ALTERNATIVE DISPUTE RESOLUTION IN ENVIRONMENTAL AND NATURAL RESOURCE DISPUTES: NATIONAL AND INTERNATIONAL PERSPECTIVES

*Abdul Haseeb Ansari**
*Muhamad Hassan Bin Ahmad***
*Sodiq Omoola****

Abstract

Resolving environmental disputes, wherever necessary, by alternative dispute resolution (ADR) mechanisms has numerous advantages. Especially, since disputes are resolved amicably, the compliance level of disputes resolved through this mechanism is higher than those resolved on the basis of the contentious method of dispute resolution. It is for this reason that efforts are being made in countries like New Zealand, India, Australia *etc.* to resolve environmental disputes through ADR mechanisms. But their applicability is not yet appreciably high. The paper discusses the level of applications of the ADR mechanisms at both, state and international levels and suggests that: at state level efforts should be made to maximise the use of the ADR mechanisms; and at international level, an international environmental court should be created under the auspices of the United Nations to resolve such disputes primarily by application of ADR mechanisms, and only exceptionally by contentious means. In order to facilitate this, a comprehensive legal framework needs to be worked out.

I Introduction

ENVIRONMENTAL AND natural resource disputes usually involve disputes over the use, exploitation and exploration of the natural resource and its effects on various interest groups. All elements of the nature, such as water, fossil fuels, land, air, precious stones, timber, and grazing land have been the subject matter of environmental disputes because they have been degraded, overexploited, destroyed due to war, or subjected to jurisdictional issue. This is a result of the potential of natural resource in augmenting economic development and sustenance and health

---

* A paper on this theme was presented at the International Conference on Compliance and Enforcement of Environmental Law (IREL 2016), Wuhan University, Wuhan, China (Sep. 8-10 2016).

** Professor of Law, Faculty of Laws, International Islamic University Malaysia (IIUM), Malaysia. ahaseeb@iium.edu.my

*** Lecturer, Faculty of Laws, International Islamic University Malaysia, Malaysia.

* Research Scholar, Alternative Dispute Resolution (ADR) Unit, Faculty of Law, International Islamic University Malaysia.

of the people. Often intertwined with politics, economy, cultural and religious practices, it has proven to be acutely intractable and a cause of violence across national and regional borders and even at global level. The effectiveness of international dispute resolution institutions such as the International Court of Justice (ICJ), the Permanent Court of Arbitration (PCA), the World Trade Organization (WTO) and the European Court of Human Rights (ECtHR) has been met with some criticisms. In this paper, the possible extent of applying alternative dispute resolution (ADR) mechanisms in natural resource and environment related disputes by these legal institutions will be examined. The unwillingness of the parties to submit to a win-win settlement is fuelled by the fact that they might be offered less compared to the win-lose court process.[1]

The concept of ADR has been incorporated in almost all forms of disputes in the 21st century. The extent of its successful application in the resolution of environmental and natural resource disputes, nationally and internationally has not been much emphasized in legal practice. Although, ADR has proven to be much more effective in the resolution of disputes related to family, investment, commerce, labour and armed conflicts, with some degree of success in environmental disputes, it has been noted that the parties resort to negotiation or mediation out of fatigue from protracted litigations. In addition, international and national legal texts have encouraged the use of consensual and flexible ADR mechanisms such as negotiation, mediation, conciliation, arbitration, court-annexed mediation and other hybrid processes in order to alleviate the quest for litigating environmental disputes and decongest the traditional court system. This paper seeks to examine the peculiar characteristics of environmental and natural resource disputes and resolve them on the basis of suitable ADR mechanisms at national and international levels. Modest attempts have been made to identify peculiarities of environmental disputes and the benefits accruable from the adoption of ADR for resolving them at both the levels.

II Alternative dispute resolution – A brief history

The human existence has depended on the expeditious and amicable dispute resolution mechanism. This is because in ancient societies, disputes over issues

---

1 Guy Burgess and Heidi Burgess, *Environmental Mediation: Beyond the Limits Applying Dispute Resolution Principles to Intractable Environmental Conflicts* 50–94 (University of Colorado–Conflict Research Consortion. Colorado, 1994).

such as food and mates were resolved one way or the other, but amicably.[2] The mechanisms were mostly mediation, conciliation and negotiation. However, in the modern world, the development of the concept of ADR was on account of the growing discontent for litigation,[3] particularly the litigation explosion in the United States.[4] ADR has now become a global phenomenon in its over 35 years of development and has been gradually introduced into the justice delivery system globally.[5] Environmental matters are also gradually creeping into the justice delivery system. The following sections will examine a brief history of modern ADR and the factors that led to its emergence in the global dispute resolution landscape.

Modern ADR and its mechanisms mainly originated in the United States towards the end of the 20th century. Prior to the widespread adoption of litigation as the common method of resolving disputes in many parts of the world, variants of ADR had been practiced and used in different forms of disputes including trade dispute,[6] religious disputes (*e.g.*, matrmonial disputes in Muslim community). A historical fact, which is rarely acknowledged by western ADR historians, is that ADR existed and still exists today in some forms in China, India, the Middle-East and Africa. Faith-based communities such as the Muslim and Jewish have concept of *sulh* and the Rabbinical courts respectively, which set-out different forms of dispute resolution mechanisms to regulate domestic transactions among their adherents.[7]

Before the advent of modern ADR in the United States (US), litigation had become the norm and the judges became umpires as the courtroom turned into a battleground for all sorts of disputes.[8] The cost and delay embodied in

---

2 Jerome T Barrett and Joseph Barrett, *A History of Alternative Dispute Resolution: The Story of a Political, Social, and Cultural Movement* 13 (John Wiley & Sons, 2004).

3 Lawrence Friedman, "Litigation and Its Discontents" 40 *Mercer L. Rev.* 973 (1988).

4 Walter K Olson, *The Litigation Explosion: What Happened When America Unleashed the Lawsuit* 30 (Truman Talley Books-Dutton, 1991).

5 Richard Chernick, "'ADR' Comes of Age: What Can We Expect in the Future?" 4 *Pepperdine Dispute Resolution Law Journal* 21 (2012).

6 Michael F Hoellering, "Alternative Dispute Resolution and International Trade" 14 *NYU Rev. L. & Soc. Change* 785 (1986).

7 Seth E Lipner, "Methods of Dispute Resolution: Torah to Talmud to Today" 16 *Am. Rev. Int'l Arb.* 315–581 (2005).

8 *Supra* note 4; Fleming Macklin. "Court Survival in the Litigation Explosion" 54 *Judicature* 109 (1970); Sarat Austin. "The Litigation Explosion, Access to Justice, and Court Reform: Examining the Critical Assumptions" *Rutgers L. Rev.* 37 (1984): 319.

court procedures were seen by litigants and lawyers as worth the fight. Huge costs were awarded to the victorious litigants after a series of arduous procedures, including adjournments, discoveries and examinations. Huge damages were awarded and are still being given in torts, especially in high profile cases, which makes it attractive for lawyers to sue anyone, to the extent of bankrupting businesses and corporations. This tendency culminated in the emergence of the contingency fee and 'ambulance-chasing' and the phenomenon known as 'litigation explosion'.[9]

In 1912, the dissatisfaction with the administration of justice in the US soon became the subject matter of legal and academic discourse[10] with a call for reorganization of the justice system. The identified causes of dissatisfaction were the use of ancient procedures, the overwhelming pressure and congestion of court through mass litigation. The need to make adequate provisions for speedy disposition of petty litigations, to take care of the grievances of the middle class called a look inward for reorganization of the administration of justice in modern cities.[11] Unfortunately, the lack of interest in small and petty causes still exists, thus, new ways of resolving such dispute continue to evolve.

