International Seminar

on

GLOBAL ENVIRONMENTAL POLITICS

UGC-SAP, Department of Political Science
University of Allahabad, Allahabad

December 8th-9th, 2012

Compiled from references
and presented by
Justice Sunil Ambwani,
Judge, Allahabad High Court

INTRODUCTION

1. Human development and technological advancement are exhausting earth's natural resources, which took millenniums to develop. Every single aspect of the environment is being affected by human involvement. With little contribution to the betterment of the environment the earth is on the edge of environmental breakdown. With melting ice caps, rapidly changing environmental phenomenon, increased hurricane and earthquake counts, humans are fighting a battle to keep mother nature on their side. The World Wildlife Funds' Living Planet Reports, 2008 has issued a word of caution that our global footprint now exceeds world's capacity to regenerate by about 30%. If our demands on the planet continue at the same rate, by the mid-2030s we will need the equivalent of two planets to maintain our lifestyles. The ecological credit crunch is now a global challenge. The report tells us that more than three quarters of the world's people living in nations that are ecological debtors as their national consumption has outstripped their countries by capacity. Most of us are drawing exclusively on our current lifestyles, and our economic growth upon the ecological capital of other parts of the world. In the last century the world has moved from ecological credit to ecological deficit.

2. The Stockholm Declaration of 1972 laid emphasis on the development with protection and preservation of the natural environment. The participant nations agreed that efforts must be made to reconcile the needs of development and the need to protect and improve the environment. The nature's conservation must be given priority in planning for economic development.

3. The movement for sustainable development conceived in Brundtland report gained momentum with the publication of the World Commission on Development and Environment-"Our Common Future" in 1987. The principle of sustainable development is based on the principles of intergenerational equity. The goal of economic and social

development, the Commission report proclaims, must be defined in terms of sustainability in all countries whether developed or developing, market oriented or centrally planned. It also requires meeting the basic needs of society, and extending to all the opportunity to satisfy their aspirations for better life. Further economic growth and development involves changes in physical ecosystem in both renewable and non-renewable natural resources. Sustainable development is a process of change in which the exploitation of resources, the direction of investments, the orientation of technological development, and institutional change are in harmony and enhance both current and future potential to meet human needs and aspirations.

4. The United Nations Conference on Environment and Development (UNCED), 1992 was the hallmark in this respect. It emphasised that economic and social progress depends critically on the preservation of the natural resource base with effective measures to prevent environmental degradation. The UN summit focussed on three broad concepts: An "Earth Charter" covering a number of principles aiming at development and the protection of the environment, was the first focus for discussion. Secondly, "Agenda 21" was intended to be a global action plan for sustainable development: thirdly, developing countries demanded a substantial increase in new funding from developed countries to contribute to sustainable development in the South. Thus it was first a concentrated, concerted and cooperative effort on the part of world nations and delivered an agenda for sustainable development. The Earth Summit resulted in the following documents:

- Rio Declaration on Environment and Development
- Agenda 21
- Convention on Biological Diversity
- Forest Principles
- Framework Convention on Climate Change (UNFCCC).

5. Both Convention on Biological Diversity and Framework Convention on Climate Change were set as legally binding agreements. India has ratified both the Conventions in 1993 and 1994 respectively; therefore India has also taken necessary steps to implement them by passing the Biological Diversity Act in 2002. It is to be noted that an important achievement was an agreement on the Climate Change Convention which in turn led to the Kyoto Protocol adopted on December 11, 1997. The main object of Kyoto Protocol was to achieve the 'stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system'.

6. The Rio Declaration stated that 'In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it'; and that 'National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.' Further it advocated for 'Environmental impact assessment' and 'Precautionary principle' as instruments of sustainable development. Thus it can be said that this Rio Conference (Earth Summit) gave great impetus to the idea that economic growth has to adopt environmental principles to save the world.

7. To avoid misinterpretations of the meaning of such development, the Rio Declaration was supplemented by Agenda '21, the magnum opus of the Conference. Agenda '21, in other words "What must be done in the 21st century", is the systemic programme for mankind's sustainable development, the strategy for the new, qualitative development. After Rio, insistence on unilateral economic growth is not just an outdated policy but one that is both illegal and unethical.

8. As a sequel to this, the Johannesburg Summit 2002 – the World Summit on Sustainable Development was held. It declared that 'poverty eradication, changing consumption and production patterns and protecting and managing the natural resource base for economic and social development are over arching objectives of an essential requirements for sustainable development'. It also provided the plan for the implementation of resolutions on sustainable development and declared that 'the three components of sustainable development- economic development, social development and environmental protection as interdependent and mutually reinforcing pillars. Poverty eradication, changing unsustainable patterns of production and consumption and protecting and managing the natural resource base of economic and social development are overarching objectives of, and essential requirements for, sustainable development'. This Summit also took note of the Millennium Development Goals of 2000 while formulating the strategies for sustainable development.

9. A holistic approach was adopted to implement the agenda. It considered that the eradication of poverty is indispensable requirement for sustainable development; and participation of indigenous people and women must be made in decision making. Similarly emphasis was also given to health care services, primary education, to increase food availability and its affordability, adequate drinking water, cleaner use of liquid and gaseous fossil fuels, environmentally sound energy services, strengthening the

contribution of industrial opportunities, cities without slums and sustainable natural resource management were considered the basis for sustainable development.

