CHAPTER 6
CONCEPTUAL ANALYSES OF LIABILITY REGIME OF MARINE POLLUTION WITH SPECIAL REFERENCE TO SOLID WASTE

I. INTRODUCTION

Human society has been for a long time recognizing certain rights as being invested upon its members prescribing along with its correlative duties on others. The basic philosophy of respecting the rights of others is that his rights might be respected\(^1\).

Normally every right is attached with the responsibility and similarly in international environmental law the right to explore and exploit the natural resources itself includes the responsibility of protection and preservation of environment\(^2\).

However the international responsibility of states is a subject which has tendered the attention of scholars from long back. Codification of effective regime has become unsuccessful because of peculiar difficulties in the subject and also because of divergent views and interests to this context. This state of affairs is strongly reflected in the striking attempts made by Mr. Fransisco v. Garcia, Ambassador of Cuba during the period he worked as the special Rapporteur on this topic under the auspices of the International Law Commission between 1955 and 1961. His first report made a general survey of the topic by introducing what may be called as an obligation approach to state responsibility by taking in to account all the modern developments, where as the second report is far from the promises of the first report and limited it self to the injuries caused to the persons and property of aliens.

\(^1\)Francesco Francioni and Tullio Scovazzi, International Responsibility for Environmental Harm, Graham and Tortman, Boston, page 3.

\(^2\)Ibid.
The second Rapporteur on the topic, Mr. Roberto Ago had disregard the entire earlier work and proceeded with a new outlook. He gave altogether a different shift to the very approach of state responsibility. He specified international responsibility of states by maintaining a strict distinction between the principles that govern the responsibility of states for internationally wrongful acts and the rules that place obligations on states.

According to him, there is a distinction between primary rules which imposed specific obligations and secondary rules which are only concerned with determining the legal consequences of failure to fulfill obligations established by the primary rules.

According to him the field of responsibility covered only the secondary obligations. From the very beginning Mr. Ago affirmed the distinction between responsibility of states for internationally wrongful acts and liability of states arising out of the performance of lawful activities. He once again clearly pointed out that the area of responsibility covered only wrongful acts living the field of injurious consequences arising out of lawful activities. In fact this may be regarded as the beginning of the formal growth of the concept of liability in international law or injurious consequences, arising out of acts not prohibited by international law.

State Responsibility is a fundamental principle of international law, arising out of the nature of the international legal system and doctrine of state sovereignty and equality of states. It has been provided that when ever a state commits an internationally

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3 Dr.H.K.nagaraj, research thesis, entitled the concept of liability under international law, University of Mysore, the Page no 4.
4 Ibid
unlawful act against another state, the state which has committed such violation is under
international responsibility. Obviously breach of an international obligation gives rise to a
requirement for reparation\textsuperscript{6}. Always there is a difficulty with regard to the principles
relating to procedural and other consequences flow from a breach of substantive rule of
international law. However International law Commission has been working extensively
on this topic. In 1975 it took decision to draft articles on the state responsibility, which
can be divided into three parts.

Part I st deals with the origin of international responsibility. Part II \textsuperscript{nd} deals with
the content, forms and degrees of international responsibility. Part III deals with the
settlement of disputes and implementation of responsibility. Here part two and part three
have been considered as very sensitive part. The essential characteristics of state
responsibility hinge upon certain basic factors. They are (a) the existence of an
international legal obligation between two particular states. (b). the occurrence of an act
or omission in violation of that obligation and which is imputable to the state
responsibility. (c). that loss or damage has resulted from the unlawful act or omission.
These requirements have been made clear in a number of leading cases\textsuperscript{7}.

In the \textit{Spanish Zone of Morocco claims}\textsuperscript{8} Judge Huber, emphasized that ‘‘
responsibility is the necessary corollary of a right. All rights of an international character
involve international responsibility, and responsibility is in the form of duty to make
reparation in case of breach of obligation in question\textsuperscript{9}. Similarly, In the \textit{Chorzow Factory

\textsuperscript{6} ibid
\textsuperscript{7} Ibid
\textsuperscript{8} (1923); 2 ILR, page 157
\textsuperscript{9} Supra note no 5.
case\textsuperscript{10}, the Permanent Court of International Justice said that; it is a principle of international law, and even a greater conception of law, that any breach of an engagement involves an obligation to make reparation\textsuperscript{11}.

Article I of the International Law Commission draft Articles on state responsibility repeat the general rule that every internationally wrongful act of a state entails responsibility, while article II emphasizes that every state is subject to the international responsibility for the internationally wrong full act entailing its international responsibility\textsuperscript{12}. This basic re-affirmation on the foundation of state responsibility is reinforced by two further articles. Article 3 provides that there is an internationally wrongful act of state when state,

a) Conduct an act or omission of an act which is attributable to the state under international law; and

b) If that conduct constitutes a breach of an international obligation of the state\textsuperscript{13}.

Of course, it is international law that determines what constitutes an internationally unlawful act, irrespective of any provisions of municipal law.

However the issue of relationship between the rules of state responsibility and those relating to the law of treaties arose in the Rainbow warrior Arbitration case between France and New Zealand in 1990. The arbitration followed the incident in 1985 in which French agents destroyed the vessel Rainbow warrior in harbor in New Zealand. The arbitration tribunal decided that the law relating to treaties was relevant but that, the

\textsuperscript{10} See PCIJ series A, no.17, 1928, page no 29. see also Corfu channel case, ICJ Reports ,pp4,23;16 ILR, p.155.
\textsuperscript{11} Ibid.
\textsuperscript{12} Year book of ILC, 1975, vol.II, part 2, page.,30
\textsuperscript{13} Ibid
legal consequences of a breach of a treaty, including the determination of the circumstances that may exclude wrongfulness (and render the breach only apparent) and the appropriate remedies for breach, are subjects that belong to the customary law of state responsibility.\textsuperscript{14}

It was noted that the international law did not distinguish between contractual and tortuous responsibility, so that any violation by a state of any obligation of whatever origin gives rise to state responsibility and consequently to the duty of reparation\textsuperscript{15}. The arbitration commission on Yugoslavia also addressed the issue of the relationship between the state responsibility and other branches of international law, by stating that the question of war damage was one that fell within the sphere of state responsibility, while the rules relating to state succession fell into a separate area of international law.

The distinction has been drawn between international crimes and international delicts, with in the context of internationally wrongful acts. Article 19 of the ILC draft provides that all breaches of international obligations are internationally wrongful acts. But, an internationally wrongful act that results from the breach of an international obligation which is essential for the protection of the fundamental interests of the international community is recognized as a crime, by that community as a whole, hence constitute an international crime. All other internationally wrong full acts are international delicts\textsuperscript{16}.