Modern ADR owes its ideas and proposition to Frank Sanders of the Harvard Law School, who has been acknowledged as the father of modern ADR.[12] He proposed in 1976, the concept of multi-door courthouse (MDCH)[13] that seeks to create varieties of dispute processes to enhance access to justice, with litigation as just one of the options rather than being the sole method of dispute settlement. The move from a mono-dispute court to a multi-door court, though slow, was suggested to be court-centred and court initiated.[14]

Since the proposition of the multi-door concept by Sanders, multiple ADR mechanisms continued to evolve both within and outside the court room. Each process is amenable to disputes emanating from specific sectors; arbitration has dominated the commercial dispute resolution landscape and mediation is

---

9 Fleming Macklin *ibid.*

10 Roscoe Pound, "The Causes of Popular Dissatisfaction with the Administration of Justice" 29 *Annu. Rep. ABA* 395 (1906); Roscoe Pound, "The Administration of Justice in the Modern City" 26(4) *Harvard Law Review* 302–328 (1913).

11 *Ibid.*

12 Wayne D. Brazil "Court ADR 25 Years after Pound: Have We Found a Better Way" 18 *Ohio St. J. Disp. Resol.* 93 (2002).

13 Frank Sander, "The Multi-Door Courthouse" 3 *Barrister* 18 (1976).

14 G. Kessler and L.J. Finkelstein, "The Evolution of a Multi-Door Courthouse" 37 *Cath. UL Rev.* 577–590 (1987).

largely used in labour and family disputes. Other mechanisms include: negotiation, conciliation, ombudsman, arbitration, early neutral evaluation, mini-trial, and hybrid processes.

III Emergence of environment disputes resolution

Environmental dispute resolution (EDR) originated in the 1960s as a result of the growing appeal of an amicable resolution of recurring environmental claims and litigation in the US and Canada.[15] ADR was introduced into other forms of disputes such as family, commercial and labour. In order to stem the tide of environmental litigation, the Environmental Protection Agency (EPA) of the US together with the Congress took pre-emptive measures to provide guidelines to be followed in the resolution of natural resources related environmental disputes in the US. As a result, legislations were formulated to make *inter alia* such guidelines an embodiment of positive law in both federal and state enactments; such laws include National Environmental Policy Act (1969), the Clean Air Act (Amended 1970) and the Clean Water Act (Amended 1977).[16]

In Europe also consensual methods of dispute resolution started gaining field from 2008, when the council directive 2008/52/EC of the European Parliament prescribed a framework for mediation for resolving cross-border disputes on civil and commercial matters. To this effect, the European Commission's recommendations 98/257 and 2001/310 for out of court settlement of disputes and consensual dispute resolution constituted the starting point of application of ADR. In 2013, the European Parliament and the European Council adopted directive 2013/11 for consumer disputes. There was, however, a lack of specific directive to decide on environmental disputes by application of ADR mechanisms.[17]

In Japan and South Korea, environment related disputes are generally resolved on the basis of ADR mechanism, mainly on the basis of negotiation and arbitration. In North Korea, the Environmental Dispute Resolution Commission is authorized to resolve environmental disputes under a dispute resolution system developed by it in 1991, mainly by application of mediation

---

15 David J. Hayes, "Elusive Goal-New ADR Models Help in Natural Resources Disputes" 7 *Disp. Resol. Mag.* 29 (2000).

16 Jennifer Girard, "Dispute Resolution in Environmental Conflicts: Panacea or Placebo?" *available at*: http://cfcj-fcjc.org/sites/default/files/docs/hosted/17465-dr_environmental.pdf (last visited on Jan. 20, 2015).

17 Maud Piers, "Europe's Role in Alternative Dispute Resolution: Off a Good Start?" *Journal of Dispute Resolution* 1-38 (2014).

under the Environment Dispute Adjustment Act 1997, which has since then been amended several times. Most of the cases are resolved at this level. In Japan, the position is more or less the same. Residents there may file their complaints to the local government, and the complaints are taken care of by the Environment Pollution Complaint Councillors (EPCC). If it fails to amicably resolve the matter, it is referred to the Environment Dispute Coordination Commission (EDCC) or the Prefectural Pollution Examination Commission (PPEC). They have power to investigate and consult experts in technical subject matters. They resort to conciliation, mediation and arbitration according to the choice of the parties to the case. EDCC can also provide adjudication services if the matter could not be resolved by application of ADR mechanisms. The system of environmental dispute resolution with ADR is working very well in Japan. In the wake of ever growing environmental degradation due to errant human activities and complaints against such activities, environmental courts and tribunals, with judicial and technical members, are becoming necessary in order to decide complex environment and natural resource related matters. The National Green Tribunal of India, the Land and Environment Court in Australia and the Environment Court of New Zealand are some of the best examples. They are deciding disputes with or without the application of ADR mechanism. The Environment Court of New Zealand under the Environment Court of New Zealand, Practice Note 2014, which has abolished all previous practices, specifically prescribed ADR mechanisms for resolving environmental disputes. On the contrary, the National Green Tribunal, India, adjudicates on the cases; but while quantifying the amount of compensations to be paid to affected people, it may resort to ADR mechanisms. It has to be noted here that courts that are resorting to the ADR mechanisms are more popular than others.[18]

The meaning of an environmental dispute seems to have evaded acceptable definitions among experts, although there have been varying understandings from different fields. Sir Ninian Stephen puts it as "dispute in which environmental factors can be seen to play a significant part."[19] However, from the environmental planning perspective, an environmental dispute is attributable to ineffective environmental management techniques; therefore, it can be

---

18 George Pring and Catherine Pring, "Twenty First Century Environmental Dispute Resolution- Is There An ECT in Your Future" 33(1) *Journal of Energy and Natural Resources* (2015).

19 Stephen Ninian, "Environmental Dispute Resolution" 28(1) *Australian Zoologist* 10-15 (1992).

resolved through partnership, collaborative and cooperative techniques among the disputing parties rather than on contest basis.[20] Historically, the main crux of most environment dispute is the abundance or inadequacy of resource, while its absence rarely serves the impetus for conflict. This is quite ironical as it has led to more conflict and underdevelopment than its absence. This phenomenon has been tagged 'resource curse' or 'paradox of plenty' by economic and development experts.[21]

The special character of disputes involving natural resource and environment has made it non-amenable to the traditional dispute resolution mechanisms provided through the court of law. Other justification for seeking new ways of resolving this form of dispute include, power imbalance, the absence of a comprehensive corpus of legal reference on the subject (except treaty norms), the multiplicity of parties, presence of technical and scientific information, the realization of the finite nature of resource and other future uncertainties on the proposed projects.[22]

The role of state agencies and statutes in an environmental dispute can be two fold, *i.e.*, protection of natural resource and granting permits for its use.[23] While the government might possess an unlimited interest in the natural resource within its domain, it also has the powers to grant permits to private corporations who might continue to deplete the environment for economic gains. This is a breach of the 'public trust doctrine' which stipulates that the resources of the state are held in trust for the present and future generation as the beneficiary.[24] However, it is 'business as usual' and the state is failing in its trust to the disadvantage of the beneficiaries and the living resource within and outside its borders.

Since polluting acts responsible for degradation of the environment were considered as criminal acts, they were traditionally dealt with negative sanctions, fine and imprisonment. But now, both preventive and punitive measures are considered to be equally effective. Rather, participation of all stakeholders,

---

20 Peter Oliver, "Natural Resource and Environmental Management Partnerships: Panacea, Placebo or Palliative" in National Coastal Management, Coast to Coast Conference, Tweed Heads, Australia (2002).

21 J.D.Sachs and AM Warner, "The Curse of Natural Resources" 45(4) *European Economic Review* 827–838 (2001).

22 *Supra* note 5 at 12.

23 Mary C. Wood, "Advancing the Sovereign Trust of Government to Safeguard the Environment for Present and Future Generations (Part I): Ecological Realism and the Need for a Paradigm Shift" 39(1) *Environmental Law* 43(2009).