10. Green economy is the part of the larger objective of sustainable development. Therefore imperatives of the sustainable development are the imperatives of green economy. The Green Economy in the context of Poverty Eradication and Sustainable Development is one of the key themes addressed in the UN Conference on Sustainable Development in 2012. Main focus of the Conference was 'green economy in the context of sustainable development and poverty eradication' and the remaining gaps in the implementation of the outcomes of the major summits on sustainable development 2002, and addressing new and emerging challenges".

International Green Economics

11. The three international conferences mentioned above were instrumental in creating awareness in the world about the need and importance of the application of principles of preservation and protection of natural environment in the field of globalization and consumerism. These principles underline that the all the policies of economic and social development, in private and public sectors, must be viewed and reviewed in the light of principle of sustainable development. To restructured and revamped the natural environment, which has been destroyed by unprecedented, unscientific and unbridled use of natural resources, is the call of time/urgent requirement to save mankind from the brink of disaster. Keeping these things in view, myriad international Conventions, Declarations, Protocols have been adopted. Some of the significant ones are as follows-

1. Convention Concerning the Use of White Lead in Painting, Geneva, 1921
2. Vienna Convention on Civil Liability for Nuclear Damage, Vienna, 1963
3. Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and under Water, Moscow, 1963
4. Phyto-Sanitary Convention for Africa, Kinshasa, 1967
5. Convention Concerning Protection Against Hazards of Poisoning Arising from Benzene, Geneva, 1971
6. Convention on the Prohibition of the Development, Production as Stockpiling of Bacteriological (Biological) and Toxin Weapons, and on Their Destruction, London, Moscow, Washington, 1972
7. Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (as amended), London, Mexico City, Moscow, [Washington], 1972

8. Convention on International Trade in Endangered Species of Wild Fauna and Flora, Washington, 1973
9. Convention concerning Prevention and Control of Occupational Hazards Caused by Carcinogenic Substances and Agents, Geneva, 1974
10. Agreement on an International Energy Programme, Paris,1974
11. Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, Geneva, 1976
12. Convention Concerning the Protection of Workers Against Occupational Hazards in the Working Environment Due to Air Pollution, Noise and Vibration, Geneva, 1977
13. Convention on Long-range Transboundary Air Pollution, Geneva, 1979
14. Convention Concerning Occupational Safety and Health and the Working Environment, Geneva, 1981
15. Vienna Convention for the Protection of the Ozone Layer, Vienna, 1985
16. Convention Concerning Occupational Health Services, Geneva, 1985
17. Convention Concerning Safety in the use of Asbestos, Geneva, 1986
18. Montreal Protocol on Substances that Deplete the Ozone Layer Montreal, 1987
19. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Basel, 1989 and its protocol of 1999
20. Convention Concerning Safety in the use of Chemicals at Work, Geneva, 1990
21. Convention on Environmental Impact Assessment in a Transboundary Context, Espoo, 1991
22. United Nations Framework Convention on Climate Change, New York, 1992
23. Convention on Biological Diversity, Rio de Janeiro, 1992
24. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, Paris, 1993
25. Convention on Civil Liability for Damage Resulting form Activities Dangerous to the Environment, Lugano, 1993
26. Convention Concerning the Prevention of Major Industrial Accidents, Geneva, 1993
27. The Energy Charter Treaty, Lisbon, 1994; and Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects, Lisbon, 1994

28. Protocol to the 1979 Convention on Long-range Transboundary Air Pollution on Further Reduction of Sulphur Emissions, Oslo, 1994
29. Convention Concerning Safety and Health in Mines, Geneva, 1995
30. Kyoto Protocol to the United Nations Framework Convention on Climate Change, Kyoto, 1997
31. Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matter, Aarhus, 1998
32. Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, Rotterdam, 1998
33. Cartagena Protocol on Bio-safety to the Convention on Biological Diversity, Montreal, 2000
34. Stockholm Convention on Persistent Organic Pollutants, Stockholm,2001
35. International Treaty on Plant Genetic Resources for Food and Agriculture Rome,2001
36. World Health Organization Framework Convention on Tobacco Control, Geneva, 2003

12. Thus the plethora of conventions and protocols make it clear that the World States are much concerned about making the economics green. These are some of the steps adopted create awareness about the adverse effects of the brown economics and a pressing need to adopt clean and green technology in all developmental activities. Further the 'brown' economics must be replaced by 'green' economics' to save present generation and its progeny. As per principles of green economics the polluting industries and developmental activities have to take on and employ the clean and green technology for production or they have to cease to operate, The espousal of clean and green economics cannot be delayed or denied as it involves high production cost. We have to reiterate that 'no development at the cost of environment the bottom-line.

Environment and International Security

13. In 1982, the UN General Assembly Resolution 'World Charter for Nature' officially acknowledged that: "[C]ompetition for scarce resources creates conflicts." A few years later, the Brundtland Report highlighted possible linkages between environmental problems and international security. It maintained that environmental

problems could be" ...a possible cause as well as a result of conflict". Four years later, the Rio Declaration on Environment and Development acknowledged that the environment may lead to disputes and it reminded States that they must work together in order to solve such disputes peacefully. However, in the last decade the international community has not been too concerned about the linkage between environment and international security. In fact, while both the Millennium Declaration and the Johannesburg Declaration on Sustainable Development further stressed the possibility that environmental problems might lead to violent conflicts, there has been no real follow-up to these declarations.