Article 19 has provided some examples of situations that may leads to international crimes. These include aggression, the establishment or maintenance by force

\textsuperscript{14} C. Eagleton \textit{the responsibility of state in international law}, New York, 1928.
\textsuperscript{15} Supra note no 5.
\textsuperscript{16} E. Mohr, \textit{The ILC’s Distinction between International Crimes and International Delicts”} and its implications’ in UN codification, page.115 and K. Marek, ‘\textit{criminalizing state responsibility}
of colonial domination, slavery genocide, apartheid and massive pollution of the atmosphere or of the seas. Hence according to Article 19 massive pollution of the seas and world oceans are considered as international crime. The question is whether the state is criminally responsible for such crime is highly controversial, because there are contradictory of statements regarding this concept. Brownlie argues that the concept is of no legal value and can not be justifiable in principle. Although it is good in the political and moral spheres, it is pointless in the legal sphere. Therefore the State responsibility was limited only to the obligation to compensate. The problems of demanding for penal sanctions from state could only be creative and volatile. However others have argued that particularly since 1945, the attitude towards certain crimes by states has alerted so as to bring it with in the realm of international law\textsuperscript{17}.

The Rapporteur in his commentary to article 19 of ILC has recognized three specific changes since 1945 to the concept of liability; they are, first, the development of the concepts of jus Cogens as a set of principles from which no derogation is permitted. Secondly, the rise of individual criminal responsibility directly under international law and Thirdly, the UN charter and its provisions for enforcement action against a state in the event of threats to or breaches of the peace or acts of aggression. How ever there are serious problems with regard to state criminal responsibility and the issue is no likely to be easily resolved\textsuperscript{18}.

\textsuperscript{17} Boyle & Brownlie, state responsibility system of law of nations, Part I, Oxford page 50
\textsuperscript{18} Ibid.
II. STATE RESPONSIBILITY AND THE ENVIRONMENT;

The principles of state responsibility dedicate that states are accountable for breaches of international law. Such breaches of treaty or customary international law enable the injured state to maintain a claim against the violating state, whether by way of diplomatic action or by way of recourse to international mechanism. Recourse to the International Arbitration or to the International Court of Justice is also possible provided that the necessary jurisdictional basis has been established. Customary International law has imposed several important fundamental obligations upon the state in the area of environmental protection. The very first duty of the state is not to act so as to injure the rights of another state; hence the concept of territorial sovereignty incorporated an obligation to protect with in the territory, the rights of other states.

In the Trail smelter arbitration case, the arbitration has noted that under principles of international law and as well as the law of United Nations, no state has the right to use or permit the use of territory in such a manner as to cause injury by fumes in or to the territory of another state or the properties or persons there in, when the case is of serious consequences and the injury is established by clear and convincing evidence.

The International Court of Justice has reinforced this approach, by emphasizing in the Corfu Channel case, by stating that it was the obligation of every state not to allow knowingly, its territory to be used for acts which are contrary to the rights of other states. In 1995 while concluding the Nuclear Test Case, the court has suggested that the test to be conducted without causing harm to the rights of other states and there by up

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19 Ibid
20 ILR page 315, and also see the Trail smelter Arbitration, 1 Canadian year book of international law 1963.
21 ICJ reports 1949.p.4 and also ILR 155.
22 Ibid.
held the obligations of states to respect and protect the environment. In addition, the UN General Assembly in its advisory opinion on the liability of the use or threat of Nuclear weapons, recognized the existence of the general obligation of states to ensure that activities with in their jurisdiction and control should not damage the environment of other states and every state has to respect the environment of other states or of the areas beyond national control, which is now a part of the corpus of international environmental law.

This judicial approach has now been widely reaffirmed in international instruments. For example, Article 192 of the UNCLOS III 1982 has provided that states have the obligation to protect and preserve the marine environment. In addition article 194 has noted that states shall take all necessary measures to ensure that activities under there jurisdiction and control should not cause damage to the rights of other states.

The noticeable point is that the focus has been shifted from the state to the wider perspective. In other words, at the beginning of the international environmental law the state has the responsibility towards other states, but now the states have the responsibility to protect the environment of the areas which is beyond the control of the nation, which includes the high seas, deep sea bed, and outer space.

Similarly the Stockholm Declaration of 1972 and Rio Declaration 1992 has recognized the responsibility of the state towards the environment of the earth surface and there by contributed to the swift growth of liability regime under the international environmental law.

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At present, there are different regimes of responsibility for a wrongful acts and one regime of liability without a wrongful acts. They are,

1. Fault responsibility.
2. Objective responsibility.
   i) Objective and relative responsibility or strict responsibility.
   ii) Objective and absolute responsibility; and
3. Liability with out a wrongful act.

According to the traditional view under the fault responsibility regime victim state has to prove the existence of psychological fault (willful or negligent conduct) behind the breach of international obligation by the organs of the state accused of the wrongful act. According to the traditional view under the fault responsibility regime victim state has to prove the existence of psychological fault (willful or negligent conduct) behind the breach of international obligation by the organs of the state accused of the wrongful act.25

Under the category of objective responsibility, responsibility does not require to be proved the fault but this responsibility arises from the mere breach of an international obligation. Objective responsibility is further classified in to two categories, they are 26

Objective and relative responsibility or strict responsibility, when the state accused of the wrongful act, may invoke one of the circumstances precluding wrongfulness allowed by international law.

Finally, liability regime with out wrongful act, such regime is characterized by the fact that the obligation to pay compensation is on the basis of mere causal link between these activities and the damage occurred. Generally, liability arises from unlawful activities, but here the liability arises even due to the lawful activities and states

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25 Ralph P. Kroner, transnational environmental liability and insurance, Graham and Tortman publications page 218.
are liable to pay compensation just because they had causal link with the activities that caused damage.

III. COMPLIANCE MECHANISMS OF LIABILITY REGIME IN INTERNATIONAL ENVIRONMENTAL LAW

*Louis Henkin*’s has observed that “*all most all nations observe almost all principles of international law and all most all of their obligations all most all of the time*”. But some times the states have failed to obey the obligations especially relating to the International Environmental Law, because the cost of compliance is more and consequences of non-compliance is uncertain\(^{27}\).

However the reasons for the failure to compliance with the international obligations are varied and not always resulting from bad will. As pointed out by the *Mitchell*, some states choose not to comply with the international obligations because the benefits of compliance simply do not outweigh its costs\(^ {28}\). Research indicates that non-compliance with International Environmental Law is due to the institutional incapacity than bad faith. In addition most developing countries lack the financial, administrative, or technical capacities for meaningful compliance. Non compliance may result even from best efforts, and a country may comply with some treaty provisions while failing to comply with others. Hence it is quite difficult to say that non-compliance of international obligations under environmental treaty regime is due to the ill will. Mainly there are *three components of management of environmental treaty regime*. They are a primary rule system, a compliance information system, and a non compliance response system.

\(^{27}\) Supra note no 24.

\(^{28}\) Ibid
1. The primary rule system consists of the acts, rules and processes related to the behavior that is the substantive target of the regime. The primary rule system determines the degree and source of pressure and incentives for compliance and violation. The first step in gaining compliance and facilitating implementation with international regime is to establish a regime that is acceptable to most of the countries that are necessary to make the particular regime, effective. In other words, the process of negotiation must include the effective participation in the negotiation process so that countries will be able to make necessary changes to ensure subsequent compliance. More importantly they will become more committed to the goals and approaches adopted in the treaty. However the role of developing countries is significant in resolving the major environmental issues, hence some times developing countries are negotiating for some financial benefits to be a party to some environmental conventions best example is Montréal Protocol for Ozone Depletion\textsuperscript{29}.