24 *Ibid.*

including public at risk, is being considered of immense importance from the point of view of compliance of environmental laws and dispute resolution. Thus, public participation in environmental decisions-making is a matter of great importance, rather a *sine qua non* in certain matters.[25] In certain cases, *e.g.*, environment impact assessment (EIA) public participation has been a matter of great importance. Same has been in the case of introducing genetically modified organisms. Public participation in these matters is in the interest of people and the environment as it, in effect, enforces the 'precautionary principle. As administrative authorities are quasi judicial authorities and have to act judiciously, in the case of public disputes, it is always better for them to decide issues on the basis of conciliation and negotiation like the Japanese Environmental Dispute Coordination Commission and Prefectural Pollution Examination Commission, and the South Korean Environmental Dispute Resolution Commission. For example, instead of penalizing the polluter, negotiation or mediation can lead to shifting or diverting the polluting source, and payment of compensations to those who suffer from. It will also be a long-term solution, because it is consensual. Negotiation or mediation can also work as a successful tool for starting an environmentally safe project or shifting or closing a project or arriving at an amicable compensation to be paid for cleanup activities or for redressing the loss to the people. Negotiation and mediation has always been a successful tool to strike a meaningful balance between environment and development for achieving the imperatives of sustainable development.

IV Potentials of ADR in environmental disputes

The finite and limited nature of natural resource makes the use of ADR a veritable tool to safeguard it from their unsustainable exploration. The benefits of it can be divided into two, *vis-a-vis* benefit to the contesting parties and benefit to the environment. Excessive emphasis has been placed on the benefits to the parties. The benefits to environment from ADR are intrinsic and embedded in sustaining the elements of nature, such as biosphere, hydrosphere and the atmosphere, which are usually the subject matter of environmental disputes. The obvious advantages of ADR in justice delivery systems are cost efficacy, easier communication, faster, position aggregation

---

25 Ansari, Abdul Haseeb, "Principle 10, the Aarhus Convention and Status of Public Participation in Environmental Matters in the Malaysian Laws with Special Reference to EIAs" 17 (1) *IIUM Law Journal* 57 (2009).

and sustainable party-driven solution. The overwhelming benefits of seeking ADR processes to resolve environment disputes has been highlighted in some earlier studies in the context of 'environmental mediation'.[26]

An important feature of litigation, which also portends negative impact on environmental cases, is the procedure-oriented proceedings which are usually in compliance with the existing statutes. Such compliance mechanism, which is considered as a means of enhancing fairness, tends to divert the focus on the parties and environmental groups for amicably solving fundamental and intricate environmental issue and for achieving sustainable objectives.[27] Environmentalists are more concerned about conservation of the environment and its elements for the benefit of all, while the pro-development and industrialists are interested in building infrastructures at the expense of the environment. However, procedural rules result in quick, amicable and fast disposal of environmental issues based on consultations and mutual agreements of the parties. These might be useful for the environmentalists where such rules give relief from the lengthy and tiring procedural delays. Moreover, environmental courts, which have both judicial and technical members, around the world now have relied on summary proceedings, wherein they visit sights, call other experts and arrange negotiations between the parties, if need be, and issue necessary directive in their judgments to concerned government officials and public. In environmental matters, where environmental degradation has not brought menace to the general public, negotiation can be the best way of solving disputes. It can be with or without the involvement of the courts. It has to be noted here that while arbitration has not made much inroad in solving environmental disputes, the ADR tools like negotiation and mediation have proven to be useful. In order to avoid litigations, appropriate government departments organize meetings of all stakeholders and negotiate on all issues and take necessary decisions based on the popular views emerging from the consultations. The Bt. Brinjal episode of India is the best example. Before allowing it to be marketed, the Central Government organized meeting of members of the public, non-governmental organizations (NGOs) scientists and government officials. After several rounds of meetings in different states, it was decided that the Bt. Brinjal should undergo several field and lab testing. In case of the Bruga Mega, incineration project in Malaysia was abandoned by the government upon negotiations with all stakeholders. Both the decisions are considered to be in the interest of environment and protection

---

26 John L. Watson and Luke J. Danielson, "Environmental Mediation" 15(4) *Natural Resources Lawyer* 687-723 (1983).

27 *Ibid.*

of public health. Sustainable forest management can be used to strike a balance between forest inhabitants' easementary rights and establishing reserve forests. In many instances forest inhabitants have been displaced in order to facilitate construction of dams, dikes and barrages, *e.g.*, displacement of forest inhabitants to facilitate construction of the Bakun Dam of Sarawak, Malaysia and displacement of forest residents form forests declared as reserve forests in Uttar Pradesh, India *etc.* Public participation in finalizing environmental impact assessments is an area where negotiations have proven to be very useful.[28]

V Challenges and peculiarities of EDR

Some situations where ADR can be a useful tool for an amicable resolution of environmental disputes have been noted above. However, in achieving environmental justice through EDR, it is pertinent to inquire whether the ADR principles, which are applicable in other forms of dispute, can produce the desired result in the resolution of environment related disputes. it is also important to consider the effect of these principles on the basis of certain environmental governance and concepts such as public participation in environmental decision-making and access to information.

Apparently, it seems that ADR principles such as confidentiality and privacy are seemingly incompatible with the widely accepted need for public participation in environmental decision-making. These contradictions might also require some level of dynamism in the mediator's and negotiators handling of relevant scientific and technical information concerning natural resources. Nevertheless, in many environment related cases where full confidentiality is required to be maintained, total confidentiality is maintained; where partial confidentiality is required to be maintained, some parts of the information is retained and the rest is disclosed; in cases where nothing is confidential, total disclosure is made. For example, in the case of future development, *e.g.*, setting up a heavy plant or machinery yet to be finalized, information may not be disclosed at all. But where public input is essential for finalizing any development plan, *e.g.*, constructing a canal or drainage, it is disclosed among the negotiators, which may include a representative of the public who might be affected by the proposed project. But in cases where confidentiality is not necessary, *e.g.*, exploration and exploitation of natural resource, access to all

---

28 Dan Swecker, "Applying Alternative Dispute Resolution to environmental Problems" *Mediate*, *available at* : http://www.mediate.com/articles/sweckerD1.cfm?nl=108 (last visited on July 20, 2014).

relevant documents may be allowed. The Land and Environment Court of Australia and National Green Tribunal of India are working on these basic principles.

Confidentiality and public participation

Public participation is one of the elements of precautionary principle which requires necessary precautionary measures to be taken before introducing something into the environment or allowing any developmental activity to go ahead, as it is there in cases of exportation and importation of genetically modified living and non-living substances from one country to another country. If the impact of introducing anything into the environment or of any proposed developmental activity cannot be scientifically determined, it should not be introduced, as was done in the case of Bt. Brinjal episode of India. This approach helps to encourage policies and environmental decisions that protect human health and conserve the environment in the face of uncertain foreseeable risks.[29]

Confidentiality is a hallmark of the ADR process. Rules regarding confidentiality have been codified in ADR statutes around the world. One such statutory provisions on confidentiality of ADR processes was recommended by the New Jersey State Supreme Court in these words: [30]

> In order to create a climate of trust, participants must be assured that the revelations made during the mediation process will be held in strictest confidence by the mediator. Without such assurances, disputants may be unwilling to reveal relevant information and may be hesitant to disclose potential accommodations that might appear to compromise the positions they have taken.

Two reasons have been identified as the causes of seemingly contradicting situations between confidentiality and public participation, *i.e.*, affect of environmental litigations on individuals, groups of individuals and non-parties, who are not involved in the litigation and requirement of confidentiality of the process in ADR mechanism.[31] The enactment of freedom of information

---

29 Kriebel, D, J Tickner, and P Epstein, "The Precautionary Principle in Environmental Science" 109,9 *Environmental Health Perspective* 871–876 (2001).

30 "New Jersey State Supreme Court Task Force on Dispute Resolution" Final Report 23 (1990).