14. In 2003, the UN Secretary General was convinced that international security had to be redefined in order to highlight new threats and to find plausible solutions. For this purpose he appointed a high-level panel on threats, challenges, and change (hereinafter "high-level panel") that issued a report in December, 2004. Therein, a threat to international security is defined as:

> "Any event or process that leads to large-scale death or lessening of life chances and undermines States as the basic unit of the international system..,"

15. One of the threats to international security that the high-level panel highlighted concerned:

> "Economic and social threats, including poverty, infectious diseases and environmental degradation."

16. A possible interpretation of the high-level panel's report is that the international community must finally shift from a traditional concept of international security to the concept of human security. An armed conflict may cause significant deaths and upheaval in many regions of the world, but it is not the only possible cause of such misery. Statistics show that natural disasters have affected six times more people than interstate armed conflicts between 1990 and 1999.

17. Water scarcity alone is not a threat to international security. However, if an environmental problem is linked to poverty, excessive urbanization, and social and economic threats, such as in the Middle East or Bangladesh, it may end up constituting a threat to international security, and this is the concern highlighted by the high-level panel.

18. Despite all the international documents that have progressively reaffirmed the linkage between the environment and international security, and the growing literature on this subject moving in the same direction, the Security Council has, to use a

colloquialism, the “final word on the matter”. In fact, the latter is the only international body that currently has the power to determine if an international problem is a threat to international peace and security and to give legal effects to such determination. The wording of Article 39 of the UN Charter is very clear:

> 'The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.'

19. Despite the fact that the UN Security Council has not yet clearly determined that an environmental problem constitutes a threat to international peace and security, the linkages do exist. If current environmental trends are not modified, the relationship will become evident to the international community in the near future. The 2004 report of the high-level panel may create momentum in the UN framework in order to enable the Security Council to readdress the linkage between the environment and international security.

Climate Change and International Security

20. The international community has started to link climate change with international security. Until now, all international climate-related efforts were focused on the science of climate change, and how States should attempt to mitigate or adapt to climate change. Despite their importance and relevance, equal efforts have not been dedicated to the linkages between climate change and international security. However, as the scientific evidence and the awareness of the dangers of climate change increase, things are changing. Research institutes and scholars have started to conduct studies on climate change and security. The States have also started to consider climate change as a security issue.

21. Climate change effects, such as sea rise, and clean water scarcity, which can constitute a threat to human security. Climate change constitutes a potential threat, regardless of the manner in which international security is considered, i.e., in military terms or inclusive of a human security issue. On the one hand, climate change may cause serious environmental degradation that will decrease the availability of natural resources, like water, which could then lead to violent conflicts, which may be called as <u>water wars</u>. The UN Secretary General stressed that the 21st century conflicts may concern water. On

the other hand, climate change may be responsible in the future for natural disasters and the related humanitarian crises. When one considers that in the last decade alone, 188 million people were affected by such extreme events, the threat to human security by increasing disasters in the future appears clear. Natural disasters and humanitarian crises can trigger, just like environmental degradation, massive migration movements, which could foster political tension and finally bring countries to war. This is especially true for developing countries that lack the capacity to respond to such calamities. Armed conflicts due to massive movements of people that want to flee their country for climate change-induced environmental problems are foreseen in the report by the Pentagon, according to which, for example, in 2010 there will be "[B]order skirmishes and conflict in Bangladesh, India, and China, as mass migration occurs toward Burma." The scenario gets even worse in 2020 when, according to the report, there will be "[P]ersistent conflict in South East Asia …... [between] Burma, Laos, Vietnam, India, China."

The UN Security Council has already maintained that massive flows of refugees due to internal political instability may pose a threat to international peace and security.

22. Although climate change is not the direct cause of a person leaving their home (the direct reason being the flooding caused by sea rise, the destructive power of a storm, or the progressive desertification of land), still one must acknowledge that a primary cause behind these environmental problems is climate change.

23. Can the UN mechanisms, set-up by the international community in order to respond to a global threat, accommodate an environmental menace to peace and security, and in particular one related to climate change? Chapter VII of the UN Charter provides the guidelines as to how the international community must respond once the Security Council has determined that a particular situation constitutes a threat to peace. However, before the Security Council makes a pronouncement on the nature of the situation, States will attempt to deal with the environmental problem through Chapter VI of the Charter.