2. The compliance information system consists of the acts, rule and processes that relating to collect, analyze and disseminate information regarding the instances of and parties responsible for, violations and compliance. The self-reporting, independent monitoring, data analysis, and publishing activities that comprise the compliance information system determine the amount, quality and uses made of data on compliance and enforcement.

3. The non-compliance response system consists of the acts, rules, and processes governing the formal and informal responses undertaken to include those identified as in non-compliance to comply. The non compliance response system

\textsuperscript{29} Ibid.
determines the type, likelihood, magnitude, and appropriateness of responses to non-compliance\textsuperscript{30}.

However the following \textit{factors are the prime mechanism for improving the implementation and compliance system}. 

1. Renovation of international regulations, in other words for the effective implementation and enforcement of international regulations at national level requires insertion of those international regulations into domestic laws, because the states and its subjects are the main and ultimate concern of International Environmental Law.

2. Financial co-operation. In other words, in implementing an International Environmental Agreement, countries have to incur significant direct and indirect costs. The direct cost of implementation includes the expenditure that are necessary to administer and enforce new laws, and to develop or purchase any new technology which are necessary to comply with an agreement. The indirect costs include the economic and social development foregone or postponed, because of the policy changes. However there has been a constant point of contention between developed and developing countries. As the stance of China and India, developed countries have a duty to provide financial assistance, both because of their greater contribution to global environmental problem and because of their greater resources.

3. Transfer of technology. In many ways Technology transfer is analogous to financial assistance. Preferably the developing countries forward their demand to the developed countries to share environmentally sustainable technologies, as a

\textsuperscript{30} Ibid.
part of their bargain to join global environmental agreements. Access to these
technologies is often essential to the successful implementation of environmental
treaty commitment, but the cost of acquiring the new technologies can be
prohibitive for developing countries. Thus a growing number of agreements have
called on developed countries to transfer their technologies to developing
countries on fair or favorable terms31.

IV. RESPONSIBILITY FOR HARM CAUSED TO INTERNATIONAL ENVIRONMENT UNDER CONVENTIONAL INTERNATIONAL LAW.

There are only few agreements in conventional international law that contains
precise rules on responsibility or liability for the protection of the marine environment in
case of damage and for breach of international obligations. For example, 1972
convention on international liability for damage caused by space objects, which
expressly provide two different forms of responsibility i.e. absolute liability without a
wrongful act for damage caused on the surface of the earth or aircraft in flight and fault
responsibility for other kinds of damage.

Another treaty which contain rule on responsibility is Article 139 of the 1982 Monte
go Bay Convention on the Law of the Sea, this article contemplated responsibility of the
states with regard to their participation in activities carried out in the international sea-
bed area, and also include responsibility for pollution. Article 139 is based on
responsibility for wrongful act and for fault or lack of due diligence. In fact state is not
automatically responsible for any damage caused, but only for damage caused by the
failure to respect its obligations. More over Article 139 makes it clear that the state is not

31 Ibid.
responsible for damage caused by persons “sponsored” by it if the state has taken all appropriate measures to secure compliance with the rules contemplated with the convention\(^{32}\).

V. UNITED NATIONS CONVENTION ON THE LAW OF THE SEA -1982 AND LIABILITY REGIME OF MARINE POLLUTION DUE TO SOLID WASTE

Article 235 of UNCLOS 1982 has provided that states are responsible for the fulfillment of their international obligations concerning the protection and preservation of marine environment, in accordance with international law. Further state should ensure that remedy is available in accordance with their legal systems for prompt and adequate compensation or other relief in respect of damage caused by pollution of marine environment by natural or juridical person, under their jurisdiction. Again the same article has stated that, state shall co-operate with the objective of assuring prompt and adequate compensation, to implement the existing international law and also for the further development of international law relating to the assessment of responsibility, liability and for the settlement of related disputes. Further efforts should be made for the appropriate development of criteria and procedures for the payment of adequate compensation, such as compulsory insurance for compensation funds\(^{33}\).

\(^{32}\) Ibid
VI. INTERNATIONAL CONVENTION ON THE LIABILITY AND COMPENSATION FOR DAMAGE CAUSED DUE TO THE CARRIAGE OF HAZARDOUS AND NOXIOUS SUBSTANCES BY SEA (HNS) 1996

While concluding the CLC Convention on oil pollution liability in 1969, government realized that the carriage of hazardous goods other than oil could also cause damage to persons, property and environment but the drafting of one international instrument covering both oil and other hazardous goods is too complex a task. Hence during the early eighties the discussions were started on HNS convention.

However a diplomatic conference on the subject held in 1984 but failed due to views being too diverging and later compromises were sought and also found, but the subject remains an extremely complicated one. A new diplomatic conference is foreseen in 1994 and finally established in 1996. The convention has covered not only the damage from pollution but also covered the damage that caused due to the risk of fire and explosion, including loss of life and personal injury and damage to property.

Hazardous and Noxious substances are defined by referring the lists of substances included in various IMO conventions and codes. Hence the hazardous and noxious substances include oils, other liquid and gaseous substances carried in packed forms, solid bulk materials, and other materials which are defined as possessing chemical hazardous. The convention also covered residues left by the previous carriage of hazardous and noxious substances other than those carried in packaged form.

Further the convention has defined the term damage so as to include the loss of life or personal injury, loss or damage to property due to the loss of ships, and also the

36 Supra note no 35.
damage by contamination of the environment. The convention has introduced the strict
liability for the ship owners and a system of compulsory insurance and the ships are
under the obligation to keep insurance certificates on board\textsuperscript{37}.

The convention on hazardous and noxious substances is based on two tire
system established under the CLC and Fund Convention\textsuperscript{38}; first tier imposed a strict
liability on the ship owner for the damages caused due to the HNS substances up to one
limit for which the ship owner has to take up the insurance coverage. The second tier
provides supplementary compensation for claims which remained unpaid under the first
tier this supplementary compensation has to pay by a scheme or by a fund and financed
by a levy paid by the shippers of hazardous substances.

The convention has forwarded an ingenious collection system, where each state
party has to appoint one or more issuing agents who have to collect the levy against the
sale of dangerous and hazardous substances. The rational behind such assistance is ,many
times the ship owner may not be able to pay the amount of compensation as a reparation
for the damages caused due to the carriage of HNS, hence this provision entail the ship
owner to make good the loss with the help of fund created by the convention.

\textit{Limits of liability under HNS convention;}

For ships not exceeding 2,000 units of gross tonnage, the limit is set at 10
million SDR (about US $12.8 million). For the ships above that tonnage, an additional
150 SDR is added for each unit of tonnage from 2001 to 50,000 and 360 SDR for each

\textsuperscript{37} P.C. Sinha, Encyclopedia of Disaster Management series Coastal and Marine disasters, Anmol
publications, 121-160.

\textsuperscript{38} International Convention on the Establishment of an International Fund for Compensation for oil
Pollution Damage, Brussels 1971, as amended by protocols 1976 and 1984 (Fund Convention 1984)
(Consolidated version)
units of tonnage. The total possible amount for which the ship owner is liable is limited to 100 million SDR (US$ 128 million).

States which are parties to the convention have decided for not to apply the liability system of HNS to ships of 200 gross tonnage and bellow, which carry only the Hazardous Noxious Substances in packaged form and are engaged on voyages between ports in the same state or between two neighboring states which can further agree to apply similar conditions to ships operating between ports of two countries. In order to ensure that, ship owners engaged in the transportation of Hazardous Noxious Substances should be able to meet their liabilities.