31 E.R. Max "Confidentiality in Environmental Mediation." 2 *NYU Envtl. LJ* 210 (1993).

law in advanced democracies has made access to information a democratic right.[32] Therefore, public participation in decision-making requires that the public be actively carried along in the processes of deciding issues that might affect their immediate environment, health and livelihood. Public participation, which is a major component of precautionary principle can be carried out in different ways, which can suit specific environmental and scientific objective.[33] They include opinion polls, public hearing, consultation exercises, involving focus groups, referendum, and questionnaire techniques with the aim of enabling the public to participate in the decision-making process. At still higher levels, members of the public may be selected to take part in exercises that provide major degree of contribution in planning, implementation and dispute resolution processes by the environmental decision-making authority.[34]

According to Sherman,[35] the confidentiality provision in the Texas ADR Act, 1987, the has two main aspects: 'process' itself that is considered essential towards achieving the objective of ADR, and 'public access' issue which relates to the over-riding interest of the public to information on the ADR proceedings. Therefore, there is a need to prioritize public interest over the need to encourage the disputing parties to confidently speak in the ADR proceedings. This cogent concern for openness in environmental justice has found its way into policies and statutes, hence proceedings, meetings, and hearings must be made open to override ADR confidentiality.[36] It can be concluded that the role of confidentiality in ADR is highly unlikely to hold in environment and natural resource related disputes in order to allow public participation and scrutiny of environmental decisions. It is possible in the only ways indicated above.

Some multilateral environmental agreements (MEAs) notably the AARHUS Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 1998, has incorporated this noble provision for wider public participation in environmental decision

---

32 Thomas C Beierle and Jerry Cayford, *Democracy in Practice: Public Participation in Environmental Decisions* (Resources for the Future, 2002).

33 *Supra* note 29 at 871.

34 Gene Rowe and Lynn J Frewer, "Public Participation Methods: A Framework for Evaluation" 25(1) *Science, Technology & Human Values* 3–29 (2000).

35 Edward F. Sherman, "Confidentiality in ADR Proceedings: Policy Issues Arising from the Texas Experience" 38 *S. Tex. L. Rev.* 541 (1997).

36 *Ibid.*

making.

Technical and scientific information

The amount of scientific and technical information involved in natural resource and environment matters require the ability of the parties and mediators to interpret and constructively use their scientific knowledge towards resolving the dispute. Such volume of technical and scientific information might elude the understanding of a lay-party or a witness. The information might help the mediator with vital scientific information for the resolution of the dispute. Specific information given during the resolution processes can expose the inadequacy of the existing EIA procedures.

For instance, dispute between rice farmers and management of hydroelectric company might occur as a result of the planned diversion of water towards hydroelectric power generation or agricultural irrigation for rice production. In this situation, there is a need to describe the technical details of power generation to farmers and a need for the power corporation to understand the course of water flow to farmlands.

The cost of investigation and gathering scientific information required in the resolution of this kind of disputes might be enormous. As practised by the Japanese Environmental Dispute Coordination Commission (EDCC), the dispute resolution institution can provide a funding mechanism to facilitate such investigations.[37] The funding mechanism covers filing fee and the cost of investigating the damages.

Intractability of environment disputes

Another major obstacle for EDR is intractable nature of most environmental disputes. This makes it difficult to manage or find a viable technique for achieving consensus and mutually acceptable resolutions of environmental problems.[38] Natural resource disputes are more intractable where it involves ideological, ethnical or cultural differences. For instance, the aborigines in Australia, the *orang-Asli* in Malaysia and other native people, who are firmly attached to forests, cannot easily be moved to other places where there are no forests in the vicinity. In these cases, the parties are unlikely

---

37 Naito, Katsuhiko, and Tatsuro Utsugi. "Environmental Dispute Resolution System in Japan" (2010) *available at*: http://www.aecen.org/sites/default/files/forums/2010/Environmental%20Dispute%20Resolution-%20NAITO.pdf (last visited on Jan. 20 2015).

38 *Supra* note 1 at 54.

to willingly negotiate, since negotiation is usually seen as a means of extracting compromise of their values and ancient heritage. This gives impetus to environment related arms conflicts,[39] in which the parties are also unlikely to respond to administrative subjugation or compromise. Confrontation and arms conflict seem to be the next option towards protecting their environment and reverse the loss and depletion of their resources.

Intractability is a peculiar factor in the distinction between disputes and conflicts.[40] While the former is less intractable, less complex and amenable to an amicable resolution and settlement, the latter is acutely difficult, raises moral and ideological questions, and the parties are unwilling to shift position. The ideology of the tribes and their belief system attached to environment is a common source of conflict as groups are not willing to give up their ancestral heritage and resource. Burton[41] succinctly explains such conflict as long-term divisions between groups with different beliefs about the proper relationship between human society and the natural environment. These situations can well be exemplified by the *Penan* problem of Sarawak, Malaysia. *Penans* of Sarawak are one of the major tribes living in forests. They resisted logging activities in their areas as they considered that the whole forest belonged to them. The problem was solved by negotiation on an amicable relocation scheme. Although they did not look satisfied, they did not assert their right after that. In a similar scenario, 10,000 households had to be relocated in order to facilitate construction of the Bakun Dam in Sarawak. Similarly, when a forest area was declared a reserve forest by the Uttar Pradesh Government in India, a large number of forest inhabitants were displaced. The Supreme Court of India in *Banwasi Sewa Ashram* v. *State of Uttar Pradesh*,[42] brought relief to them. In such situations, it is warranted that there should be an amicable settlement on the basis of negotiations between representatives of displaced people and government officials. An amicable relocation package should have:

- Provision for housing,
- Creation of source of income by encouraging small scale community businesses and jobs, education, transport, sanitation and provisions store,
- Prompt implementation by the designate government officials,

---

39 *Ibid.*

40 *Ibid.*

41 John Wear Burton and Frank Dukes, *Conflict: Readings in Management and Resolution* 1 (St. Martin's Press, 1990).

42 AIR 1987 SC 374.

- Reasonable re-location time,
- Proximity of the new place to the forest so that they could feel as if they are not away from the forest,
- Payment for inconvenience.

Multiple interests and non-legal parties

The peculiar nature of natural resource dispute can be viewed from the multiplicity of parties and interest groups involved in many disputes. Such parties include environmental groups, business groups, corporations, local and indigenous communities, wildlife protection organizations, government agencies, and animal right groups and other NGOs among others. This situation poses a Herculean challenge to the would-be environmental mediators and policy-makers on the appropriate technique for the resolution of the dispute.

The level of involvement of several interest groups in natural resource dispute can be daunting. Therefore, the absence of critical interest in the resolution process might necessarily stall the commencement of the resolution.[43] Where confrontation and conflict creeps into the resource struggle, persuading the arms-laden party may prove to be difficult. This situation exists in oil-rich area such as Nigerian-delta region and the middle-east.[44] It is necessary that all affected parties are included and decisions are made in a manner that all interest groups are satisfied. The mediators face a challenge in bringing the reluctant stakeholders to the round-table, to convince all the parties to see the process as their best alternative in the circumstances and to encourage them to participate in good faith.[45] However, this is not an impossible challenge.

Power imbalance

Environmental disputes occasionally involve the parties with unequal and highly tilted powers. In such situations, there is a possibility on the part of the superior party to garner political and economic support. Conservation movements are known to have limited financial, human and logistic resource; [46] hence, the pursuit of expensive and time-consuming administrative and

---

43 *Ibid.*

44 *Supra* note 37.

45 J. Thomas-Lamer, "Getting Reluctant Stakeholders to the Table" 7 *Consensus* 5-6 (1998); AR Talbot, *Settling Things: Six Case Studies in Environmental Mediation* (Conservation Foundation, Washington DC, 1983).

46 *Supra* note 26.

judicial proceedings can be daunting thereby creating an imbalance over the pro-development parties, mostly comprised of industrialist, and large corporation backed by policy-makers and enforcement officials.[47] The long walk to justice through the court system requires resilience and funds at every stage. Hence, the likelihood of the various pro-conservation groups of sustaining a litigious venture is very uncertain. It is much easier for the conservationist to challenge administrative decisions through motions and summary judgments. Similarly, corporations and pro-development interests extract unfair concessions and compromises from environmentalists at the bargaining table due to the disadvantageous position of the other party.[48]

In view of this situation, if there is not enough political will on the part of the government to amicably decide environmental resource and developmental issues, this will lead to partisan decisions which might degrade the quality of the environment and violate rights of the people and negatively impact the resources. It is, therefore, suggested that all crucial decisions should be taken on the basis of negotiation, and nothing should be taken for granted. This popular view is gathering strength and administrative and judicial decisions are now based on negotiations that pay due attention to the interest of the people. For this purpose, judges are making visits to designate sights, taking expert opinions, giving opportunity to people to present their viewpoints, and if need be holding meetings of all stakeholders. Based on this logic, in *Rural Litigation and Entitlement Kendra* v. *State of U.P.*,[49] popularly known as Doon Valley case, the Supreme Court of India, in the interest of conservation of the forests and protection of health of the people, ordered closing of all mines in the Doon Valley.