24. How could the mechanism provided for in the UN Charter respond to a situation, in which the threat to peace does not lead, at least immediately, to a violent conflict? Imagine the following example: The government of the Tuvalu Islands in the Pacific Ocean considers that climate change is a threat not only to their own existence but to the survival of many other small islands in the West Pacific. Increasing sea-levels will eventually cover the islands making life impossible on them. For this reason, the

government of the Tuvalu Islands asks the Security Council to carry out an investigation on the possible existence of a threat to peace and international security related to its particular situation. The UN body undertakes an investigation and agrees on specific recommendations aimed at decreasing the risks of sea-level rise. However, the Security Council faces the problem—To whom should these recommendations be addressed? Where a State is preparing military action or acting aggressively against another State, or is acting in a way that might lead to a humanitarian crisis, it is easy to determine the country that recommendations must be addressed to. **But which State is directly responsible for sea rise and for the current climate change trends?** The Tuvalu Islands see that the UN has not been able to do anything and that the sea-levels are rising at an alarming rate. The Security Council also acknowledges that the situation is worsening, and it finally issues a Resolution in which it determines that climate change-related sea rise is a threat to international peace. Theoretically, the door is open now to the response of the international community. The Security Council has the right to allow all UN Member States to adopt political and economic counter measures. But against whom? The Security Council could decide to start a military campaign in order to restore peace and international security. But where?

25. In conclusion, the first way that the international community may respond once climate change is considered a threat to international peace and security, is through the traditional mechanisms provided for in Chapters VI and VII of the UN Charter. On the one hand, if the climate change-related environmental problem leads to a traditional armed conflict between States, the mechanism could be effective. However, if Security Council resolutions are vetoed by one of the permanent members, the international community response may be blocked. This could eventually lead to unlawful unilateral interventions in the name of global environmental protection. On the other hand, if the international community intends to tackle a climate change-related environment problem before it leads to a military or a humanitarian crisis, then the UN Charter is irreparably flawed. In fact, how can the Security Council decide to whom it should address recommendations under Chapter VI and, in particular, against whom may it allow political and economic countermeasures under Chapter VII?

Implementation of International Environmental Treaties by Judiciary-Access to Justice in International Environmental Law

26. Two main interrelated causes can be identified: a continuing environmental degradation and a lack of respect for the law going hand in hand with a changed approach to ethical and moral values. Recent monitoring and data-collection systems evidence the increasing, frightening amount of threats and damages to the environment with global, transboundary and national deleterious effects. Although the endeavours on the national and international level to avoid and prevent environmental risks and infringements have intensified since Rio 1992, the object has not been achieved adequately. This negative result was also stated by the UN Millennium Declaration of September 2000 and confirmed again by the Johannesburg Declaration on Sustainable Development in September 2002. Under para 13 it says:

> 'The global environment continues to suffer. Loss of biodiversity continues, fish stocks continue to be depleted, desertification claims more and more fertile land, the adverse effects of climate change are already evident, natural disasters are more frequent and more devastating and developing countries more vulnerable, and air, water and marine pollution continue to rob millions of a decent life.'

27. To alter this state the Millennium Declaration stressed the urgent need to implement and respect the principles of equity and social justice, of tolerance, eradication of poverty and to develop a new ethic of conservation and stewardship for our common environment with more respect for nature to guarantee in the end peace and security on our planet. Emphazising the opportunities of globalization in general, the Declaration states that ‘at present its benefits are very unevenly shared, while its costs are unevenly distributed’. In order to translate all these shared values into actions, it postulates to develop more efficient capacity-building, good governance and democracy instruments and to promote the protection of human rights, by peaceful dispute resolution in conformity with the principles of justice and international law. The Johannesburg Summit, which can be characterized as the ‘Summit of implementation, accountability and of partnership’, picked up and stressed these targets and undertook to speed up improved, more effective implementation of Agenda 21 and of further political commitments by its Plan of Implementation. It does not, however, directly address aspects of legal access to courts and refers to the position of non-governmental actors only in a very general way in the context of building partnerships with governments.

28. There is an unique challenge and opportunity for national and international lawyers to promote and support this implementation process. They have to consider innovative legal instruments such as progressive environmental laws and international

agreements on the one side and to guarantee their implementation and execution on the other. As unfortunately a huge deficiency in the application of legal norms can still be stated, the tool of judicial control by independent institutions is indispensable. According to the theory of separation of powers it belongs to the hallmarks of each democratic legal order that at least an independent judicial institution is empowered to control the legislative and executive organs to guarantee the implementation, application and execution of law. Without such an instrument the existence of any legal system is endangered. The Johannesburg Principles on the Role of Law and Sustainable Development adopted at the Global Judges Symposium in August 2002 is a step in that direction. The judges reminded the Community of States and all parts of society to respect, uphold, strengthen and enforce the Rule of Law. They are right to affirm that:

> "an independent Judiciary and judicial process is vital for the implementation, development and enforcement of environmental law, and that members of the Judiciary, as well as those contributing to the judicial process at the national, regional and global levels, are crucial partners for promoting compliance with, and the implementation and enforcement of, international and national environmental law."

29. The judges stressed that the 'Judiciary has a key role to play in Integrating Human Values set out in the United Nations Millennium Declaration ….' By its four key principles and the adopted, concerted and sustained programme of work– determining in a very precise manner the elements of information, data-exchange, environmental law education, access to justice etc. – the judges have proposed fundamental environmental law capacity building instruments to promote the implementation of the Montevideo Programme III and to effectuate sustainable development in the future. The Montevideo Programme by its objectives and detailed fixed actions, has laid a general strong foundation for the further development of environmental law and the means for making it more effective.