The convention has introduced the compulsory insurance system. In addition certificate of insurance must be carried on board with a copy of record of registration of ships. The tier will consists of one general account and three separate accounts for oil, Liquefied petroleum gas (LPG), in order to avoid the cross subsidization between different HNS substances and also with the CLC and Fund Conventions. In case of occurrence of any incident which can be commensurable under the HNS Convention, compensation could first be sought from the ship owner, up to the maximum limits of 100 million SDR (US $ 128 million). Once these limits are crossed, compensation would be paid from the second tier that is from the HNS fund, up to a maximum of 250 million SDR (US $ 320 million) (including compensation paid under the first tier).

The Fund will have an assembly consisting of all states which are parties and a secretariat headed by a director. The assembly would normally meet once in a year.\[39\]

In addition to the HNS convention, CLC 1969, 1992 and Fund 1971, 1992 are also deal with the provisions relating to the compensation for the damage caused to the
marine environment, but these conventions provide relief against the damages caused due to the oil pollution. In order to cover the gaps in the CLC, particularly where pollution damage occurred in a non member state, the oil industry introduced two voluntary schemes namely, the Tanker Owners Voluntary Agreement Concerning Oil Pollution, popularly known as TOVALOP which mirrored the CLC, the Contract Regarding an Interim Supplement to Tanker Liability for oil pollution, CRISTAL that mirrored the FUND. Increasing number of states has ratified either the old or new CLC/FUND regimes (or mixture of both). However the agreements became increasingly outmoded and were formally wound up on February 1997.\(^{40}\)

Another point for discussion is that the legal relation of limits of liability as laid down in other conventions, such as the 1976 Convention on limitation for maritime claims and the 1974 Athens Convention relating to the carriage of passengers and their luggage by sea. Furthermore, a lot of more technical points in respect of the working of the scheme, which may have the important financial consequences, still have to be solved. Indeed the existing liability regime is not optimistic, workable and effective as long as government (who in many cases are amongst the largest claimants) maintain their political desire while paying full compensation for victims of damage caused by the carriage of hazardous goods. However certain risks are inherent to a modern society, hence government should pay more attention towards the prevention of damages than trying to impose liability on carriers after occurrence of the event, which go beyond what is reasonable limits of insurance.

In case of the Nuclear Liability regime, it comprised of three conventions, they are the OECD sponsored Paris Convention, The Brussels Convention, IAEA sponsored

\(^{40}\) supra note no 32
The state parties to the Paris Convention are not parties to the Vienna Convention, hence in order to enhance international cooperation, the joint protocol relating to the application of the Vienna and Paris Convention 1988 has been established. The protocol has provided that a state party to both Vienna and Paris Convention can recover damages from a nuclear plant operator, located in any state which is party to either convention. Both the Paris and the Vienna conventions have imposed strict and limited liability on the operator of a nuclear installation, and joint and several liabilities when two or more operators are liable for any damage and such damage is not reasonably separable.

Limited liability was preferred because it provides protection to the new nuclear energy industries. Again the protocol has imposed Channeling liability, exclusively to the operator who avoided the excessive administrative and insurance costs of identifying the liability of the other actors, such as suppliers and transporters. The convention also imposed compulsory insurance on the operators of nuclear facilities. But the specification of the amount, type and terms of such insurance is left to each state party.

The conventions inter alia prescribed the liability for damages caused by radioactive waste transportation and disposal. The term nuclear damage comprises loss of life, personal injury, and damage to the property. It does not include economic loss and loss of future earnings unless the courts of the competent state so provide.

The Brussels convention prescribed an interesting compensation scheme; where a portion of the compensation is paid by the operator insurance, another by the

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42 Supra Note no 25
installation state, and remaining balance by the state parties, according to a special formula based on the GNP and the nuclear power of the installation state\textsuperscript{43}. Victims can bring claims under the conventions only in the court of the state where the nuclear incident occurred. Under the general rules of private international law, however, any state suffering damages has jurisdiction over such claims and plaintiff can engages in forum shopping.

However the nuclear liability regime is not as comprehensive as oil pollution regime. The prescribed liability is limited and the maximum limit of prescribed liability is ridiculously low, best example is Chernobyl disaster\textsuperscript{44}. In addition, unlike the 1984 oil pollution regime, there are no mechanisms to update the liability limits, and to compensate for preventive measures and economic loss. Furthermore, there is no international fund to sponsor immediate or residual relief after a nuclear disaster. In fact, the particular nature of nuclear accidents has disconnected the nuclear liability regime from the reality; recently there have been efforts to update the conventions, and specifically the liability limits. However the revision process involves close co-operation between the OECD and IAEA\textsuperscript{45}. Therefore, the application of the classical international

\textsuperscript{43} Supra Note no 24
\textsuperscript{44} Chernobyl accident occurred on 26-April-1986 in the former Soviet Union. It was the largest nuclear accident in the history which has caused Transboundary nuclear pollution. This disaster focused international attention on the question of safety of nuclear reactors in the former Soviet Union. A decade later Chernobyl accident gives the Moscow Summit on nuclear safety and Security on opportunity to increase international awareness of nuclear safety. Most of the newly independent states, established after the collapse of the Soviet Union, are in the process of advancing political and economic reforms, but are not in financial situation to take independent measures necessary for nuclear safety by themselves. Therefore after the Munich G-7 Summit in 1992, co operation has been provided by the G-7, various European countries and others to support the improvement of nuclear safety in the former Soviet Union and Eastern Europe.

\textsuperscript{45} Ministry of Foreign Affairs of Japan, Kasumigaseki, Chiyoda-ku, Tokyo
approach of state responsibility for breaches of international obligations and the requirement to make reparation for such breaches and to the environmental problems is particularly problematic. The need to demonstrate that particular damage has been caused to one state by the actions of another state is itself difficult. In many cases it is simply impossible to prove that particular damage has been caused from one particular source, infact the protection of environment of the earth is truly a global problem requiring a global response and it is not possible to tackle the problem with such an arbitrary and peace meal fashion. Hence the approach to dealing with the environmental matters has to be shifted from the bilateral state responsibility paradigm to the establishment and strengthening of international co-operation.

It is a developing theme of International Environmental Law, founded upon general principles. Principle 24 of the Stock Holm Declaration 1972 noted that international matters concerning the protection and improvement of the environment should be handled in a co operative spirit. Principle 7 of Rio Declaration 1992 emphasized that state shall co operate in a spirit of global partnership to, conserve, protect and restore the health and integrity of the earth’s eco system. Principle 13 of the Rio declaration referred both to national and international activities, in this field by stating that state shall develop national law regarding liability and compensation for the victims of pollution and other environmental damage. States shall also co operate in a prompt and more determined manner to develop further international law regarding liability and compensation for the adverse effects of environmental damage caused by activities with in their jurisdiction or control to areas beyond their jurisdiction46.

