Fairness to Future Generations: International Law, Common Patrimony and Intergenerational Equity* (New York 1989).

[17] See Brownlie, "A Survey of International Customary Rules of Environmental Protection", in L. Teclaff and A Utton (eds.), *International Environmental Law - I*, 1975; He calls for an expansion of standing at the international level.

[18] *South West Africa (Ethiopia v. South Africa and Liberia v. South Africa) Second Phase (Judgment) ICJ Reports, 1966*, p.6.

C. Enforcement by International Organizations

Though international organizations are legal persons[19] States have not been willing to grant too much enforcement power to them. However, it cannot be denied that international organization/institutions play an important role in limited, collective supervision arrangements relating to enforcement of certain rules and standards. Such regulatory role is seen in the Antarctic Treaty System wherein States parties have been able to draw up a number of treaties relating to conservation of seals, marine living resources minerals exploitation and protection of flora and fauna. For example, under the Convention for the Regulation of Antarctic Mineral Resource Activities (CRAMRA), 1988, it is envisaged that an Antarctic Mineral Resources Commission be established. Under Article 7(7), the Commission can draw the attention of all Parties to any activity that affects the implementation of the Convention, or hampers compliance by a party.

Similarly, the International Oil Fund Convention gives a legal status to the Fund, wherein it can be a party to enforcement proceedings in the domestic court of a State party. As regards UNCLOS 1982 some of the institutions are vested with enforcement powers. The Council of the International Sea Bed Authority (ISBA) can supervise and co-ordinate the implementation of Part XI and also draw the attention of the Assembly to cases of non-compliance; institute proceedings on behalf of the Authority before the Sea Bed Disputes Chamber and issue emergency orders to prevent serious harm to the marine environment arising out of activities in the Area.

Another well established regional institutional mechanism for dispute avoidance or enforcement is the European Community Commission. The EEC Treaty, 1957 in Article 155 ensures that provisions of the Treaty and other

[19] *Reparations for Injuries suffered in the service of the United Nations, ICJ Reports, 1949*, p.185.

secondary legislation are applied under Article 168 of the EEC Treaty. The Commission may after giving the State concerned an opportunity to submit its observations, being cases of alleged non-compliance before the European Court of Justice.

International supervision by organizations often place emphasis on consultative processes for discussion within a forum for ensuring treaty compliance and improving institutional effectiveness, rather than going in for dispute settlement. Examples of consultative meetings are those of the London Convention as amended by the 1996 Protocol, the International Whaling Commission and the UNEP Regional Seas Programme. Under the London Convention, amendments are adopted by tacit consent wherein rules agreed upon by all contracting parties are made applicable. A stricter enforcement of treaty obligation is observed in the International Convention for Prevention of Pollution from Ships MARPOL 73/78 that sets standards for pollution from all sources.

Dispute Settlement Mechanism

Effective dispute avoidance may not be possible when State are unable to fulfill obligations or undertake implementation owing to lack of capacity, resources or technical know-how. All such cases of non-compliance would be needed to be adjudicated upon by a dispute settlement process/body. Dispute settlement, can sometimes be confrontational, time consuming, adversarial, largely bilateral, and often expensive. Despite these limitations, a formalistic adjudicative process can play an important role in supervising treaty compliance and clarifying and determining the applicable rules and principles of international environmental law.[20]

[20] *North Sea Continental Shelf cases, ICJ Reports 1969*. The Court held that customary laws could evolve through conventional norms too.

Principle 26 of the Rio Declaration states that "States shall resolve all their environmental disputes peacefully and by appropriate means in accordance with the Charter of the United Nations". Article 33 of the UN Charter reads: "The Parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements or other peaceful means of their own choice". Dispute settlement means can be broadly classified on the basis of their legal content into two categories (a) diplomatic mode of settlement; and (b) judicial mode of settlement.

(i) Diplomatic means of dispute settlement

The diplomatic method of settlement would include resort to negotiation, good offices, enquiry, mediation and consultation and conciliation. Negotiation would entail proposals and counter proposals being discussed in good faith with a view to finding a peaceful and amicable solution. A good example was the negotiated settlement over the damage suffered by Canada in the Cosmos 954[21] satellite, which disintegrated over its territory. The parties (Canada and erstwhile USSR) agreed to abide by a negotiated settlement of claims as provided in the Convention on International Liability for Damage caused by Space Objects, 1972. Good offices generally involve a third party intervention trying to persuade parties to a peaceful settlement. Enquiry would involve a determination being made by an independent fact-finding body.