VI Environmental dispute resolution and ADR : An international perspective

Since late 1990s, there has been a recurrent debate on the need for an international environment court (IEC),[50] under the auspices of the United Nations, as a platform for the actualization of fundamental right to a healthy environment through just resolution of intergovernmental environmental and natural resource disputes and by balancing material interests of states with

---

47 *Supra* note 15.

48 D.J. Amy, "The Politics of Environmental Mediation" 11(1) *Ecology Law Quarterly* 1-19 (1987).

49 AIR 1989 SC 594.

50 Sean D. Murphy, "Does the World Need a New International Environmental Court" 32 *Geo. Wash. J. Int'l L. & Econ.* 333 (1999).

conservation of natural resource. This section examines decisions of international courts and judicial bodies in the handling of environment cases. The courts include Permanent Court of Arbitration (PCA), International Court of Justice (ICJ), World Trade Organisation (WTO) and International Tribunal on the Law of the Sea (ITLOS).

Overview of international legal regime

Several arguments have been placed to justify the establishment of such a specialized court at the world level due to the inadequate mechanisms of the existing forums and because the partisan approach in the existing institutions seem to be incurable.[51]

Such a demand is primarily based on the experience of the WTO member states. Almost all panelists sitting on the panels and the appellate body are trained in international trade law and are not well versed with environmental law. They have failed to strike a meaningful balance between conservation of the environment and economic interests of the disputing states, except for very clear cases like *European Communities-Measures Affecting Asbestos and Products Containing Asbestos*.[52] Their reports have been allegedly leaning towards international trade, because they strictly adhered to the WTO laws by giving literal interpretation to them without taking into consideration the environmental imperatives.[53] Similar criticism has been levelled against the ICJ. There also, judges, except for few,[54] are not well versed with environmental problems and have therefore, limited their decisions to legal norms rather than interpreting them in light of the contemporary environmental principles. For example, it was found by the court that protection of the environment was not a compelling factor to outlaw the use of nuclear weapons.[55] Moreover, it may also be noted

---

51 *Ibid.*

52 WT/DS135/12 (Apr. 11, 2011).

53 *Supra* note 25.

54 It has been opined by Veeramantry J in *Gabcikovo-Nagymaros Project* (*Hungary* v. *Slovakia*) [1997] ICJ Rep. 7 that sustainable development is not only a concept, but a principle having normative value. Thus, we must strike a balance between environment and development. He also emphasized that all treaties, old and new, have to be interpreted keeping in view states' obligation towards conservation of the environment. Thus, states are duty bound to adhere to environment impact assessment (EIA). The second part actually complements the first part of his decision.

55 See the advisory opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons [1996] ICJ Rep. 226 , and the case on Gabcikovo-Nagymaros Project (*Hungary* v. *Slovakia*) [1997] ICJ Rep. 7. It has to be noted here that it may be argued that the latter case may be an environmental case, but the non-environmental aspect , *i.e.*, right to unilateral suspension of treaty obligation was dominant and of greater importance.

that the jurisdictions under the WTO and the ICJ are only with respect to states; private individual cannot move an application for instituting case. The proposed international environmental court has to be different from them in terms of interpreting laws, and it should also resort to ADR mechanisms, especially arbitration and negotiations. If such a court is established, the question is: how will it work? In order to answer this question, one needs to examine the issues related to protection of the environment and environmental rights of states and individuals; striking a meaningful balance between environment and development; resolving disputes on individual environmental interests and collective environmental interest of the people; and strict adherence to the statutory provisions or interpreting them in the light of contemporary environmental principles in the greater interest.

The idea to have an international court of arbitration is a shift of approach from *conflict to consensus*, to ensure greater degree of compliance. Thus, the Permanent Court of Arbitration (PCA) in the *Trail Smelter case* (*US* v. *Canada*),[56] which delineated the customary law, held that no state will cause harm or provide its territory to cause damage in another country. This was the first case involving environmental dispute decided on the basis of ADR mechanism and it opened a gate for application of ADR for deciding disputes in accordance with environmental principles. In this vein, the latest case is the *South-China Sea case* (*Philippines* v. *China*).[57] This case is not directly on conservation of the environment, but might have long-term bearing on conservation of the marine life in the region. The task of the PCA has been carried forward in the *Mox Plant case* (*Ireland* v. *United* Kingdom),[58] the *Land Reclamation case* (*Singapore* v. *Malaysia*),[59] the *Marine Boundary case* (*Barbados* v. *Trinidad and Tobago*),[60] and the *Sea delimitation case* (*Guyana* v. *Suriname*).[61] It is a matter of great significance that the PCA developed the Optional Rules for Arbitration of Disputes Relating to Natural Resource and Environment, with some additions and modifications to the existing UNCITRAL rules, to deal with environment related cases granting right to institute case to individuals. Unfortunately, in view of greater emphasis laid on optional use of the rules and confidentiality of information, they might

---

56 3 *U.N. Rep. Int'l Arb. Awards* 1905 (1941).
57 PCA Case No. 2013-19.
58 ITLOS Case No 10.
59 (2005) XXVII RIAA 133.
60 PCA Case No. 2004-02.
61 ICGJ 370 (PCA 2007).

not be of much use.

A group of international lawyers gave practical shape to the idea of having an international environment court by setting up in 1994, the International Court of Environmental Arbitration and Conciliation in Mexico. As is evident from its name, it is simply a court working on resolving disputes between states on the basis of ADR mechanism. It can entertain applications also from individuals. It can also give its consultative opinions. But the court has failed to play any significant role in resolving international environment related disputes.[62]

The ECtHR did not apply ADR mechanisms in resolving disputes. The cases decided by it demonstrate strict adherence to legal norms. But there are few cases where the court considered collective rights of the people, including right enshrined in protection of the environment to have precedence over individuals' rights to possess and enjoy their properties. The court in *Frendin* v. *Sweden* [63] while commenting on article 1 of the First Protocol to the European Convention on Human Rights and Fundamental Freedom, 1950, guarantees individuals peaceful enjoyment of their properties in possession, with an exception that there can be deprivation only for protecting public interest as "in today's society, the protection of the environment is increasingly an important consideration". Similarly, in *Pine valley Development Limited and Others* v. *Ireland,* [64] the court observed that interference with the right to peaceful enjoyment of property was for protection of the environment and it was "clearly a legitimate aim in accordance with the general interest".[65] In *Dubetska* v. *Ukraine,*[66] the court accepted that living in an area marked by pollution in excess of minimum noise standards meant unnecessary exposure to increased health risk.[67] In *Hutton* v. *United Kingdom,*[68] the minority of five judges ruled that while allowing night flights at the Heathrow Airport, the United Kingdom Government did not give sufficient weight to right to private life. It is notable here that the court did not say anything emphatically for protection of the environment as protection of public interest. Moreover, the court did not design rules for striking a balance between private interest and public interest. It is said in this context that if the

---

62 Ole W. Pedersion, "An International Environmental Court and International Legalism" 24(3) *Journal of Environmental law* 547-558 (2012).

63 [1991] 13 EHRR 784.

64 ECHR (Ser. A) No. 222.

65 *Id* at paras 54 and 57.

66 Application no. 42488/02 (2014).

67 [2011] ECHR 256.

68 ECHR Grand Chamber (2003) 37 EHRR 28.

matter is predominantly in the interest of protection of right to enjoy a property of a person with minor harm to the environment, it has to be decided in favour of the individual. In view of this it is suggested that the court should interpret legal rules in light of environmental imperatives. For an amicable resolution of disputes the court should also resort to ADR mechanism, as there is no prohibition on resorting to them.