46 20U.Miami Inrter-Am.L.Rev.579
The *Corfu Channel Case*[^47], has provided that the states are not permitted to do the acts, with in their territory which are likely to harm the rights of other states and imposed a duty on the states to cooperate with each other, by way of giving information about the knowing environmental hazardous to the other states. A large number of international agreements have also contains the same provision, for example Article 198 of the Convention on the Law of the Sea 1982 has provided that when a state become aware of cases in which the marine environment is in imminent danger of being damaged or has been damaged by pollution, it shall immediately notify other states it deems likely to be affected by such damage, as well as the competent international authorities. Again article 13 of the Basel Convention on the control of Transboundary movement of hazardous waste 1989 has provided that state parties shall inform another state, in the case of an accident occurring during the Transboundary movement of hazardous waste which is likely to present risks to human health and to the environment of that states[^48]. In 1974 the OECD (the organization for economic co operation and development) adopted a recommendation that prior to the initiation of works or undertaking that might create a risk of significant Transboundary pollution, early information should be provided to states that are or may be affected[^49].

In 1998, the OECD adopted a council decision in which it is provided that states must provide information about the accidents at installations and transmit to exposed countries the results of their studies on proposed installations in order to prevent the marine pollution. In addition the states have a duty to exchange the emergency plans, as

[^47]: ICJ reports 1972, page no 4
[^48]: O.V Nandimath and Rao Sumitha, Enforcers Training Manual in Hazardous Waste and Management Law, Center for Environmental law education, Research and Advocacy (CEERA), National Law School of India University, Bangalore-72, Environmental Training Network, CPCB, New Delhi
[^49]: Supra Note no 42
well as a duty to transmit immediate warning to exposed countries where an accident is likely to pose an imminent threat to the marine environment\textsuperscript{50}. The point is also emphasized in the Rio Declaration of 1992. Principle 18 has provided that states shall immediately notify other states about any natural disasters or any other emergencies that are likely to produce sudden harmful effects on marine environment of those states. While principle 19 has stipulated that states shall provide prior and timely notification and relevant information to potentially affected states on activities that may have a significant adverse Transboundary environmental effect and shall consult with those states at an early stage and in good faith. Hence the states are also under the obligation to have a prior consultation of the states.

Another emerging principle, which has been more widely, accepted in some countries and regions, popularly known as \textit{polluters pay principle}. Principle 16 of the Rio Declaration noted that the state or any subject of the state which caused harm to the marine environment is under the responsibility to conduct the clean up work as a whole. In other words the polluter of the marine environment is under the obligation to make good the loss or damage caused to the environment\textsuperscript{51}.

\section*{VIII. SETTLEMENT OF DISPUTE UNDER INTERNATIONAL ENVIRONMENTAL LAW IN CASE OF MARINE POLLUTION DUE TO SOLID WASTE}

UN charter placed the states under a general obligation to cooperate and resolve disputes peacefully. Most International Environmental Treaties have provided for the

\textsuperscript{50} Supra note no 24.
\textsuperscript{51} Alexander Kiss and Danish Shelton, International Environmental Law, Copernicus and Grotious publications, Cambridge University press 1995. page no 39
array of formal dispute settlement mechanisms ranging from informal consultation to formal arbitrations. In practice the formal dispute settlement procedures are rarely used in most International Environmental Treaties. However, several factors account for the lack of reliance on formal dispute mechanisms. First, the rules of decision in treaties are not well developed, thus involving great uncertainty for any parties to take resort for specific dispute settlement proceedings. Further we can find only hand full of ICJ decisions especially with regarding to the issues relating to International Environmental Law. Moreover, the jurisdiction or authority of the formal dispute resolution mechanisms may be inadequate to ensure a meaningful remedy. Formal dispute mechanisms are slow and costly proceeding. Dispute settlement procedures may simply be inappropriate for reaching effective and practical solutions to the technical and difficult issues frequently posed by environmental treaties. Hence the states prefer to avoid taking resort to the formal dispute settlement procedures and gave importance to the dispute avoidance mechanisms. This shift to avoiding or preventing disputes is particularly important in the environmental field because it places the focus on avoiding or preventing environmental harm. Further the transaction cost of dispute avoidance is lower then those of subsequent dispute settlement. In other words, the formal dispute settlement process in case of non compliance of International Environmental Law needs more money and also time consuming. In addition till the completion of formal dispute settlement proceeding, said non compliance environmental issue may cause irreparable loss or damage to the environment. Thus dispute avoidance mechanisms are closely connected with one of the most recognized principle of International Environmental Law viz, precautionary measures. In other words preventing environmental harm is better than
compensating the damage that caused to the marine environmental. However the following are the well recognized dispute avoidance mechanisms\textsuperscript{52}.

1. **Exchange of information:** Exchange of information through specific, periodic reporting requirements is one of the most important tools for identifying environmental problems at an early stages and it is one among the well recognized mode of dispute avoidance.

2. **Notification:** Prior notification to potentially affected states regarding activities that may have significant adverse Transboundary environmental effect is the first step among the dispute avoidance procedure. Emergency notification provisions are basic components of international approaches to oil spills, industrial accidents, and nuclear accidents which have provided an opportunity to the states to mitigate potential damages to the environment.

3. **Consultation:** Ecology of all states are inter-related and inter dependent, hence if any states have planning to conduct activities that may cause harm to the environment or natural resources of another state, are often required by treaty to enter in to good faith, consultations over a reasonable time to minimize the environmental impacts. Consultation implies an opportunity to review and discuss a planned activity that may potentially cause damage. Consultation is being institutionalized at the international level, either through existing international bodies or through new institutions created in the frame work of specific environmental conventions.

\textsuperscript{52} supra note no 24
4. **Prior Informed Consent:** States should receive the prior informed consent of another state before carrying out potentially harmful activities in the territorial waters of that particular state. Activities that currently require prior informed consent includes exporting hazardous wastes in to another state, exporting domestically banned chemical substances to other state etc.

5. **Transboundary environmental impact assessment:** All state should undertake environmental impact assessment before engaging in any activity that may create a risk of significantly affecting the environment of another state or state sharing resources. Environmental Impact Assessment has been widely adopted for investigating and communicating potential Transboundary impact in many contexts, for example, when states plan activities that may cause substantial pollution or harm to the marine environment, or that are likely to have significant adverse effects on biological diversity.

Again marine pollution is a global problem so need joint and individual efforts at various levels. Hence sovereign states should cooperate in developing legal regimes and institutions at various levels for the following purposes.

- For managing shared Transboundary resources,
- To establish routine procedures for sharing information,
- For setting environmental standards,
- For allocating natural resources and discussing specific issues in an important means of building confidence,
- Reducing overall transaction costs and avoiding environmental disputes\(^{53}\).

\(^{53}\) supra Note no 24
All most all, the conventions on marine pollution gave much importance to the international cooperation, and many conventions have offered even financial benefits as a reward to their cooperation to the protection and preservation of environment. Since, there is only one environment on the earth surface hence the protection and preservation of the marine environment, co operation at various levels is inevitable. The obligation of states and procedures for settlement of disputes in peaceful manner is well established in international environmental treaties and inserted in article 33 of the UN Charter. Article 33 has framed the procedures for the formal dispute settlement mechanisms that are available to states including negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements or other peaceful means of their own choice.

These mechanisms and other closely related measures are common provisions of most international agreements, including those related to environment. However, in practice the environmental disputes have rarely settled, hence instead of detailed dispute settlement procedures, extensive prominence is given to the efficacy of dispute avoidance mechanisms.