In cases of mediation, the third party is actively involved in the dispute settlement, often providing an informal proposal too. Consultation is another means of dispute settlement, which rather than being strictly on the lines of negotiation, involves confidence-building measures and resort to

[21] Settlement by Protocol 2 April 1981 wherein USSR agreed to pay $300,000 to Canada.

discussions between states to resolve a dispute. A number of agreements require parties to consult each other in times of emergencies. Article III (a) of the International Civil Liability Convention, 1969 provides for measures to prevent pollution of coastlines from oil pollution incidents on the high seas. Similarly Article XIV (3)of the African Nature Convention. 1985 provides for consultations with regard to development plans which may affect the natural resources of another State. In the same vein, the 1996 Protocol to the London Convention, 1972 in Article 8 provides for authorization of ocean dumping in emergency operations'.

Conciliation in essence is a combination of mediation and enquiry. After the third party has established facts of the case, it also makes proposal for the settlement of the dispute. Such a function is established under the Dispute Settlement Procedures of GATT and the Dispute Settlement Understanding of the WTO. Article XXIII (2) of GATT provides that the Dispute Settlement Panels help the parties to reach a solution by conciliation. Failing this, the panels make an objective assessment of the matter in accordance with GATT rules. The Panel can also make recommendation/or a ruling, if requested to do so by the contracting parties. Similar provisions for settlement by conciliation are found in Article 27 (4) of the Convention on Biological Diversity, 1992. Articles 14(5) to (7) of the UNFCC, and the Vienna Convention on the Protection of the Ozone Layer 1985, and many other environmental agreements and regional agreements.

(ii) Judicial means of dispute settlement

Legal means of dispute settlement would in essence be accusatory and adversarial in nature. Remedies would lie in compensation largely in monetary terms, often unable to restore the environment to its former self before destruction. Moreover, States are always wary of being litigious as this could lead to chain reaction wherein other states would be encouraged to being cases leading to a 'boomerang effect'. Two such time-tested modes of settlement are arbitration and

recourse to the International Court of Justice and other tribunals.

Arbitration

This mode of quasi-judicial settlement would involve parties appointing arbitrators by choice. The decision of the arbitral body/tribunal is final and binding as between the Parties. Arbitration with its flexibility and choice of law and forum, with increased party autonomy, can be a favoured mode of dispute resolution in environmental matters. Recourse to arbitration is provided in a number of conventions. An Annex on Arbitration is found in the Convention on Biological Diversity 1992; Climate Change Convention, 1992; Basle Convention on Transboundary Wastes 1989; International Oil Pollution Fund Convention, 1969; Marpol 73/78; Barcelona, 1976 and the Noumea Convention, 1989. There have also been proposals suggesting of a possible role for the Permanent Court of Arbitration, Hague relating to the development of special procedures in environmental matters.

Judicial Settlement

Judicial settlement essentially involves an adjudicative process by the International Court of Justice or such similar judicial bodies. States must explicitly accept its jurisdiction, either by a general declaration concerning all the disputes with States which equally accepted the courts jurisdiction or by a special agreement. The decisions of the ICJ are mandatory and must be executed. Though they are binding only between the parties and in respect of that particular case,[22] they are considered to express customary international law. [23]

[22] Article 59 of the Statute of the ICJ provides that "the decision of the Court has no binding force except between the parties of that particular case".

[23] Article 38 (1) paragraph (d) of the Statute of the International Court of Justice reads "subject to the provisions of Article 59, judicial decisions and teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law".

Recent environmental agreements allow parties to accept the compulsory jurisdiction of the ICJ at the time of signature, ratification or accession or anytime thereafter. For example, the Vienna Convention 1985, Basel Convention 1989, UNFCC, 1992, Convention on Biological Diversity, 1992 make such provisions.

