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THE INTERNATIONAL ADJUDICATORY PROCESS AND TRANS-BOUNDARY RESOURCE DISPUTES

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I. INTRODUCTION

That the judicial process is an indispensable mechanism for dispute resolution is not controvertible. What may be contested, however, is whether judicial practice as conventionally operates in the domestic and international systems is suitable for all cases irrespective of the nature of the dispute. This article is founded on that controversy. In two momentous decisions half a century apart, the international adjudicatory process laid down landmarks for the protection of the international environment. The arbitration tribunal and the International Court of Justice (ICJ) in *Trail Smelter Arbitration*[1] and *Gabcikovo-Nagymaros*[2] respectively showed remarkable inexactitude in reaching finality and this, it is contended, is in part due to the character of the dispute in both instances.

In *Trail Smelter Arbitration,* the tribunal first disposed of the issue on liability for damage to the agricultural industry in the State of Washington, United States. It held Canada responsible for the polluting activities of the Smelting and Mining Company at Trail in the Canadian province of British Columbia. However, it called for new monitoring systems to be established and imposed a new regime of environmental tolerance on the company. In *Gabcikovo-Nagymaros,* the ICJ held that although both Slovakia and Hungary had breached the terms of the hydro-electric project treaty of 1977,[3] the treaty was still valid and mandated the parties to negotiate or arrange for the settlement of the issues surrounding the execution of the project.

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[1] (United States v Canada) (1938 and 1941) 3 Reports of International Arbitral Awards 1905.

[2] (Hungary/Slovakia). The text of the Judgment on the Merits of the case may be found at the ICJ's website at <www.icj-cij.org> (visited November 2001).

[3] For the text of the treaty see (1993) 32 International Legal Materials 124.

Based primarily on these two cases, this article will argue that the adversarial system of dispute resolution, the nucleus of mainly domestic but also international judicial systems, is unsuitable for the settlement of disputes on the exploitation and management of resources located in an area shared by two or more States. In so doing, it will outline the channels by which the adversarial orientation of dispute resolution enters the international adjudicatory process and present the reasons for the non-sustainability of the adversarial system in trans-boundary resource disputes. Finally, it will review the call for the establishment of a special international environmental court.

II. SOURCES OF ADVERSARIAL THINKING

Basically, there are three main methods of adjudicating disputes between States and other international legal personalities. These are the complete ICJ processes, binding arbitration and ICJ advisory opinions.[4] The basis for invoking the ICJ's jurisdiction may be the acceptance of its compulsory jurisdiction, agreement between the parties to submit their dispute to it or where the Charter of the United Nations[5] confers jurisdiction on it. Arbitration, on the other hand, is dependent on agreement between the parties either as a provision in a treaty dealing with broader matters or as an agreement resulting from their inability to resolve an already emerged dispute.

The United Nations General Assembly, Security Council or a specialised agency (with the General Assembly's authorisation) may generate the advisory jurisdiction of the ICJ.[6] In all three cases, the respective adjudicatory bodies are generally called upon to make decisions in a largely binary mode. That necessarily entails rigorous

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[4] There are other methods based on consensus such as mediation, conciliation and the good offices of the United Nations Secretary-General. Specialised institutions, such as the International Monetary Fund, the World Bank and the International Labor Organisation, also have their own respective internal dispute resolution mechanisms: David Davies Memorial Institute of International Studies, International Disputes: The Legal Aspects (1972, Europa Publications, London); Merrills JG, International Dispute Settlement (1998, Cambridge University Press, Cambridge).

[5] Rosenne S, Documents on the International Court of Justice (1979, Sijthoff, The Netherlands).

[6] Article 65 of the ICJ Statute and Article 96 of the United Nations Charter.

presentation of facts, evidence and persuasion of the body by either side. In the process, very little room is left legally and process-wise for a unificatory, consensual forward-looking processual conclusion. In the end, one side has to either win or lose on the merits. These adversarial 'winner takes all' retrospectively founded decisions have permeated the international adjudicatory process from a number of sources. Not the least, the statutory provisions relating to the international adjudicatory institutions and their jurisdictional and other processes.