Similar questions arise in relation to environment and development. The Court of Justice, the Court of First Instance of the European Communities, have made significant contribution through referral cases ensuring compliance of the environment related regulations, especially on environment impact assessment, nature and biodiversity conservation and protection of habitat. In these cases the court has simply expressed its rulings on the questions referred to it.[69] They have not adjudicated on contentious cases between the member states. So there is no question of deciding the issues with or without application of ADR mechanism unless the jurisdiction of the court is changed.

The award of the arbitral tribunal in *Compania del Fesarrollo de Santa Elina SA* v. *Republic of Costa Rica*[70] is clear. In this case, the award cleanly stated that environmental protection objectives could not take precedence over economic interest of a country, *e.g.*, foreign direct investment. It is clear that the tribunal in this case failed to clearly indicate as to how to strike a balance between environment and development. It may be reiterated here that if the matter is predominantly for protection of economic rights and adverse impact on the environment is trivial, economic rights must be prioritized; on the contrary, if it is imperative to protect the environment, the economic rights may not be given precedence. In a case where both may be of equal importance, it should go in favour of protection of the environment. Such rules need to be developed by the international tribunals and courts.

The decisions in these cases would have been different under the prevailing world's perception about environment and its protection. It needs to be understood that the protection of the environment will serve greater interest of the people of the world than preservation of economic interests. A meaningful balance between environment and economic development is required

---

69 *Available* at http://ec.europa.eu/environment/legal/law/pdf/leading_cases_en.pdf (last visited on Dec. 20, 2016).

70 ICSID Case No. ARB/96/1 (2000).

so that all developmental activities are sustainable, the benefits of the environment and its resource are enjoyed by the future generations and there is common but differential liability of states with respect to solving any global environmental problems, *e.g.*, global warming, protection to the ozone layer, maintaining the ecological balance and conserving biological diversity.

Therefore, there is a pressing need to review these decisions and develop pragmatic rules for striking a balance between environment and economic activities, including export and import activities, and foreign investments. International courts and tribunals need to interpret treaties, other than multilateral environmental treaties (MEAs), keeping in mind their environmental impacts. They have to fully understand both scientific and environmental arguments, strike a meaningful balance between international trade law and environmental law; properly understand individualistic human right arguments and collective right of the people of health environment; understand the environmental imperatives and state responsibility; prioritize environmental keeping all relevant aspects in view and properly know the differing priorities of developed, developing and least developed countries, keeping in mind the 'common but differential liability principle', the 'polluter pays principle', the 'precautionary principle' 'sustainable development' and 'inter generational equity principle'.

The beginning of formulation of international environmental law from *Trail Smelter*[71] and *Lake Launaux*[72] cases were quite encouraging. But after the Second World War the whole perception changed and the emphasis shifted to development. It was only at the UN Convention on Human Environment, 1970, that it was realized that due to errant human activities, environment is being degraded and states were asked to work to the best of their ability to protect the environment. It opened a floodgate for international treaties and local environmental policies and specific legislations for protection of the environment. Now, to strike a balance between the environment and development is *sine qua non*. And in order to have amicable rulings, ADR should be practiced. Perhaps, it is for this reason that ICJ, WTO and ITLOS realized the importance of conservation of the nature and its resource. However, only ITLOS resorted to negotiation; the other two decided cases with either strict adherence to statutory provisions or exceptionally interpreting them in light of cotemporary

---

71 *Supra* note 56.

72 *France* v. *Spain* (1957) 12 R.I.A.A. 281.

environmental principles developed for conservation of the environment and natural resource. In *Pulp Mill case,*[73] thus, the ICJ supplied emphasis on environment, and made it a necessary to do environment impact assessment (EIA). In this case ICJ ruled that '... a precautionary approach may be relevant in the interpretation and application of the provisions of the Statute...' The WTO Appellate Body recognized the right of sovereign nations to protect environment but it may have to be a done in a non arbitrary and non-discrminatory manner in *United States – Import Prohibition of Certain Shrimp and Shrimp Products.*[74] In a later case, the WTO Panel ruled that "...few interests are more vital and important than protecting human beings from health risks, and that protecting the environment is no less important". It is just a remark made by the panel. WTO panels and the appellate body worked as a normal court and resolved disputes with strict adherence and narrow interpretation of the WTO laws. They seldom interpreted them in light of the greater interest of protection the environment and its resource. It is for this reason that their approach has never been balanced. Contrary to the WTO practice, in *Land Reclamation by Singapore In and Around the Straits of Johor* (*Malaysia* v. *Singapore*)[75] *case* of ITLOS, based on the rulings of the Malaysia-Singapore Joint Committee on the Environment (MSJCE), two countries agreed to exchange information and discuss matters concerning environment in the area, and to monitor water environment in the sea and estuaries, and to monitor ecology and morphology.[76] It brought amicable and long-term solution to the problem. Similarly, the Commission on Environmental Cooperation under North-American Free Trade Agreement (NAFTA) established an ad hoc arbitration for deciding issues in *S.D. Myers Inc.* v. *Government of Canada*,[77] to be decided by way of award(s) under the UNCITRAL rules. The award was an amicable solution to the problem. It is for this reason that Canada's application to the Supreme Court of Canada to review the award was rejected by the court.

---

73 *Case Concerning Pulp Mills on the River Uruguay* (*Argentina* v. *Uruguay),* ICGJ 425 (ICJ 2010).

74 WT/DS58/AB/R (Oct. 12, 1998).

75 (2005) XXVII RIAA 133.

76 See generally, James Harrison, "Reflections on the Role of International Courts and Tribunals in the Settlement of Environmental Disputes and the Development of International Environmental Law" 25(3) *Journal of Environmental Law* 501-514 (2013); Philippe Sands, "Litigating Environmental Disputed: Courts, Tribunals and the Progressive Development of International Environmental Law", OECD Global Forum on International Investment, OECD Investment Division, *available at*: www.oecd.org/investment/gfi-7 (last visited on Dec. 20,2016).

77 UNCITRAL (2000-2002).

There has been a general practice that disputing parties appoint technical experts for pleading cases as counsels before courts and tribunals. In the *Pulp Mill case* the ICJ objected to this trend and said that they should rather appear in the court as an expert rather than counsels and they should be cross-examined.[78] This ruling of the ICJ demonstrates the importance of appearing of experts of contesting parties in the court and drawing a conclusion based on their examinations and cross-examinations. Perhaps, in future ICJ may rule that experts draw amicable solution(s) to the issue(s) on the basis of consultations among them. *Case Concerning Whaling* saw the first examination and cross-examination of experts before the ICJ.[79] It is notable that the contemporary trend in ITLOS is that they are being appointed as negotiators, as in *Land Reclamation case* between Singapore and Malaysia.

The above brief discussion on various international dispute settlement bodies, courts and tribunals, accentuate that they worked within their assigned jurisdictions. But there was lack of comprehension among some of the adjudicators. In order to have a comprehensive and concerted mechanism of dispute resolution covering all aspects of dispute resolution, contentious and advisory, with application of ADR mechanism, what is needed is to have an international environment court under the auspices of the United Nations, with civil as well as criminal powers, on the pattern of the International Court of Justice and International Criminal Court. If there is an independent international environment court, comprising legal and technical experts, working with application of ADR mechanisms, the approach of the court will be quite balanced, thus, acceptable to disputing parties. This court can also be given the task to resolve the issues pertaining to rivers bordering more than one state or passing through more than one state. This power can easily be given to this court by making suitable amendments in the United Nations Convention on the Law of the Non-Navigational Use of International Water Courses, 1997. Similarly, the court can be authorized to try international environmental crimes under the Protocol I to the Geneva Convention and the 1976 Convention on the Prohibition Military or Any Hostile Use of Environment Modification Technique (ENMOD) and some other MEAs, especially the Biological and Toxic Weapons Convention, 1972 and the Chemical Weapons Convention, 1993.

Despite the successes achieved in the use of ADR mechanism in other international dispute resolution arena, environmental cases are still a major

---

78 [2010] ICJ Rep.14, 167.