30. The UNEP Governing Council with its Decision 22/17 on Governance and Law adopted on 7 February 2003, recalled the six regional judges symposia on environmental law convened by the UNEP Programme during the period 1996-2001, noted with appreciation the Global Judges Symposium of Johannesburg. It calls on the Executive Director to support within the Montevideo Programme the improvement of judicial capacity-building commitments. The Decision stresses the need to improve:

> the capacity of those involved in the process of promoting, implementing, developing and enforcing environmental law at the national and local levels such as judges, prosecutors, legislators and other relevant stakeholders, to carry out

> their functions on a well informed basis with the necessary skills, information and material with a view to mobilizing the full potential of the judiciaries around the world for the implementation and enforcement of environmental law, and promoting access to justice for the settlement of environmental disputes, public participation in environmental decision-making, the protection and advancement of environmental rights and public access to relevant information.

31. This demand reflects Principle 10 of the Rio Declaration and the goals which have been implemented in the meantime by the Århus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters. Such an approach is, however, restricted to the national law level and may fail in solving transnational, international environmental law affairs. That part on 'Enhancing the Application of Principle 10 of the Rio Declaration' of Decision 22/17 merits special attention. Thereby the Governing Council requested the Executive Director:

> to assess the possibility of promoting, at the national and international levels, the application of principle 10 … and determine, inter alia, if there is value in initiating an intergovernmental process for the preparation of guidelines on the application of principle 10.

32. The concrete contents and meaning behind this demand remain ambiguous. For instance such potential guidelines enable concerned citizens and victims of transnational environmental damage to bring an action against State organs – even against the foreign polluter-State – and to grant them legal access to international courts, such as the International Court of Justice? Such an assumption certainly would be unconventional, because the sovereignty of States stands against it and the States are not willing to relinquish their sovereign rights. What States have in mind is to rule the complex problems of legal access on the level of private actors, i.e.; on the level of domestic or comparative national law. This tendency is also manifested by promoting the instrument of civil liability concepts and the lack of progress in setting up binding obligations in the field of State Responsibility/Liability as evidenced by the Work of the UN International Law Commission. The future will prove whether this 'private-actors' approach can sufficiently meet the environmental challenges of today. The enhancing legal access to national courts according to the law on conflicts and international procedural law is a first step in the right direction. Not only individuals directly or potentially affected in their legal interests must be granted direct access to the courts, civil society organizations, such as environmental interest groups and NGOs representing common societal and environmental interests and acting as guardians of the state of the environment, must have legal access as well. Accordingly, the Montevideo Programme stresses new options

‘for advancing the effective involvement of non-state-actors in promoting international environmental law and its enforcement at the domestic level’.

33. The ‘domestic judiciary’ approach accepted for the time being is not sufficient and must be changed, or expanded and amended by new instruments on the international level of jurisdiction. When it comes to litigation before civil courts of the polluted state, both claims for compensation and also actions to cease environmentally harmful and hazardous activities meet with failure.

• individuals mostly abstain from filing a lawsuit because of the potentially high costs and the problem of dealing with a foreign language;
• immunity from jurisdiction may hinder the competence of the home-courts as well as of the court of the polluter-state;
• pursuant to the rules on the law of conflicts or of the ‘ordre public’ the application of the substantive law can be excluded; and
• immunity from enforcement can defeat the enforcement of a foreign decision.

34. As regards lawsuits brought before the administrative courts of the polluter-state the 'ius standi' can be very problematic. In particular, the application of the substantive law, dominated by the principle of territoriality, can be refused if it does not protect foreign legal interests. By reason of sovereignty the home-court of the injured individual has no competence to examine public foreign law aspects. The polluter-state’s court will argue that its decision cannot be enforced abroad by reason of immunity from enforcement.

35. With regard to environmental protection by the criminal courts, the German Supreme Criminal Court has emphasised in a case concerning the transboundary movement of hazardous waste from Germany to Poland, that the German criminal law does not protect the legal interests of foreign injured individuals and will only apply on German territory.

36. The national judicial proceedings are still mostly ineffective because they lack the requisite powers and have to be further improved in matters concerning international environmental law. The long duration of litigation, lasting sometimes more than a decade - as with the River Rhine Salinisation case and the Lingen case - also undermines legal protection. The protection of the global commons remains outside the scope of national

jurisdiction and courts refuse, or are very reluctant to guarantee these legal interests by an interpretation pursuant to public international law. Such a task of interpretation demands too much from the national judge who is not as proficient in international law.

37. In this context it is worth mentioning that the Supreme Court of India has recently established the special national environmental courts composed of judges highly qualified in environmental law and with technical experts and scientists very proficient and experienced in environmental matters. The Permanent Court of Arbitration has implemented this approach by its recent procedural Optional Rules for conciliation and arbitration of international disputes in the field of the environment.

38. As a unique exception for the protection of global commons and the implementation of the principles of intergenerational equity and responsibility the decision of the Supreme Court of the Philippines in the famous Oposa case of 1993 is noteworthy. The plaintiffs, all minors, duly represented by their parents, successfully claimed to cease the continuing deforestation of the tropical rainforests– the indispensable natural resource for the life of present and future generations.