The ICJ is the principal judicial organ of the United Nations and all its member States are *ipso facto* parties to the ICJ Statute constituting the Court.[7] Under Article 36 of the ICJ Statute, the jurisdiction of the Court includes all cases referred to it by the parties and all matters specifically provided for in the United Nations Charter or treaties. State parties may declare their recognition of the compulsory jurisdiction of the Court in all legal matters pertaining to the interpretation of a treaty, any question of international law, the existence of any fact that if established would constitute a breach of an international obligation, and the nature or extent of the reparation to be made for the breach of an international obligation. This provision, though to be expected for a judicial body having regard to the objectives of the United Nations, also conveys an indication of a binary procedural consequence. Where a treaty provision is contested by one or more parties, the authoritative pronouncement of the Court is likely to determine the correctness or otherwise of one interpretive position. The same may be said of issues of international law.

More clearly, the establishment of a fact that may constitute a violation of an international obligation would necessarily entail the rigorous search and advocacy of positions of narrow interest. The skills and benefits of the adversarial system would not only be needed but would be vindicated. This is because, even if there is one party involved,[8] the possible consequences of the establishment of the said fact is sufficient

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[7] Articles 92-93 of the United Nations Charter. The ICJ Statute itself is an integral part of the Charter.

[8] As may be the case in advisory opinions: see Pomerance M, The Advisory Function of the International Court in the League and UN Eras (1973, John Hopkins University Press, Baltimore and London) 396-405 especially where the State participants in advisory opinion proceedings are listed.

incentive to resist or to present a more favourable alternative factual situation. The ultimate result of the ICJ fact-finding mission is a confirmation of the alleged factual position that invited its jurisdiction or a negation of the same.

Closely connected to the establishment of a factual situation that may constitute a breach of an international obligation is the determination of the nature or extent of reparation to be made for that breach. This also calls for the assembling of facts supportive of what should or should not be appropriate reparation. The process of ascertaining this would inevitably invite a dualistic opposition. In fact, even the judicial determination of the jurisdictional competence of the court is itself fraught, though not as conspicuous, with a result that would be favoured by one party and unfavourable to the other.[9] Article 36 of the ICJ Statute is thus an important source of the adversarial 'winner takes all' thinking of the international judicial process.

Another statutory provision that delineates an entry for the adversarial process is Article 38 of the ICJ Statute. This provision outlines the sources of law the ICJ is to apply. Whereas the first two sources are not very different from the argument proffered in regard to the two subjects that may be adjudicated upon in Article 36, the last two sources of law to be applied by the ICJ provide an avenue for the entry of the practice in domestic legal systems into the ICJ process. The words in Article 38, "[t]he general principles of law recognized by...nations" and "the judicial decisions and the teaching of the most highly qualified publicists of the various nations"[10] mean nothing less than the doctrines, concepts and practices of jurisprudence in the States that have had profound influence on world systems. These are mainly European States and, *a fortiori,* the common law and civil law traditions.

Though there are significant differences between the common law and civil law systems, profound similarities also exist. One similarity is the vigorous representation of adversarial positions before an adjudicatory body. Therefore, in most domestic systems, there must generally be both victorious and vanquished sides and an end to litigation through

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[9] This was most vividly exemplified in South West Africa [1966] International Court of Justice Reports 6.

[10] Article 38(1)(c)-(d) of the ICJ Statute.

the judicial process. This is instilled into the international judicial process by relying on the principles and judicial decisions of States.
A less explicit avenue for the entry of domestic legal practice into the international system is the appointment of the judicial personnel to the ICJ bench. Under Article 2 of the ICJ Statute, the judges of the ICJ are to be persons "who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law." It means then that before a person qualifies to be appointed to the ICJ, he or she must be well versed in the domestic legal system and practice.

In *Arbitral Award Made by the King of Spain on 23 December 1906,*[11] Judge Moreno Quintana made this explicit when he referred to himself as "a representative on this court of a Spanish-American legal system."[12] In fact, some judges who served on the ICJ were hitherto judges of the highest national court or the Ministers of Justice in their respective countries. They included Schwebel, Jennings, Bedjaoui, Weeramantry, Singh and Elias.[13]

For certain judicial functions no other model was readily available. Methods of procedure, mechanics of interpretation, methods of drafting judgments and so on had to be adapted from the diverse experience of various national juridical systems until the new institution could build up its own body of practice and jurisprudence. By then the working methods of the superior national courts had stamped the ICJ indelibly and they still remain the standard and point of comparison for the contemporary practice of the Court, even if the judges' reference to them is unconscious.[14] Additionally, the agents or advocates who present the respective positions of the disputing parties are generally