IX. DISPUTE SETTLEMENT REGIME

Over centuries the seas and oceans have often proved to be source of dispute between states or between states and individuals. More over, the proliferation of uses of the seas in recent times can easily lead to an increase in the frequency and intensity of disputes. Sources of disputes under International Environmental Law include.

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55 Ibid
1. Question of delimitation and sovereign rights.

2. Implementation of various rights that arising from the international law.


4. Management of natural resources of the high seas and sea bed.

The dispute settlement procedures are more or less common to all kinds of disputes of International Environmental Law. However with regarding to marine pollution by solid waste, till the date, no case has been registered.

It is fair to say that international law has always considered its fundamental purpose to be the maintenance of peace and security of the world community. Basically the techniques of conflict management fall in to two categories, diplomatic procedure and adjudication. The Former involves an attempt to resolve differences either by the contending parties themselves or with the aid of other entities by the use of the discussion and fact finding methods. Adjudication procedures involve the determination by a disinterested third party of the legal and factual issues involved, either by arbitration or by the decision of judicial organs.

The International Environmental Law being a part of international law not departs from the object and methods of dispute settlement. in fact international environmental law is newly emerging law, hence one can not expect full fledged and comprehensive set of frame work for dispute settlement in case of serious environmental pollution.  

X. ENFORCEMENT AND SANCTIONS;

Normally when a party violates any treaty obligation because of political preferences rather than incapacity, the other parties may turn to diplomatic and public pressure, withdrawal of membership benefits, trade measures, or other sanctions to enforce the treaty. The most common means of responding to non-compliance is through diplomatic pressure. Conferences of the parties’ treaty secretariats and less formal channels can be used to urge states to abide by their commitments. Informally, at least, a country’s authority to participate as an equal partner in the development of treaty policies is significantly weakened if it is perpetually in non-compliance. International environmental treaties often link compliance with the receipt of benefits arising from membership in the regime. The parties to the Montreal Protocol responded to non-compliance by denying the non-complying party access to the protocol’s positive measures of financial co-operation and transfer of technology. A number of environmental treaties have explicitly provided for the use of trade measures as a sanction for non-compliance. Most environmental treaties with trade sanctions, also control the movement of environmentally harmful substances or limit trade, that itself environmentally harmful. Best examples are the Montreal Protocol, Basel Convention etc. However rather imposing sanctions on non-compliance, giving much importance to the positive aspects of improvement of compliance is praiseworthy57.

In reality the existing liability regime is not at all sufficient and is very general and vague. For instance, all most all the treaty contemplated a general commitments concerning co-operation among the state parties. The vagueness and the uncertainty of

57 Herald Jacobsen and Edith Brown Weiss, Engaging Countries. Strengthening Compliance with international environmental Accords 1998
such commitments raise doubts as to their binding nature and on possibility of enforcing international responsibility for their breach\textsuperscript{58}.

Further the nature and degree of international responsibility is varying as per the individual treaties and even according to individual obligations lay down in each treaty. Naturally such kind of provisions gives room for confusions and thereby tenders further interpretation. Hence, especially with regarding to marine pollution we need specific, detailed and more sophisticated rules on liability, by introducing additional protocols to the existing convention. More attention should be given to combat the marine pollution due to all kinds of solid waste. Since the accumulation of solid waste can be controlled to its maximum extent, because it is in the hands of the state organs and depends on how effectively a state has implemented the integrated solid waste management at various level. However there are certain wastes, for which ocean dumping is inevitable and there are certain wastes which naturally find their way to the marine e.g. coastal out falls, treated waste water from various coastal industries\textsuperscript{59}.

**XI. DISPUTE SETTLEMENT PROCESS AND ENFORCEMENT MEASURES OF UNCLOS 1982**

UNCLOS III has forwarded compulsory procedures for dispute resolution among parties. Such a procedure ensures respect for compliance with the provisions of UNCLOS III and clarifies provisions that may be ambiguous or conflicting. The dispute

\textsuperscript{58} Ibid
\textsuperscript{59} Supra note no 24
settlement process of UNCLOS 1982 is comprehensive and accommodating. The silent features of the dispute settlement resolution of UNCLOS III are as follows.\(^60\)

All parties are under the obligation to settle the disputes by peaceful means. In other words; a dispute between parties concerning the application or interpretation of UNCLOS-III is first addressed informally by exchanging views through negotiation. It means the dispute resolution process is either simple or complex depending upon the will of the parties. Because parties may jointly choose any dispute settlement process as their wish, even they can decide to by pass the UNCLOS-1982 procedures entirely by deciding to use a bilateral, regional or other dispute settlement system. If informal negotiation fails to achieve mutually acceptable settlement, a party may request formal dispute resolution. Note worthy point is that the only one state may be a party to the dispute. However the state parties are enjoying the right of forum shopping.

XII. DISPUTE SETTLEMENT MECHANISMS OF UNCLOS-III

- The international court of justice and 3 bodies created by UNCLOS 1982.
- The international tribunal for the law of the sea,
- The Arbitral Tribunal
- The Special Technical Arbitral Tribunal.

The parties to the dispute may agree to choose any one of the fora. If the parties are disagree with the appropriate form of dispute settlement mechanism, such dispute shall be submitted to compulsory arbitration as provided for in Annex VII and Article 280 - 287 of UNCLOS-III.

\(^60\) United Nations Convention on law of the sea 1982-A commentary volume1, Edited by Myron H. Nordquist, Center for Oceans Law and Policy, University of Virginia
The International Tribunal for Law of the Sea is composed with twenty one independent members elected by UNCLOS parties. The International Tribunal for Law of the issued decision in four cases by January 2001, three of which involved allegedly illegal fishing practices and the following are most important cases decided by the International Tribunal for the Law of the Sea, they are Southern Blue Fin Tuna case and Camouco Case.

**Southern Blue Fin Tuna Case**, where New Zealand Australia brought an action challenging Japan’s experimental catch program. Southern Blue fin Tuna population have come under heavy pressure because it more valuable than gold. Hence in 1993, the convention for the conservation of southern Blue fin Tuna was created to manage stocks, with the assistance of its scientific committee, the commission set a total allowable catch for Tuna. In 1995 Japan proposed to increase the total allowable catch but no agreement has been reached to do so. In 1998, Japan increased its harvest of Tuna by 2000 ton’s and described as experimental fishing deemed as necessary to collect more scientific data for establishing total allowable catch. Australia and New Zealand was claimed that this was a sham commercial operation and alleged that Japan has breached its UNCLOS obligations to conserve and manage the Tuna by failing to restore population levels to maximum sustainable yield or cooperate with New Zealand and Australia in good faith. International Tribunal for Law of the Sea ordered Japan to refrain immediately from authorizing or conducting any further experimental fishing for Southern Blue fin Tuna without the agreement of New Zealand and Australia, and directed to negotiate and cooperate in good faith with New Zealand in setting future conservation measures to restore

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61 Ibid

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the southern Blue fin Tuna stock to maximum sustainable yield levels and not to exceed
the existing total allowable catch until the formulation of new one. For final resolution of
the dispute Australia and New Zealand invoked the UNCLOS 1982 dispute resolution
procedures to create a five member arbitral tribunal specially appointed to address the
Southern Blue fin Tuna case. The members of the Arbitral Tribunal specially appointed
to address the Southern Blue fin Tuna case. The member of the Arbitral Tribunal were
selected by the agreement of the Australia, New Zealand and Japan and administered by
the world Banks International centre for settlement of investment disputes.