Indispensability of International Judiciary

39. There is not the slightest doubt about the indispensability and fundamental role of domestic judiciary for effective enforcement of environmental law. Cases with transnational effects, however, cannot always be solved sufficiently for various reasons. National jurisdiction, therefore, must be flanked by international judiciary. It is indispensable for the following main reasons:

• the behaviour of the states must fall within judicial control, as states themselves may commit or tolerate environmental destruction;

• only an independent judicial institution can scrutinize the implementation and enforcement of international treaty law and international law obligations, if the States at an earlier stage have failed to achieve compliance by ‘political non- confrontational’ mechanisms or agreement;

• the necessary protection of Global Commons and the development of ‘ergaomnes-obligations’, as well as of a Human Right to a decent environment can be ensured and promoted by international judiciary.

40. Another crucial problem is the initiating of an international dispute settlement procedure, if not merely state interests but interests of individuals or environmental associations as well, are at stake. States, not infrequently, by political opportunity are very reluctant or refuse to support their injured nationals and to bring the ‘polluter-state’

to court, as for instance in the Chernobyl case. State interests, in particular economical priorities, can stand against those of citizens and the environment. The individuals, enterprises and environmental civil society organisations must be granted direct access to international judicial institutions. For the controlling of state activities as well as of private actors the engagement of NGOs, environmental interest groups and individuals as guardians of environmental matters should be encouraged as environmental grievances are clearly highlighted by the activities of these groups. We may recollect the protesting activities of Greenpeace movement against the introduction of toxic substances into rivers and the North Sea, against the nuclear tests on the Mururoa- Atoll, or the campaign against the disposal of the oil platform 'Brent Spar' in addition to the numerous activities of the World Conservation Union (IUCN) in the fields of nature protection and biodiversity.

41. Despite the indispensability of an international judicial institution, we must be aware of the fact that even a tribunal or a court in the end cannot replace the will of states to implement effectively their obligations under international agreements because the competence of an international arbitral or tribunal instrument also depends on the will of the states, in the agreement or compromise. The decisions of a court and impending potential sanctions may nevertheless press states to implement their obligations.

42. The importance of peaceful settlement of environmental disputes is emphazised in Principle 26 of the Rio Declaration, in Agenda 21 and in the Montevideo III Programme. Paragraph 39.10 of Agenda emphazises, inter alia, the importance of the judicial settlement of disputes. It calls on states 'to further study mechanisms for effective implementation of international agreements, such as modalities for dispute avoidance and settlement'. It identifies the full range of techniques such as: prior consultation, fact-finding, commissions of inquiry, conciliation, mediation, non-compliance procedures, arbitration and judicial settlement of disputes. Paragraph 4 of the Montevideo Programme undertakes to realise the respective targets of Agenda 21 in particular stresses the need 'to consider innovative approaches to dispute avoidance'. There is a general consensus that all preventive instruments of dispute avoidance should be favoured in principle. The 'political' non-confrontational mechanisms of 'compliance-procedure' as well as of 'Conference of the Parties (COP)' need special attention. Regarding the Convention on Biodiversity (CBD) for example, it is noted that the CBD does not contain a provision establishing a compliance regime. Instead of this the COP-mechanism is favoured in

Article 23. In case an agreement cannot be achieved by further negotiation or a decision of COP, Article 27 para 3 of the CBD provides for an agreed compulsory settlement of disputes either by arbitration or submission of the dispute to the International Court of Justice. The CBD also recognises the indispensability of a judicial control mechanism, if all modalities for dispute avoidance remain unsuccessful. Laudable though this approach is, it must be stressed that these 'non-judicial' instruments operate only between the organs of the states. NGOs or private third parties are not involved yet. They also cannot participate in the non-compliance procedure.

43. A unique exception is the new 'compliance-procedure' to the Convention for the Protection of Alps and its protocols adopted in November 2002.56 It enables NGOs – under certain conditions of confidentiality - to participate in the controlling mechanisms concerning the implementation and enforcement of the Convention. Such an innovative approach reflects the idea of participation as described in the Report 'Implementing Agenda 21' of the UN Secretary-General.57 It emphazises that:

> Participation generates shared values, mutually reinforced commitments, joint ownership and partnership, which are crucial to achieving sustainable development… The increase in major group participation has been a key area of success in the post-Rio period ….

44. But also worthy of notice is its critical remark on the participation of non-state-actors at the national and international level:

> "Participation is often based on temporary and ad hoc rather than permanent and reliable mechanisms and procedures. A strengthened sense of ownership of the decisions taken among participating stakeholders would help in implementing many decisions relating to sustainable development.

International Court of Justice (ICJ)

45. In 1993 the ICJ established an ad hoc chamber for environmental matters. The ICJ, however, cannot be the right forum, because states alone have direct access. This is regrettable because by its very function, the ICJ could be the proper institution to control the implementation of environmental treaty obligations– as shown in the Gabčikovo-Nagymaros case, – to develop further and improve international environmental law and to concentrate on the urgent problems of protecting the global commons by applying the concept of erga omnes obligations. Sooner or later, under the influence of the current efforts and programmes of the state community to strengthen and enhance the legal

position of NGOs, non-state- actors will also be granted legal access to the ICJ. But such step would require states to relinquish sovereignty and expose themselves to legal proceedings as a prerequisite. Such necessary reform of the ICJ Statute and of the UN Charter do not appear to be possible at the moment.