79 *Case Concerning Whaling in the Antarctic*, CR 2013/7, 38.

preserve of litigation. Due to the inability of litigants to resolve environment related disputes amicably on the use of natural resource, conservation of the environment and rights related to its resource, several international legal instruments have recommended the use of ADR while there have been a louder call for a stronger global environmental court resolving disputes mainly on the basis of ADR mechanisms.[80] However, a common denominator among the array of international tribunals available with exception is the limited role given to private entities and other non-state parties to stand in environmental cases and proceedings.[81]

The above discussions demonstrate that apart from PCA, ITLOS and others courts do not give due consideration to environmental imperatives for resolving disputes. Courts and other dispute resolution bodies, with few exceptions, have cursorily shown their concern and have given input of contemporary environmental principles. It is needless to say that conservation of the interest is of great value for survival of the mankind. As stated above, an international court of environment under the auspices of the United Nations can solve this problem amicably by application ADR mechanism.

After having a brief account of the international scenario on the international dispute resolution mechanism by various dispute settlement bodies with a pointer that the ADR mechanism is becoming popular, MEAs and the bodies are also finding it better to adopt it because consensus leads to a greater degree of compliance. The laws governing dispute resolution on the basis of ADR mechanisms are as under.

Environmental disputes resolution at the Permanent Court of Arbitration (PCA)

The Permanent Court of Arbitration is the oldest organ of the United Nations with jurisdiction to settle disputes among member states. Although the PCA has jurisdiction on all kinds of disputes, including environment and resource disputes, adoption of the Optional Rules for Arbitration of Disputes Relating to Natural Resource and/or the Environment Optional Rules for Conciliation of Disputes Relating to Natural Resource and/or the Environment in 2001

---

80 Kenneth F. McCallion and H. Rajan Sharma, "Environmental justice without borders: The need for an International Court of the Environment to Protect Fundamental Environmental Rights" 32 *Geo. Wash. J. Int'l L. & Econ.* 351 (1999).

81 Christopher D. Stone, "Should Trees Have Standing—Toward Legal Rights for Natural Objects" 45 *S. Cal. L. Rev.* 450 (1972); David Scott Rubinton, "Toward Recognition of the Rights of Non-States in International Environmental Law" 9 *Pace Envtl. L. Rev.*475 (1991).

and 2002 respectively[82] was an attempt to reposition the judicial institution in its readiness to conduct proceedings on environmental matters. Based on the United Nations Commission on International Trade Rules (UNCITRAL Rules), these rules are significant, as they unify litigation, arbitration, conciliation and other ADR processes under a single forum, albeit with separate rules of the PCA,[83] and are the first of its kind in international environmental dispute resolutions. The rules also have the effect of incorporating ADR mechanism into the modus of the court of arbitration.

With far reaching procedural flexibilities and innovations introduced under the rules, the PCA seems to have attempted to settle the debate over the bias and unfriendliness of international courts and tribunals towards environmental protection. Some of the significant innovations include the number of parties, status of non-state actors and non-governmental organizations (NGOs), composition of panels with experience in legal and environmental protection and natural resource.[84]

The notion of state sovereignty has been the basis for restricting disputant in international legal forum such as the ICJ, WTO among others, with few exceptions allowing NGOs as audience in legal proceedings or at best gain access to the tribunals through sovereign states.[85] However, the PCA gave legal standing to non-state actors such as NGOs and individual equal standing with multinational corporations in environmental matter. This is necessary in order to accommodate various interests and multiple parties, which characterize environment dispute resolution.

In addition, the process and procedure of panel composition can be twofold: one panel of arbitrator and the other panel of environment experts. Arbitrators may be appointed by the parties or entrust the appointment to an authority.[86] The rules also allow parties where necessary to appoint an expert panel that will report to the arbitration panel. Such experts might be appointed from a list of

---

82 Permanent Court of Arbitration, Environment Dispute Resolution, *available at:* http: // www.pca-cpa.org/showpage.asp?pag_id=1058 (last visited on Feb. 28, 2015).

83 Charles Qiong Wu, "Unified Forum-The New Arbitration Rules for Environmental Disputes under the Permanent Court of Arbitration" 3(1) *Chi. J. Int'l L.* 263 (2002).

84 *Ibid.*

85 Andreas Bieler, Richard Higgott, and Geoffrey Underhill, *Non-State Actors and Authority in the Global System* (Routledge, 2004).

86 Permanent Court of Arbitration, Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment ("Rules") art., 6-8 *available at* : http://wvrw.pca-cpa.org/EDR/ENR.rules.htm (last visited Feb. 20, 2015).

scientific and technical experts established and maintained by the PCA as nominated by the member states and the Secretary-General.[87] Furthermore, the PCA has been acknowledged as the judicial interface for dispute under the MEAs such as the United Nations Framework Convention on Climate Change (UNFCCC) and its mechanisms.[88]

International Court of Justice (ICJ)

The International Court of Justice, "in an attempt towards creating a separate regime for environment disputes, […] established a special Chamber for Environmental Matters (CEM) in 1993".[89] The court has not received more environmental disputes partly because state parties are not convinced about the availability of CEM judges with experience in environmental matters.

In 1997, the court refused to consider the anticipated environmental damage to the Danube River in the Gabicikovo-Nagymoros Dam Project,[90] which involves the Danube River. It appears that the ICJ environmental dispute resolution can easily be interpreted as a case regarding rights of states in bilateral agreements. This had further strengthened raging criticism of the CEM's approach to protection and conservation of the environment.[91]Although the court has the power to appoint scientific and environment experts to access the possibility of potential damage to the environment, there is no evidence of invoking such power.[92]

In addition to the above criticism of the ICJ, only sovereign states are allowed to initiate proceeding against each other. In other words, private individuals, environmental interest groups, NGOs and corporations are not allowed to initiate case. This position regarding *locus* of non-state actors is antithetical to the intention of other multilateral environmental agreements

---

87 *Id.* art. 27(5).

88 Permanent Court of Arbitration, Environment Dispute Resolution, *available at* : http://www.pca-cpa.org/showpage.asp?pag_id=1058 (last visited on Feb. 28, 2015).

89 *Supra* note 83 at 263.

90 *Supra* note 54.

91 Mari Nakamichi, "The International Court of Justice Decision Regarding the Gabcikovo-Nagymaros Project" 9 *Fordham Envir LJ* 337 (1998).

92 Philip Riches and Stuart A. Bruce , "Brief 7: Building an International Court for the Environment: A Conceptual Framework" *Governance and Sustainability Issue Brief Series* (2013) *available at*: http://scholarworks.umb.edu/cgs_issue_brief_series/7 (last visited on Jan. 20, 2016).

such as the Aarhus Convention, 1998 and the Cartagena Protocol on Bio-safety, 2000, which provide for dispute settlement mechanisms through the compliance committee and makes the ICJ unsuitable for resolution of environmental disputes. [93] To this end, the CEM has been closed as a result of absence of caseload since its establishment in 1993.[94]

World Trade Organisation (WTO)

The structure and process of the understanding on rules and procedures governing the settlement of disputes seems to have incorporated the core principles of ADR within the operations of its main dispute resolution bodies *vis*-à-*vis*: dispute settlement body (DSB) and the independent and quasi-judicial institutions that are the panels, the appellate body and arbitrators. In addition to the voluntariness of the process, the reference to the concept of good offices, conciliation and mediation also shows the overall perception of ADR in the WTO process.[95]

However, DSB and appellate body have been very reluctant to make decisions towards protection of the environment and protection of human health as regulated under article XX of the General Agreement on Tariff and Trade (GATT).[96] While several dispositions of the WTO dispute settlement body had been in favour of trade, efforts to refocus the body towards environmental concerns in its dispute resolution mechanism so that a meaningful balance could be created between them and the development could be sustainable, led to the creation of the Committee on Trade and Environment (CTE) by WTO. The CTE and the CTE "Special Session" (CTE-SS), which was set up to support the CET, could not do anything substantial. However, subsequent decisions even after the CTE were still found to be leaning towards trade.