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[11] (Honduras v Nicaragua) [1960] International Court of Justice Reports 192.
[12] Ibid 218. Judge Anzilotti is reported to have said of Lord Finlay thus: "what Lord Finlay represented in this court, as it was his duty to do, was the legal system in which he was brought up": see Prott L, The Latent Power of Culture and the International Judge (1979, Professional Books, Oxford) 33. These views may find justification in Article 9 of the ICJ Statute that calls for the representation of the principal legal systems of the world on the Court.
[13] They are from the United States, United Kingdom, Algeria, Sri Lanka, India and Nigeria respectively: Prott L, The Latent Power of Culture and the International Judge (1979, Professional Books, Oxford) 38.
[14] Ibid.

expected to be lawyers trained primarily in domestic legal practice.[15] The adversarial system that is the hub of many domestic systems is therefore transferred by way of the judicial personnel to the ICJ.

Apart from the provisions in the ICJ Statute, some of the procedural rules followed by the Court also reinforce the adversarial orientation of its practice. Article 49 of the 1978 Rules of Court prescribes the method for filing applications. First, a memorial containing statement of relevant facts, law and the submissions is filed and a counter memorial containing "an admission or denial of the facts stated in the memorial...a statement of law in answer thereto" is also filed. Ultimately, oral presentations following the broad pattern of the pleadings are made. Though laced with injunctions and language that reflect consensual trappings and restrain the more aggressive elements of adversarial practice, the beginning and the expected end of the ICJ process is a bisection of winner from loser.

Nor is the arbitration process markedly different. The idea of arbitration, to the extent that it is an alternative to the more conventional ICJ process, may connote less adversarial process and result. Indeed, that is often the case, considering the process and the fact that arbitration is usually the product of agreement between the disputing parties. However, the organisation of the arbitration, in particular the juristic background of the arbitrators[16] and the often binary formulation of the issues by the disputants infect or make it inevitable that the adversarial trappings would be magnetised and assume an important position in the arbitral process.

There are important similarities in the organisation and practice of the ICJ and the Permanent Court of Arbitration.[17] For one thing, the

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[15] See Article 42 of the ICJ Statute.

[16] Note the priority given to members of the Permanent Court of Arbitration in the selection of judges for the ICJ in Article 4 of the ICJ Statute. Judges of the ICJ at times serve as panellists on arbitration tribunals. For example, five ICJ judges sat as panellists in Beagle Channel Arbitration (1977) 52 International Law Reports 93 and three of them served as arbitrators in Maritime Delimitation Arbitration (Guinea v Guinea-Bissau) (1985) 77 International Law Reports 636.

[17] The Permanent Court of Arbitration established in 1899 under the International Covenant for the Pacific Settlement of Disputes was the first global international organisation for the settlement of international disputes: Parry C, (1898-1899) 187 Consolidated Treaty Series 400 (1979, Oceana Publications, Dobbs Ferry, New

Permanent Court of Arbitration serves as a primary assembling point for potential judges of the ICJ as well as for arbitrators. Sometimes the prescribed procedure for arbitration is more explicit, at least in language, in its incorporation of domestic legal practice than that of the ICJ. For example, 'statement of claim' and 'statement of defense' must be filed,[18] witnesses may be examined orally and parties may also present their positions orally to the tribunal. In the end, the tribunal is expected to make final awards.[19]

It would appear that there is nothing fundamentally wrong with the adversarial procedure. It has served both the international and domestic judicial system creditably. This article does not seek to derogate from that fact. The thrust here is for a more nuanced system for particular subjects or issues that invite adjudication. In fact, the adjudicatory bodies reached finality in the overwhelming majority of the cases that came before them.

For example, in *Corfu Channel,*[20] the ICJ found that Albania breached international law by mining the Corfu Channel. In *Temple of Preah Vihear,*[21] it held definitively that the territory on which the temple was located was under the sovereign jurisdiction of Cambodia and that Thailand was under an obligation to withdraw its armed forces from the territory. It also decided definitively that the 1955 Treaty of Friendship between France and the then Kingdom of Libya completely determined the boundary between Libya and Chad and therefore upheld Chad's position in *Case Concerning the Territorial Dispute (Judgment).*[22] A common feature of the foregoing cases is that there

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York). In this sense, it was a precursor to the ICJ, which may explain some similarities in their operation and practice. For example, the sources of law to be applied by the Permanent Court of Arbitration and the ICJ are almost identical: see Article 33 of the Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two States (effective 20 October 1992) (Optional Rules) and Article 38 of the ICJ Statute. The Optional Rules may be found at the website of the Permanent Court of Arbitration at <www.pca-cpa.org/BD/2stateeng.htm> (visited December 2001).