Japan argued that the dispute was not with in the ambit of the UNCLOS that the
dispute was not with in the ambit of UNCLOS that the arbitral Tribunal therefore lacked
jurisdiction, and that the proper mechanism for dispute resolution was the 1993
convention, signed by Japan, Australia and New Zealand. The Arbitral Tribunal issued its
decision on August 4th 2000, agreeing with Japan in part. The Tribunal found that the
claim appropriately fell under both UNCLOS and the 1993 convention. However, by a
vote of 4-1 it sustained Japans contention that a provision of the 1993 convention
excluded compulsory jurisdiction over disputes arising both under it and UNCLOS,
effectively preempting the UNCLOS dispute process. Accordingly, the arbitral tribunal
unanimously revoked the one year old ITLOS provisional ruling that enjoyed JAPAN
from conducting an experimental fishing programe for southern Blue fin Tuna. At the
same time, the tribunal declared that revocation or provisional measures did not mean
that parties may disregard the effect of those measures. It noted that the ongoing
negotiations among the parties had narrowed the gap between them and that Japan had
offered mediation or Arbitration under the 1993 convention. It encouraged all parties, in
the interest of achieving a successful settlement to abstain from engaging in any act that may aggravate the proceedings\textsuperscript{62}.

\textit{Camouco case}

A fishing vessel namely Camouco registered in Panama was found using long line fishing gear in the EEZ of the Crozet Island (French territory). As the French Coast guard attempted to halt the vessel, crew members threw 48 bags overboard. One bag was retrieved and revealed 34 kilograms of fresh tooth fish. France alleged the Camouco had engaged in unlawful fishing in its EEZ, failed to declare entry while having fish board the vessel, concealed the vessel's foreign flag and attempted flight. Panama requested the Tribunal to order the prompt release of the Camouco and its master, while France proposed the request and in case it were granted, asked for deposit of bond no less than FF20 million, The Tribunal ordered the release of the master and Camouco, but also required on FFs million bank guarantee as security\textsuperscript{63}.

The United States is not a party to UNCLOS 1982, but the United States has obtained provisional membership until 1998. Hence at present, they have no voice in the tribunal. However though the United States are non members to the UNCLOS 1982, but it is following the provisions of the UNCLOS 1982 as a customary rules of international law except the part XI of the UNCLOS1982\textsuperscript{64}.

How ever there are number of limitations and exception to the dispute resolution procedures of UNCLOS-1982 most relevant to environmental concern is the exclusion of

\textsuperscript{62} http://www.worldbank.org/icsid/bluefintuna/pressrelease2.htm
\textsuperscript{63} David Hunter, James Salzman, Durwood Zaelke, International environmental law and policy, second edition, University case book series, page no 987
\textsuperscript{64} Ibid
a coastal states fisheries management with in its exclusive economic zone and certain aspects of marine research with in its exclusive economic zone. Article 297 however if a coastal state manifestly fails to conserve its marine resources or arbitrarily refuses to determine the allowable catch for the other state, then the dispute is submitted to a non binding conciliation procedure. Further any dispute concerning the deep sea bed fall under the jurisdiction of the sea bed dispute chamber of the international Tribunal for the Law of the sea.

XIII. REGIONAL DISPUTE SETTLEMENT REGIME

OSLO and Paris conventions are replaced by the OSPAR convention. Hence, automatically the parties to these two conventions are also parties to the OSPAR convention. Therefore the dispute settlement provisions of OSPAR convention are applicable to all the parties of OSLO and Paris convention. Disputes between contracting parties relating to the interpretation or application of the convention, which can not be settled by the concerned contracting parties by means of inquiry or conciliation with in the commission, then request shall be submitted to arbitration. Said Arbitral Tribunal shall be constituted on the request of concerned contracting parties.

Such request for arbitration should contain the subject matter of dispute or the Article which needs interpretation. The applicant party has to provide the commission all details of the dispute including name of the party the subject matter of the dispute and article, the commission shall forward the information to all other contracting parties of the convention.
Arbitral tribunal consists of three members among these three members two members are appointed by state parties in dispute and one member is appointed by mutual consent of both the parties to the dispute. This third arbitrator shall be the chairman of the tribunal. If the chairman of the tribunal has not been designated within two months of the appointment of the second arbitrator, the president of the international court of justice shall, at the request of either party, designate him within a further two months period. Again, if one of the parties to the dispute does not appoint an arbitrator within two months of receipt of the request, the other party may inform the president of the international court of justice who shall designate the chairman of the arbitral tribunal within a further two months period.

The arbitral tribunal shall decide according to the rules of international law and particularly as per the articles of the convention. However the tribunal constituted under OSPAR convention can formulate its own rules and procedures for the settlement of disputes. The decision of the tribunal shall be taken by majority of votes of its members. The parties to the dispute are under the obligation to provide all facilities necessary for the effective conduct of the proceedings. The absence of any party to the dispute constitutes an impediment to the procedure. Finally, the award of the arbitral tribunal shall be accompanied by a statement of reasons. It shall be final and binding upon the parties to the dispute. The dispute settlement procedures on UNCLOS – III is more comprehensive accommodating and flexible. UNCLOS 1982 has forwarded a dispute settlement regime where the parties to the dispute can opt for the proceedings of their own choice; it is a sort of respect to the discretion of a sovereign state. The general provisions of part XV proceeds from the UN charter principle of peaceful settlement and
free choice of means. Further the special arbitral tribunal is exclusively mandated to deal with the disputes concerning the sensitive topics like fisheries, environmental protection, scientific research or navigation etc.

However, either it may be ICJ or any other tribunals but they have to follow the basic principles of international law and have to respect the basic principle of the UN charter, which is to maintain peace and security including conservation of environment.

XIV. ESTABLISHMENT OF INTERNATIONAL COURT OF THE ENVIRONMENT FOUNDATION

In April 1989, an international conference was convened in Rome to discuss the possibility of creating an international environmental court. Since 1989, the international court of the environment foundation was created to support this project. The International Court of the Environment Foundation has participated in the 1992 Rio Conference and held three additional conferences, finally drafted a complete framework document for the creation of an International Environmental Court. This represents one of the most complete and structured proposals to update for a new international environmental system for adjudication and compensation65.

Amedeo Postiglione, who is justice of the Italian Supreme Court, also the director of the ICEF and leading voice in the call for an International Environmental Court. He argues that, The human right to the environment must have, at the international level, a specific organ of protection for a fundamental legal and political reason: the

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65 The idea of setting up an international environmental court subsequently received support from the then ECEnvironment Commissioner, Ripa di Meana, from various Italian government ministers and a from a number of members of the European parliament.
environment is not a right of States but of individuals and cannot be effectively protected by the International Court of Justice in the Hague because the predominantly economic interests of States and existing institutions are often at loggerheads with the human right to the environment. The Court has to decide any international environmental dispute involving the responsibility of States to the International Community which has not been settled through conciliation or arbitration within a period of 18 months. Again it has to decide any disputes concerning environmental damage, caused by private or public parties, including the State.