One of such decisions was given in May 1996, by the appellate body of the WTO in a case brought by Brazil and Venezuela challenging the gasoline rules formulated by the US Environmental Protection Agency (EPA) aimed at minimizing the emissions of volatile toxic pollutants and nitrogen oxides. The

---

93 O.W. Pedersen, "An International Environmental Court and International Legalism" 24(3) *Journal of Environmental Law* 547-559 (2012); Barbara Ruis, "Alternative Dispute Resolution in Environmental Cases", *available at* : http://www.unece.org/fileadmin/DAM/env/pp/a.to.j/TF6-2013/4_Ruis_ADR.pdf (last visited Feb. 20, 2016).

94 *Ibid.*

95 David Palmeter and Petros C. Mavroidis, 2 *Dispute Settlement in the World Trade Organization: Practice and Procedure*, (Cambridge University Press, 2004).

96 General Agreement on Tariffs and Trade, 55 U.N.T.S. 188, 262.

main reason for challenging the rules was that they were inconsistent with international trade rules. The panel ruled that the rules by the EPA did not conform to the GATT rule. Thus they did not fall under any of the article XX exceptions. On appeal, the appellate body ruled that the regulations did, in fact, fall within the scope of article XX but were invalid because they failed to satisfy the requirements of the article XX chapter prohibiting "unjustifiable discrimination."[97] This decision seems to be unjustifiable to the environment considering the damage done so far through emission of obnoxious substances in to the atmosphere.

Similarly, the WTO has continued to show its lack of concern for conservation of 'shared global resource' and endangered animals when it ruled in the *US-Shrimp case*[98] that the requirement that the need to use a turtle-friendly device (turtle excluder device) in shrimp trawlers imposed by the United States is violation of article XI of the GATT; and there was unjustifiable discrimination within the meaning of the preamble of its article XX. In a case brought by group of sovereign states largely composed of developing countries including, Pakistan and India, among others, the court considered the regulation as 'unjustifiable discrimination' and thus ruled against the United States. Although the ruling was seen as a success for the developing countries,[99] it also indicates that in international environmental law the protection regulations are best achieved through bilateral and multilateral environmental agreements (MEAs) rather than unilateral domestic laws.[100]

From the foregoing analysis, the WTO has proven to be indisposed to environment dispute resolution, given the fact that it also disallows legal standing for non-state actors in its proceedings. These cases could have best been resolved on the basis of negotiation or arbitration rather than deciding it on contentious basis. In the former case, there could have been a balanced approach between environment and international trade which is necessary for sustainable development.

---

97 Kenneth F. McCallion, and H. Rajan Sharma, "Environmental Justice without Borders: The Need for an International Court of the Environment to Protect Fundamental Environmental Rights" 32 *Geo. Wash. J. Int'l L. & Econ.* 351 (1999).

98 *Supra* note 74.

99 Mohita Chibber, "Dispute Settlement Mechanism Under WTO Vis-À-Vis International Investment Agreements: Implications For Developing Countries" 1 *Spil International Law Journal* 111-133 (2014).

100 *Supra* note 97.

International Tribunal on the Law of the Sea (ITLOS)

Part XII of the United Nations Convention on Law of the Sea, 1982, (UNCLOS) codified the customary international law obligation of states to protect and preserve marine environment. It further prescribes supplementary duties of states towards the prevention of transboundary harm[101] and the exploitation of natural resource in accordance with the aforementioned obligations.[102] UNCLOS requires parties upon signing, ratifying or accession, to choose any of the prescribed forums for settlement of disputes concerning interpretation or application of the convention and protocols, such interpretation includes disputes over environmental protection and conservation.[103] UNCLOS requires the parties to choose any of the following institutions: ITLOS, ICJ, the International Court of Arbitration, in accordance with annex VII of UNCLOS. A special arbitral tribunal under annex VIII, which has two members nominated to it by each party from the list of experts, can also be constituted for resolving environmental disputes if the parties opt for it.[104]This tribunal will also apply article 3 to 13 of the annex VII of the UNCLOS.

Considering the fact that there has been no official rejection registered against ITLOS, 26 states out of 41 preferred ITLOS forum for resolution of dispute. On the other hand, three states have registered rejection against the ICJ.[105]Arbitration remains one of the default rules, where the parties have not chosen same procedure or have not made any declaration upon ratification and accession.[106]

Although binding arbitration has been the main mechanism under ITLOS, adjudication is the main dispute resolution method used by states particularly in maritime delineation disputes on the South China Sea (SCS).[107] In the latest pending case, the tribunal has about 21 judges appointed by state parties to decide on disputes filed. Depending on the nature of the disputes, the tribunal

---

101 UNCLOS, art. 192.

102 *Id.*, art. 193.

103 *Id.*, part XII.

104 *Id.*, art. 287.

105 Ravin Mom, "ITLOS and Dispute Settlement Mechanisms of the United Nations Convention on the Law of the Sea" *United Nations–The Nippon Foundation Fellow, Germany* (2005).

106 *Ibid.*

107 *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal* (*Bangladesh* v. *Myanmar*) ITLOS Case No. 16 (2012).

has established some chambers to handle the peculiarities of the sea dispute : the chamber of summary procedure, the chamber for fisheries disputes, the chamber for marine environment disputes and the chamber for maritime delimitation disputes.

Although the tribunal seems suited for environmental adjudication and arbitration, it does not possess the adequate legal framework for the application of other ADR mechanisms such as: negotiation, mediation, and conciliation. Therefore, it can be concluded that there is a very limited scope for EDR in the ITLOS framework.

VII Conclusion

Considering the nature and peculiarities of environmental disputes, it can be said that the potential of protecting the environment and natural resource through amicable dispute resolutions of ADR has not been at the expected level in both national and international arena. In some countries, application of ADR mechanisms in resolving environment related disputes is quite high; whereas, in some other countries their application is not satisfactory. It is proven that ADR mechanisms are working well in resolving such disputes. It is, therefore suggested that other states should also augment the use of ADR mechanisms for resolving environment related disputes. At the international level also, the use of such mechanisms is not significant. Some dispute resolution bodies are making use of them; whereas, some other are ignoring them. This and the overlap of international dispute resolution forums have fuelled the call for an international environmental court under the auspices of the United Nations. In the absence of such a unified environmental court, the collaborative techniques, unilateral and multilateral agreements and procedural reforms in international environmental dispute resolution institutions remain the only options for the resolution of dispute pertaining to exploration and exploitation of the nature and its resource. The contentious model of dispute resolution has been the foremost mean of achieving environmental justice at a very huge cost of time, funds and risk of continued depletion and degradation of the environment and its resource. It has been observed that the use of ADR in environmental dispute management is a sustainable mechanism which is capable of mitigating the destruction of the environment because it provides for dispute resolution on consensus basis, which is always amicable to disputing parties. It is further observed that application of ADR might help striking a balance between environment and development, and can make international trade law and international environmental law to exist together without any conflict. These will be supportive to sustainable development ideals. Perhaps it is for this reason that most of the treaties suggest dispute resolution by means of arbitration. It

may be suggested here that along with arbitration, negotiation has also proven to be successful. The suggested international environmental court may therefore, mainly resolve cases on the basis of ADR mechanisms. It may adjudicate through traditional contentious means only if the chosen ADR mechanism does not work.

It appears that the choice of an appropriate method for environmental dispute resolution is not strictly between litigation and mediation, rather there is the need to consider ADR not as mere alternative to the court system but a necessary complement to overcome the rigours of litigation on the parties and the environment.[108] This is in accordance with the opinion of Bingham, when he says that:[109]

> Although environmental dispute resolution processes are often characterised as alternatives to litigation – with the presumption that the litigation is bad…voluntary dispute resolution processes as additional tools that may not be more effective or more efficient in particular circumstances; litigation and other traditional decision-making processes remain important options.

In order to facilitate the proposed court to work, it is necessary to build a legislative framework for complementary resolution of environmental dispute. This requires codification of EDR rules in the international dispute resolution landscape. These rules should clearly specify ADR mechanisms as the primary process of dispute resolution and contentious means of dispute resolution as secondary.

---

108 Peter H. Kahn Jr, "Resolving Environmental Disputes: Litigation, Mediation, and the Courting of Ethical Community" 3(3) *Environmental Values* 211–28 (1994).

109 Gail Bingham, *Resolving Environmental Disputes: A Decade of Experience* 99 (Washington DC: Conservation Foundation, 1986).