[18] See Articles 18-19 of the Optional Rules.

[19] Ibid Article 32.

[20] (United Kingdom v Albania) [1949] International Court of Justice Reports 4.

[21] (Cambodia v Thailand) [1962] International Court of Justice Reports 6.

[22] (Libya v Chad) [1994] International Court of Justice Reports 6.

was finality and the parties accepted the findings and recommendations of the ICJ or the arbitration tribunal.[23]

In other cases, while none of the parties signalled unwillingness to abide by the findings of the process, the ICJ and the arbitration tribunal were unable or, at best laboured, to attain finality. For example, in *Trail Smelter Arbitration,* though Canada was found liable for breach of international responsibility, the Tribunal instituted a regime for the Smelter, the subject matter of the dispute. This drew on the supervisory capacity of the Court. More interestingly, in *Gut Dam Arbitration,*[24] the Tribunal made a preliminary finding against Canada on 15 January 1968 and then suspended proceedings with an admonition to the parties to negotiate on the remaining issues. The end of that case was the result of the negotiations and not the tribunal's pronouncement.[25] In *Gabcikovo-Nagymaros,* the ICJ found both sides were in breach of their obligations under the Treaty to construct barges and a dam on the River Danube, but held the treaty as valid and urged the parties to negotiate on its further implementation and management.

A common feature of these cases is that they originated from the exploitation and management of resources close to political boundaries or mostly, one that States share. Two conclusions may be drawn from the two sets of cases. First, it is not unexpected that the results of the

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[23] Of course, in cases such as Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States) Merits [1986] International Court of Justice Reports 14; Nuclear Tests Case (Australia v France), Interim Protection Order of 22 June 1973 [1973] International Court of Justice Reports 99; and Nuclear Tests Case (New Zealand v France), Interim Protection Order [1973] International Court of Justice Reports 135; Fisheries Jurisdiction (United Kingdom and Northern Ireland v Iceland) [1972] International Court of Justice Reports 12, the parties against whom findings were made substantially ignored the results of the adjudication. This, however, does not derogate from the merits of the international judicial process with its hinge on adversarial practice. Indeed, in Delimitation of the Maritime Boundary in the Gulf of Maine [1984] International Court of Justice Reports 246 (Canada/United States) both parties celebrated the ICJ's decision that was not very different from what they had reached earlier by negotiation. They also felt free to protest parts of the judgment that did not satisfy critical constituents: see Franck T, Fairness in International Law 318 (1995, Oxford University Press, New York).

[24] (Canada/United States) (1969) 8 International Legal Materials 118.

[25] Ibid 140-143.

adjudicatory process would always be 'scotched earth.'[26] Secondly, the adversarial system that undergirds the international adjudicatory process is unsuitable for disputes arising from trans-boundary resources. The latter conclusion may be supported by a number of reasons. The most important is the incompatibility of 'winner takes all' thinking with the substance and ideals of the concept of sustainable development. Embedded in the concept of sustainable development is the necessity and promotion of co-operation between states regarding their common environment. The co-operation phenomenon is acute in situations where two States are interlocked not only by their geo-political location but also over a resource that they did not create but which they, if reluctantly, have to share.

The law is established that if a State intends to exploit the resource in a way that would have significantly noticeable impact on the rest of the resource located in a neighbouring State, it must inform the neighbouring State about its plans.[27] If the notification engenders a response other than unequivocal acceptance, the next phase of co-operation (consultation and negotiation) would be entered into. If the outcome of the consultation and negotiation favours the execution of the project, there would be mechanisms for continued monitoring and evaluation.

Even if the result of the negotiation estops the project as for the time being conceived and designed, the two States would necessarily engage in continued dialogue in a search for alternative designs. This is particularly so where the resource is considered vital in the existing economic and social circumstances. The location of sub-surface resources such as fossil fuel may be such that a State cannot exploit it without affecting the condition of the resource in the neighbouring

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[26] The expectation of effective resolution of the dispute before the court may not be satisfied in these cases. See Prott L, The Latent Power of Culture and the International Judge (1979, Professional Books, Oxford) 30.