The ICJ and its predecessor the PCIJ, it may be submitted, have not been seized of a *proprio* environmental dispute. But there have been a number of decisions wherein the World Court had opportunity to give judgments establishing important general principles concerning environmental law. The PCIJ in the *Diversion of the Waters of the River Meuse*[24] had occasion to deal with the issue of equitable sharing of waters. The ICJ in the *Corfu Channel Case*[25] affirmed the principle of *sic utero tuo ut alienam non laedas*, wherein it held that 'every state has an obligation not to knowingly allow its territory to be used for acts contrary to rights of other states'. Similarly, the *Icelandic Fisheries Case*[26] established certain customary principles which would govern the preservation of shared natural resources.

At this point, it may be worthwhile to recall that the AALCC Legal Advisers Meeting held at the United Nations Headquarters, on 23 October 1992 had among other things, reviewed the outcome of UNCED and considered the role of the ICJ in the peaceful settlement of environmental disputes. A study prepared by the Secretariat had suggested that Member States should consider making use of the Chambers procedures of the ICJ, by *compromis* which was in conformity with an earlier study of the Secretariat on the wider acceptance of the World Court. The ICJ, it may be recalled in July 1993, established separate chambers to deal with environmental disputes. This chamber is currently composed of President S.

[24] *PCIJ Ser . A/.B.No. 170 (U.K. v. Albania).*

[25] *ICJ Reports, 1949,* p.4.

[26] *(U.K.V. Iceland) Merits ICJ Reports 1974,*p.31.

M. Schwebel, Vice-President C.G. Weeramantary, and Judges M. Bedjouai, R. Ranjeva, G. Herczegh, K. Fleischhauer and F. Rezak.

Dispute Settlement Mechanisms under other International Bodies

A. UNCLOS 1982 Dispute Settlement Mechanism

The UNCLOS provides in Part XV for the creation of a dispute settlement body. It offers one of the most developed dispute settlement mechanisms. There are a wide range of methods available wherein a party can choose either negotiation, conciliation or other informal means (Article 283). Parties can by either agreement or binding compulsory settlement choose from a wide range of binding or compulsory jurisdiction. These include recourse to ICJ, the International Tribunal for the Law of the Sea; arbitration and special arbitration (Article 289). The International Tribunal for the Law of the Sea (ITLOS) created in 1996 by States Parties has elected 21 Judges who possess special competence in the field of law representing the major regional groupings and principal legal systems of the world. The dispute settlement structure apart from ILTOS, consists of the Standing Chambers on Fisheries and Marine Environmental Disputes and the already existing special sea-bed dispute chamber.

B. European Court of Justice (ECJ)

ECJ is the judicial organ of the European Community responsible for interpretation and application of EEC Treaty, 1957. The ECJ has jurisdiction (Article 227) to hear actions brought by one member against another alleging failure to fulfill an obligation under the treaty. The ECJ has held the ground of domestic circumstances or lacuna in the internal legal system as insufficient reasons to justify a failure to comply with an environmental obligation. The ECJ has had occasion to deal with a number of environmental issues brought before it under the preliminary reference procedure (New Article 234).

VII. Conclusions

The existing normative framework of international environmental law is presently characterized by an abundance of multilateral conventions and other international instruments. As rightly articulated by Ambassador Chusei Yamada, Member of the ILC, "the sector by sector approach which has been adopted so far in the conclusion of various multilateral conventions, often dictated by the need to respond to urgent and specific requirements runs the risk of not addressing the need for an integrated approach to the prevention of pollution and continuing deterioration of the global environment".[27] The uncertainty over the normative framework is equally relevant in the study of effective means of implementation, enforcement and dispute settlement in international environmental law. Certain aspects of this incongruity between the traditional approaches premised on sovereign equality of territorial states and the broader concern to preserve the global environment, in the sphere of implementation and enforcement has been briefly outlined in this background note. Besides, such conceptual difficulty, issues concerning implementation in developing countries is lack of resources, technology and absence of trained personnel.

While the task of evolving fair and workable legal principles towards conserving the global environment is equally important, yet if the existing patch-work of environmental regimes are to be consolidated, the AALCC needs to consider the specific infrastructural and legal impediments facing implementation and enforcement in the Afro-Asian region. It is hoped that this Background Note would provide the backdrop for the AALCC Member States to deliberate on country specific issues encountered in the process of implementation, enforcement and dispute settlement.

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[27] See ILC document ILC (L) INFORMAL/22 entitled "*Long term Programme of Work: Feasibility study of the law of environment*".