*The crucial question is, should environmental issues be handled differently than other international conflicts?*

The ICJ has created an "environmental chamber," presumably to highlight its interest and build expertise in environmental matters. In some U.S. environmental disputes, the courts have appointed "special masters" to handle particularly complex or technical matters. Whether such examples have indicated the need for a special court as recommended by Justice Postiglione? Why does Justice Postiglione emphasize the need for an International Court for the Environment to recognize an individual right to a healthy environment? Noteworthy point is that UNCED has not explicitly recognized such rights in the Rio Declaration. What are the practical problems associated with the recognition of individual rights within the framework of international law?

What is International Court of the Environment Foundation?

66 File://H:/ICEF.htm
ICEF is an internationally recognized NGO and was officially registered in Rome as a non profit foundation, on 22 may 1992, with the following objects.

1. The right of access not only for the states but also for the individuals, NGO’S and environmental associations

2. The *erga omnes* and authority of its decisions handed down in the name of the international community.

3. On-going promotion of all initiatives aimed at strengthening existing institutions and instruments for resolving international environmental disputes.

The ICEF’S headquarters is in Rome (ITALY) and Judge Amedeo Postiglione, who is the Judge of Italian Supreme Court, environmental law expert, and also an author, is the director of the ICEF.

Recent initiatives of ICEF are as follows.

1. International Conference for Promoting more effective International law on environment and an international court on the environment within the system of United Nations, held at the Rome from 21 to 24 April 1989 with the scientific support of the centre for electronic documentation of the supreme court.

2. Official opening of the campaign for the creation of an international court of the environment, in Rome on 12 October 1990.

4. International conference on earth planet and introduction of the unregulated Global village, held at the capital hill in Rome on 5 March 1992 in the presence of Ambassadors from 50 counties.


7. International conference by the Women’s Forum on the right to a healthy environment and justice and justice held in Venice from 5 to 7 May 1995.

8. International conference on the global environmental crisis the need for an international court of the environment held on capital hill in Rome on 29 October 1996, held in the presence of ambassadors.

9. International Conference “Environment and culture, the common heritage of mankind” 5-10 June 1997 – Italy.


11. International Conference on Draft resolution in favor of the creation of an international court of the environment 3-10 September 2000, New York-USA

12. International Conference on the declaration of the support in South America for the institution of the international court of the environment 15 September 2000, Buenos Aires – Argentina
13. International Conference third ICEF environmental day Resolution for the establishment of an international court of the environment 10 November 2000 Rome Italy.

The institutional framework for the resolution of global environmental disputes

An idea of establishment of the International Court for the Environment begins in the early 1988. A committee was set up in Rome as a private initiative to examine the subject. At that time it was not certain whether the court would be based simply on moral sanctions or whether it would be set up as a permanent institution or whether it should be a combination of two.

The committee organized an international conference in Rome from 21 to 24 April 1989 attended by experts from 30 countries. The organization of the committee received substantial support from Judge Amedeo Postiglione. The conference ended with the call for the creation of an international court at the UN level for the protection of fundamental right to a healthy environment. Again it had been agreed that court should be a permanent institution and similar to the European court of human rights, to which both individuals and organizations would have access, and which would ensure that the new right to a healthy environment was upheld, and there by ensuring compliance to the international agreements on the environment and international law.

In the second conference in Florence in May 1991 resulted in the formation of basic outlines of the courts rules and procedures. They were more or less a combination of the ICJ statute and the rules of procedure of the European court of human rights.
After the Florence conference two resolutions were tabled in the European parliament in 1991 and 1992 calling for a community initiative on the said subject.

At the plenary session of 13 February 1992 the European parliament adopted a resolution stating the EC should attend the UNCED conference in Rio in 1992, since the issue of an environmental court was to be discussed at the earth summit\(^{67}\). In the Rio declaration much emphasis was given to the establishment of effective environmental legislation, including liability Law and called for more public participation\(^{68}\). Principal 10 states “states shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings including redress and remedy shall be ensured”. It was also decided to promote the work of the UN international law commission on defining environmental crimes with in the frame work of the draft code of crimes against the peace and security of the mankind.

Moreover in 1992 the original committee became ICEF (International Court of The Environment Foundation), a Non-profit Organization, NGO in order to be accredited at the United Nations and to be present with the delegation at the Rio Earth Summit\(^{69}\).

With a view to assessing the results for the environment of “after Rio” ICEF organized another conference that took place in Venice from 2 to 5 June 1994. The conference entitled “Towards the world governing of the environment”, looked at the pre-conditions for establishing an international environmental court, its chances of success and the obstacles in its way.

\(^{67}\) Paragraph 14 of the resolution called for the setting up of an International Environmental Court with world-wide jurisdiction, either at the international court of justice in the Hague or at the United Nations offices in new York

\(^{68}\) The position of the European Community on the possibility of establishing an international Court of the Environment was illustrated in the document. IV/wip/93/03/152

\(^{69}\) Supra note no 66
The conferences was divided in to five separate Forums which debated the contributions of politics, economics, law on the environment in the coming years, and also the contributions of social, cultural and finally that of religion, ethics and science. The final conclusions were drawn at the conference and expressed in the “Venice Declaration”, much importance were given to decline the global environmental crisis. National governments were invited officially to support the project for the establishment of an international court of environment and international environmental agency. The Italian government has been invited to set up a permanent committee, representing of all countries, there task is to study the existing means and identifying the immediate steps that should be taken for ensuring the international control and adjudication of global environmental problems and also to draft a protocol for the establishment of an International Court of the Environment.

However the efforts to create an International Environmental Court is admirable, because the issues relating to the environment is too diverse from other kind of international disputes involving the violation of international obligations.

XV. CONCLUSION;

A treaty is a consensual instrument. It has no force unless the state has agreed to it. Therefore there is a fair assumption that the parties interest were served by entering into the treaty. Hence there is a presumption that the state parties will ensure the compliance of the treaty obligations. It is true that a state’s incentives at the stage of negotiating a treaty is different but compliance should be the same, and based on the equality principle. Again the fundamental norm of treaty law is pacta sunt servanda-
treaties are to be obeyed. Wherefore there is a legitimate presumption of compliance with the environmental treaty obligations.

In domestic law, the typical consequence for failure to comply with the law is the enforcement procedure and the imposition of sanctions on the offending party, whether that is a monetary fine, probation or a prison term. But this can not translate to the international environmental agreements. Sovereign states do not generally subject themselves to sanctions.

In practice treaties enforcement measures are often of less practical importance then positive measures to facilitate the compliance. Despite these requisite, enforcement measures and sanctions remain important, since, enforcement measures and sanction provide some remedy against the worst offenders of international environmental law. Enforcement measures included in international environmental instruments are trade measures, member ship sanctions, and liability.

Further recourse to dispute settlement resolution in the international environmental law can pose an irreparable damage to the marine environment, since it is needs much time, money and effort. Hence rather resort to the dispute settlement measures on the non compliance of treaty obligation; it is worth to give importance to the positive provisions of encouragement and improvement of compliance like financial assistance, transfer of technology etc.