[27] See 1994 International Law Commission Draft Articles on Non-Navigational Uses of International Water Courses, especially Articles 11-19: Birnie P and anor, Basic Documents on International Law and the Environment (1995; Clarendon Press, Oxford) 363-374. See also Articles 6 and 9(2)(h) of the 1992 Convention on the Protection and Use of Trans-boundary Water Courses and Lakes in Birnie P and anor, Basic Documents on International Law and the Environment (1995; Clarendon Press, Oxford) 345-362.

State.[28] In other words, the nature of the resource and its world value would impel a continuing bilateral or multilateral engagement and co-operation in its exploitation and utility by neighbouring states. This may upset or at least be inconsistent with a 'one-off winner-takes-all' decision by a supranational adjudicating body.

The next reason why the adversarial process with its decisive allocative tendencies may not be sustainable in trans-boundary resource disputes is the evolving technological advancement for resource exploitation and the consequent changing values of some resources. In a sense, it can be argued that technology may exist or be invented that could make it possible for one country to exploit the resource located on its territory without recourse to or necessarily co-operating with the neighbour. If that were possible, the international judicial system as presently operates may not require re-invention. This position, however, may be simplistic in light of the apparent move towards global commons and fairness.[29]

Once it is established that two or more States share the same resource, it would be incumbent upon the State intending to exploit it to inform the other(s), at least, for precautionary or good neighbourly purposes.[30] More importantly, a shared resource that could not be exploited sustainably by a previous technology may be amenable to exploitation

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[28] See Lagoni, "Oil and gas across national frontiers" (1979) 73 American Journal of International Law 215; Woodlife, "International unitisation of an offshore gas field" (1977) 26 International and Comparative Law Quarterly 338; Onarato, "Apportionment of an international common petroleum deposit" (1977) 26 International and Comparative Law Quarterly 324.

[29] Under the 1982 Law of the Sea Convention, States with the relevant technology are required to share the fruits of their exploration and exploitation of deep sea bed minerals with less technologically advanced States. See generally Sohn L and anor, The Law of the Sea in a Nutshell (1984, West Publishing, St. Paul, Minnesota) 180-184.

[30] Although Lake Lanoux Arbitration (France v Spain) (1957) 24 International Law Reports 101, 119-142 held that France was not under an international obligation to seek agreement with or the approval of Spain in constructing a hydro electric project on the Lanoux, the Tribunal accepted the view that Spain must be notified. Notification cannot be just 'inform and leave'. Instead, it is the genesis of a process of consultation and co-operation. For a more detailed discussion of this subject, see Botchway FN, The Context of Trans-boundary Resource Exploitation: The State, the Environment and the Methods (unpublished manuscript held on file with the writer).

by a more advanced sustainable technological design. In that case, a judicial decision shutting the door to exploitation by one State may be otiose, inert and outdated at birth.

III. TRENDS

In light of the apparent unease at achieving closure in trans-boundary resource issues and some dissatisfaction with the ICJ's environmental jurisprudence, there is some movement towards the creation of a specialised adjudicatory body to handle environmental disputes. In July 1993, propelled in part by *Gabcikovo-Nagymaros* and *Certain Phosphate Lands in Nauru,*[31] the ICJ established an environmental chamber composed of seven judges to serve *ad hoc.*[32] Support for a specialised chamber is based on the technical nature of environmentally centred disputes and, more importantly, on the need to develop a consistent and sophisticated judicial jurisprudence in tandem with the burgeoning legislative activity in the field. In addition, the creation of an international adjudicatory body specifically for environmental controversies would be an impressive edifice in the vindication and ventilation of environmental norms and practice.

These ideals notwithstanding, it is arguable that beyond aesthetic impressions, a specialised court dealing with environmental issues may not necessarily and substantively hasten the course of environmental protection. For one thing, the judicial personnel to operate the court would inexorably have to be trained in general law in ways that would not be or should not be different from judges appointed generally to the ICJ. For example, although the judges elected to the special ICJ chamber in 1993 displayed interest in environmental matters, they were elected first to the ICJ because of their distinguished knowledge of the law.