International Tribunal for the Law of the Sea (ITLOS)

46. As regards the protection of the marine environment, according to Article 20 of the Statute of the Tribunal, the 'States Parties' to the Law on the Sea Convention, can submit disputes concerning interpretation and implementation of the regulations to the International Tribunal for the Law of the Sea, established in Hamburg in October 1996.64 Pursuant to para 2 of Article 20 the Tribunal is also open to 'entities other than States' in cases provided for in Part XI of the Convention. This concerns the competence of the special Sea-Bed Disputes Chamber with regard to seabed activities. The Chamber can hear cases brought by or against the International Sea-bed Authority, parties – including non-State parties – to a contract and prospective contractors. The same provision extends further the jurisdiction of the Tribunal in 'any case submitted pursuant to any other agreement conferring jurisdiction on the Tribunal which is accepted by all the parties to that case'. According to Article 187 para (c) read in connection with Article 153, private natural persons can present the dispute to the chamber only with the consent of a State. In general it must be emphasised that Articles 20 of the Statute only enable a limited jurisdiction in the field, and do not go beyond. Also the term 'entities' still needs to be precisely defined by future jurisdiction of the Tribunal.

The Court of First Instance and the Court of Justice of the European Communities (ECJ)

47. In Europe NGOs, enterprises and individuals have access to the Court of First Instance, established in 1988, and the Court of Justice of the European Community (also court of appeal), if the interpretation of primary and secondary European environmental law or the correct implementation and application of EU-Regulations and Directives is concerned. However, a claim of legal and natural persons is admitted only if their rights are potentially injured directly and individually. This was stated by judgment of the ECJ of 2 April 1998 where Greenpeace International and concerned residents claimed in vain against a subvention granted by the EU Commission for the establishment of two electricity-power-installations in Gran Canaria and Tenerife. The claim of three French

nationals with residence on Tahiti against the testing of atomic bombs on the Mururoa-Atoll were rejected as well in 1995. In general the courts are proud of an extensive case-load in environmental matters, but according to the restricted regional field of application of European Law their jurisdiction does not go as far as is desirable for global environmental protection. Nevertheless the importance of these courts for the further development of regional environmental law and general environmental principles remains unquestioned.

European Court on Human Rights (ECHR)

48. The jurisdiction of the European Court on Human Rights has paved new ways to improve environmental protection through an expanded concept of human rights and by linking both fields of law which traditionally have been treated separately. In its groundbreaking López-Ostra decision in 1994 the Court has opened the door for the protection of human rights against nearly all sources of environmental pollution, as opposed to just noise emissions and radiation, as was the case in the 1970s and 1980s.

International Criminal Court (ICC)

49. A conceivable perspective for the future could perhaps also be the International Criminal Court which was established on 17 July 1998 by the United Nations Diplomatic Conference of Rome. According to Article 5 of its Statute the Court has jurisdiction for the most serious crimes of concern to the international community as a whole. Those crimes are the crime of genocide, crimes against humanity, war crimes, as well as the crime of aggression. The creation of a highly desirable, autonomous, explicit jurisdiction in environmental matters by extending the list of crimes to 'crimes against the environment', as ruled for instance in Article 19(d) of the ILC's Draft Articles on State Responsibility, however, failed to gain support in the deliberations to the Statute. During the work of the Preparatory Committee on the Establishment of an ICC, a large majority of States wanted to limit the jurisdiction of the ICC to the core crimes mentioned, and refused to include the so-called 'treaty-crimes'. Instead of this it was decided to insert environmental aspects in a modified form under the heading of either a crime against humanity or a war crime. Article 8, para 2, of the Statute defines as a war crime:

> intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.

50. Although this regulation does not grant comprehensive protection of all elements of the environment, in general this approach is a preliminary step in the direction.

Permanent Court of Arbitration (PCA) as proper forum

51. As a specialist International Environmental Court with mandatory jurisdiction does not yet exist, the Permanent Court of Arbitration, The Hague, could be the appropriate forum to settle environmental disputes. This idea was born at the First Conference of the Members of the Court in September 1993 and in ICEF-Venice Conference 1994, where this idea found strong support, from the Secretary-General of the International Bureau of the PCA. Numerous resolutions also stressed the potential role of the PCA to act as the competent institution for the settlement of disputes in environmental matters, for example, the Resolutions of the George Washington University and of the American Bar Association, Washington, April 1999, of ICEF, Rome, October 2000 and of Biopolitics International Organisation, Athens 2001. The Second Conference of the Members of the PCA by its Resolution of May 1999 also called upon the Secretary-General and the International Bureau of the PCA:

> to expand the Courts role … including the area of environmental disputes, taking into account the entire range of international dispute resolution mechanisms administered by the Court.

52. This institution, having its roots in the Hague Peace Conferences of 1899 and 1907, in particular the Conventions for the Pacific Settlement of International Disputes, is well recognized and accepted by numerous UN Member States. It is a very flexible and unique institution, because it offers facilities for four of the dispute-settlement methods listed in Article 33 of the UN Charter: inquiry, mediation, conciliation and arbitration.

53. As regards conciliation the PCA established in 1996 new Optional Conciliation Rules, enabling the parties, including States, International Organisations, NGOs, companies and private associations to use this mechanism. The Rules are based on the UNCITRAL-Conciliation Rules and can be linked with possible arbitration.