Secondly, the establishment of a specialised court for the environment could isolate the environmental issues from general economic, social and political dynamics of the world. This runs counter to the spirit and letter of the concept of sustainable development and its various applications. Besides, environmental matters are inextricably linked to

[31] (Nauru v Australia), Judgment [1992] International Court of Justice Reports 240.
[32] (1993) 23 Environmental Policy and Law 243.

a wide range of developmental and societal issues. The sources of law to be applied and their consequences would hardly differ from general international law sources.[33] At the same time, the force of general international law as located in the ICJ is an invaluable weight for the advancement of environmental law because there is:[34]

> good reason why a court applying general international law is the right forum for the development of environmental law. This new law for the environment must be seen to be part and parcel of general international law; otherwise it will technically and politically be bereft of that authority and binding force which attaches to general international law.

In the particular circumstances of the foregoing discussion of trans-boundary disputes, there is no indication that a specialised court would reach results remarkably different from those reached by the ICJ or the arbitration tribunal. Any adjudicatory body, specialised or not, dealing with trans-boundary cases must give meaning to the biblical injunction to love one's neighbour as one's self.[35] That is, since the countries cannot change their neighbours, they must have a process that continually sensitises them to each other's interests and positions. Judicial usefulness in this regard must not be a preoccupation with the need to achieve closure or finality.[36] Instead, it should be a reorganisation or promotion of a continuum with juridical signposts and beacons.

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[33] The practice of some specialised adjudicatory bodies supports this view: see for example, Palmeter and anor, "The WTO legal system: Sources of law", (1998) 92 American Journal of International Law 398-413. International Tribunal for the Law of the Sea, Reports of Judgments, Advisory Opinions and Orders (1998, Kluwer Law International, London).

[34] Jennings, "Need for environmental court" (1992) 22 Environmental Policy and Law 313.

[35] See Lord Atkin's application of this teaching in Donoghue v Stevenson (1932) Appeal Cases 562 at 580.

[36] Franck T, Fairness in International Law 318 (1995, Oxford University Press, New York). Instead, the alternative modifications to judicial outcomes in the form of mediative, therapeutic, compromise, reintegration, advisory and continuing readjustment must assume central place in trans-boundary resource dispute settlement: see Galanter, "Adjudication, litigation and related phenomena" in Lipson L and anor (editors), Law and the Social Sciences (1986, Russell Sage Foundation, New York) 154.

IV. A SPECIALISED FORUM FOR ENVIRONMENTAL AND RESOURCE DISPUTES

Notwithstanding the representations made against the establishment of specialised bodies to adjudicate disputes relating to the environment, efforts have continued in that direction. The most recent promulgation of a specialised procedure for natural resource and environmental disputes is found in the Optional Rules. It basically modifies aspects of the Arbitration Rules of the United Nations Commission of International Trade Law, more commonly known as UNCITRAL, to suit the resolution of resource and environment disputes. The Optional Rules set out to achieve four objectives:

1. the speedy resolution of resource and environment disputes;
2. the consensual resolution of such disputes;
3. the explicit creation of avenue for technical or scientific input in the dispute resolution process; and
4. the grant of standing for non-State actors to participate.

The mechanisms for realising these objectives may produce conflicting results. For example, the participation of multiple parties may not enure to the speedy resolution of disputes. Beyond these objectives, it may be argued that the Optional Rules constitute a further attempt at resolving the difficulties of finality in disputes underlain by natural resources.

This is particularly evident in Articles 26, 32, 34, 35 and 37 of the Optional Rules. Article 26 on interim measures offers a very important insight regarding the fairly unique dynamics of resource dispute resolution. To be sure, the use of interim measures is not novel or unique to resource disputes. The ICJ and other adjudicating bodies have used the mechanism for decades. Indeed, interim measures are relied upon to give the parties the opportunity to resolve the dispute by negotiation as was the case in *Gut Dam Arbitration.* What is noteworthy about Article 26 is that it draws attention to the fact that resource and environmental disputes need to be dealt with speedily.

From the cases surveyed so far, adjudicatory bodies are rarely tardy or definitive in resolving trans-boundary resource disputes. It is difficult to perceive how the resort to interim measures would hasten the

definitive resolution of resource disputes.[37] It is, of course, important and necessary to hold the parties at bay and preserve the *status quo* where irreversible or expensive harm is threatened. That is the rationale behind the interim or interlocutory injunction in the domestic common law tradition. But without giving clear details regarding the period within which the interim measures should be in place or the circumstances that would engender their invocation, the overall objective of the Optional Rules of speedy resolution of resource disputes would be endangered.

One significantly novel development from the Optional Rules is the provision of the right of private bodies, non-governmental organisations (NGOs) and companies to pursue and be pursued in arbitration.[38] Hitherto, States were the sole bodies with legal capacity or *locus standi* in disputes of a trans-boundary nature or ones affecting a State's sovereignty, particularly before the ICJ.

The first significant legislative step in universalising *locus standi* is Article 26 of the 1995 Energy Charter Treaty.[39] Indeed, it provides that private parties may initiate an action against States parties to the treaty without their prior agreement to submit to the jurisdiction of the dispute resolution body established under the Treaty.[40] Adjudicatory bodies themselves have been chipping away at the exclusivity of capacity or standing of States in judicial proceedings. In *Shrimp and Shrimp Products*[41] before the Dispute Resolution Body of the World Trade Organisation (WTO), it was considered that NGOs had standing

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[37] Read together with Article 32(1), room is made for partial awards. This is somewhat an admission of the difficulty in reaching finality, reinforced by Article 35(1) on interpretation of an award, Article 36 on the correction of an award and Article 37 on the making of additional awards.

[38] See Preamble and Introduction to the Optional Rules.

[39] [1995] 34 International Legal Materials 360.

[40] See Botchway, "Contemporary energy regime in Europe" (2001) 26 European Law Review 16-17; see also Sornarajah M, The International Law on Foreign Investment (1994, Grotius, Cambridge) 262-271; Walde, "International investment under the 1994 Energy Charter Treaty" (1995) Journal of World Trade 19.

[41] See United States – Import Prohibition of Certain Shrimp and Shrimp Products, Report of the WTO Appellate Body, AB-1998-4, WT/DS58/AB/R at <www.wto.org> (visited November 2001).

to participate in proceedings before the Dispute Settlement Body of the WTO.[42]

Whereas these developments may be welcome, two closely related issues need to be addressed. First, what would be the impact of the grant of standing to non-State actors in resource disputes on the speedy resolution of such disputes? Secondly, would their participation enure to finality or definitiveness of outcome?

There is no doubt that the involvement of multiple parties as envisaged by *Shrimp and Shrimp Products* and that may happen under the Optional Rules would entail greater time, expenditure and prolonged proceedings. Under the Optional Rules, however, State and non-State actors have been mentioned specifically in a binary litigious fashion. In other words, quite unlike *Shrimp and Shrimp Products,*[43] two opposing parties are envisaged although joining other interested parties is not precluded.

As far as finality of outcome is concerned, the situation as discussed earlier is unlikely to change in disputes between States. On the other hand, disputes between States and non-State parties or between two private parties are likely to be resolved speedily and finally. There are two main reasons for this. The first refers to the deference accorded States in inter-State disputes. Regarding the second, the simmering uncertainty of resource location and value that may be lost completely to one State (in inter-State cases) would not be prominent where a non-State actor is a party to the dispute. This is especially so where such non-State party is subject to the jurisdiction or the laws of the State it is engaged with in the litigation.

Further, the value of non-State actors participating in the arbitration is the ability to facilitate the assembling of most of the relevant material and contribute to a comprehensive settlement of the dispute.

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[42] Ibid. See Qureshi, "Extraterritorial shrimps, NGOs and the WTO Appellate Body" (1999) 48 International and Comparative Law Quarterly 199-206; Perkins, Introductory Note (1999) 38 International Legal Materials 118.

[43] See Perkins, Introductory Note (1999) 38 International Legal Materials 118.

V. CONCLUSION

Dispute resolution is an indispensable phenomenon in human, corporate and international relations. Any effort to make a particular mechanism accessible, fair and expeditious must be welcome. This is particularly so in cases where two or more States are engaged in a controversy that is underpinned by natural resources across their frontier(s). In such matters, it is difficult to dispose of the case finally and with dispatch. It is this recognition that ignited the debate on the need for special adjudicatory bodies to deal with litigation over natural resources. The Permanent Court of Arbitration's Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment is one coherent step in the direction of establishing specialised procedures and for resolving resource disputes. Whether it would realise expeditious disposal of such disputes in a conclusive and final manner remains to be seen.