54. For arbitration, the Court adopted in 1992 Optional Rules for Arbitrating Disputes between Two States, and in 1993 Optional Rules for Disputes between Two Parties of which one is a State. As a consequence disputes between a non-state-actor and a state can be submitted to the Court. In May 1996 the set of Optional Rules was extended in the rules for Arbitration involving International Organisations and States as well as between International Organisations and Private Parties. By widening its jurisdiction to all parties

of the community of states, including organisations, and all members of society, it goes far beyond the competence of the International Court of Justice.

A new Dimension: the Permanent Court of Arbitration Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment

55. By its recent and special Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment of 19 June 2001 – unanimously adopted by 94 Member States – the PCA has opened a new dimension for peaceful settlement of international environmental conflicts. In a unique manner the Rules which seek to address the principal lacunae in environmental dispute resolution meet most of the respective requirements of the Montevideo III Programme and have effectuated the fundamental targets of legal access of non-state-actors to judiciary, of legal protection and of effective control of implementation and enforcement of international environmental treaty obligations and of international environmental law in general. The Rules, which have been drafted by a special PCA Working Group on Environmental and Natural Resources Law since June 1996.

56. To meet such challenges of our modern, globalized world the States must cooperate with non-state-actors albeit with the limitation of their sovereignty. Altogether, both PCA Optional Rules can play a model role for the enhancement of a 'ius standi', for ‘non-state-actors’ and for the international environmental judiciary in general. This target could also be achieved and supported by the amendment of dispute settlement clauses in existing environmental agreements and their insertion into future treaties. The PCA Guidelines for Negotiating and Drafting Dispute Settlement Clauses for International Environmental Agreements offer significant assistance in this regard. As to international judiciary the open question ‘Do we need a new International Court for the Environment with mandatory jurisdiction?’ needs further deliberations.

57. Altogether, the recent activities of judges recalling and asserting the importance of the Rule of Law and of the indispensability of judiciary in the field of environmental protection at the national and international level, is an appropriate impetus contributing to meeting more effectively the aim of sustainable development in future.

58. Shri Justice S.H. Kapadia, the then Chief Justice of India said in a massage dated June 18th, 2011 in the International Seminar on Global Environment & Disaster Management: Law and Society:-

> "Environment and development have been accommodated in a framework of balancing and ad hoc equity rather than an absolute application of rights by the Indian Courts. This has been done by balancing conflicting rights and by striking compromises between development, on one hand, and the right to livelihood, on the other hand. Environmental protection, in decision-making and implementation, requires a legal language capable of incorporating technical specifications, evaluation of industrial processes, balancing of rights (particularly socio-economic rights) and protecting complicated biological and ecological system. Thus, the subject requires application of constitutional doctrines like, doctrine of "margin of appreciation", doctrine of "proportionality", "principle of reasonableness" etc."

****

References:

(i) Institutional Innovation for Environmental Justice: By Lord Justice Robert Carnwath (Seminar Volume, International Seminar on Global Environment & Disaster Management: Law & Society, Vigyan Bhawan, New Delhi);

(ii) Private Claims for a Global Climate- An Essay on U.S. and Indian Litigation Approaches to Climate Change and Environmental Harm: By Tracy D. Hester (Seminar Volume, International Seminar on Global Environment & Disaster Management: Law & Society, Vigyan Bhawan, New Delhi);

(iii) Imperatives of Green Economics: By Satish C. Shastri (Seminar Volume, International Seminar on Global Environment & Disaster Management: Law & Society, Vigyan Bhawan, New Delhi)

(iv) Ex Post and Ex Ante [Legal] Approaches to Climate Change Threats to the International Community: By Francesco Sindico (The Icfai Journal of Environmental Law, Vo.VI No.1)

(v) Enhanced Implementation of International Environmental Treaties by Judiciary- Access to Justice in International Environmental Law for Individuals and NGOs: Efficacious Enforcement by the Permanent Court of Arbitration: By Alfred Rest (MqJICEL (2004) Vol 1

Erga omnes

Erga omnes is a Latin phrase, which literally means "towards all" or "towards everyone". In legal terminology, **erga omnes** rights or obligations are owed toward all. For instance a property right is an erga omnes entitlement, and therefore enforceable against anybody infringing that right. An erga omnes right (a statutory right) can here be distinguished from a right based on contract, which is only enforceable against the contracting party.

In international law it has been used as a legal term describing obligations owed by states towards the community of states as a whole. An erga omnes obligation exists because of the universal and undeniable interest in the perpetuation of critical rights (and the prevention of their breach). Consequently, any state has the right to complaint of a breach. Examples of erga omnes norms include piracy, genocide, slavery, torture, and racial discrimination. The concept was recognized in the

International Court of Justice's decision in the Barcelona Traction case [(Belgium v Spain) (Second Phase) ICJ Rep 1970 3 at paragraph 33]:

> "....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 obligations erga omnes. [at 34] Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law.... others are conferred by international instruments of a universal or quasi-universal character."

Examples

***** In its opinion of 9 July 2004 the International Court of Justice found "the right of peoples to self-determination" a right **erga omnes.** The finding referred to article 22 of the Covenant of the League of nations.

****