

ON THE QUEST FOR GREEN COURTS IN INDIA

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Introduction

The diagnosis of environmental problems at the historic first U.N. Conference on the Human Environment (UNCHR) in 1992, otherwise known as the Earth Summit, unleashed a spate of administrative and legislative measures in both developed and developing countries. The environmental renaissance, which saw the development of global conferencing technique at Stockholm (1972),¹ Rio de Janeiro (1992),² and Johannesburg (2002)³, has brought about worldwide phenomenal growth in environmental awareness, policies, legislation and institutions.

The importance of this development lies in the fact that enforcement of global regulatory measures has to take place at the national level. As the volume of environmental law, including both “hard law” and “soft law” grows, the question of adjudication of disputes gains prominence.⁴

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1. Conference on the Human Environment, Stockholm, Swed., June 5-16, 1972, *Report of the UN Conference on the Human Environment*, 1-68, U.N. Doc. A/CONF.48/14/Rev.1.

2. Conference on Environment and Development, Rio de Janeiro, Braz., June 3-14, 1992, *Report of the UN Conference on Environment and Development*, vol. I-III, UN Doc. A/CONF.151/26,

3. World Summit on Sustainable Development, Johannesburg, South Africa, Aug. 26 – Sept. 4, 2002, *Report of the World Summit on Sustainable Development*, pp.1-173, A/CONF.199/20.

4. Bharat H. Desai (1996), *Environmental Law: Some Reflections*, 23 INDIAN BAR REV. 191 (1996) (issue no. 3-4).

Moreover, as the seriousness of environmental problems grows, the national courts and tribunals have a greater role to play in interpreting and giving effect to this rapidly expanding body of law.

Indeed, the global environment has continued to witness serious deterioration.⁵ This is especially seen in cases of environmental disasters (both natural and manmade).⁶ This disturbing trend remains unabated in spite of a quantum jump in intensified regulatory efforts at the national, regional and global levels.

The various threats to the global environment include severe erosion of the natural resource base, disappearance of species, depletion of the ozone layer, loss of biological diversity, deforestation and desertification, as well as a spiraling increase in hazardous wastes, chemicals and persistent organic pollutants.⁷ Thus, the global environmental problems are increasing in terms of diversity, intensity and the adverse effect on human life and the living environment. These problems pose a serious regulatory challenge for the growing body of environmental law, and necessitate innovative tools and techniques to grapple with sector specific environmental issues. Since the body of environmental law has been rapidly expanding, the concerted law-making process has been reflected in the growing *institutionalization* of international environmental law.⁸ In turn, this has contributed to the growth of a sizeable body of domestic environmental policies, laws, and regulatory and judicial institutions. This growth of international environmental law, coupled with increasing stress on the global environment and acute resource-related conflicts, has unleashed prospects for international

5. P. Birnie & A. Boyle, *INTERNATIONAL LAW AND THE ENVIRONMENT*, 139, 141 (Oxford University Press 2002); see Philippe Sands, *International Environmental Litigation and Its Future*, 32 U. RICH. L. REV. 1619 (1999).

6. See, e.g., Bharat H. Desai, *Managing Ecological Upheavals: A Third World Perspective*, 30 SOC. SCI. & MED., 1065 (1990).

7. See Bharat H. Desai, *Threats to the World Eco-system: A Role for the Social Scientists*, 35 SOC. SCI. & MED. 589 (1992); see also, Susan M Hinde, *The International Environment Court: Its Broad Jurisdiction as Possible Fatal Law*, 32 HOFSTRA L. REV. 727 (2004).

8. Philippe Sands, *Litigating Environmental Disputes: Courts, Tribunals and the Progressive Development of International Environmental Law* (2008), www.oecd.org/investment/gfi-7 (distributed at the OECD Global Forum on International Investment VII, Paris, Fr., Mar. 27-28, 2008).

environmental disputes among the sovereign States and calls for an institutionalized effort to address the challenges of international environmental dispute settlement. In addition, the increase in environmental disputes within the domestic jurisdiction of sovereign states calls for special adjudicatory mechanisms to resolve them. This paper seeks to provide some reflections on the state of international environmental dispute settlements and the need to consider more seriously entrusting these disputes to a specialized set of environmental courts. It also briefly examines the quest for an environment court in India, where the right to environment has been considered a fundamental right to life under the constitution.

International Settlement of Disputes

Developments in international dispute resolution, as well as the growth in the number of international courts and tribunals, have increased in recent years. Understanding these institutions is important because they are crucial to dispute resolution in the international legal system.⁹ They are one of the most important tools for the peaceful settlement of disputes in situations where the parties have consented to the jurisdiction of the particular court or tribunal.¹⁰ The decisions of these courts and tribunals clarify international law in important ways and, although usually not formally binding on states that are not a party to a dispute, it is contended that they establish a form of de facto international common law.¹¹

The first tentative steps towards settlement of disputes through international courts and tribunals were taken at the turn of the nineteenth century.¹² The delegates to the Hague Conferences of 1899 and 1907 agreed to establish an international arbitral body, the Permanent Court of Arbitration (PCA). The PCA had a modest goal

9. Karen J. Alter, *Do International Courts Enhance Compliance with International Law?*, 25 REV. ASIAN AND PAC. STUD. 52, 54 (2004).

10. See Andrew T. Guzman, *International Tribunals: a Rational Choice Analysis* (U.C. Berkley Pub. L. Res. Paper No. 1117613, 2008), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1117613; see also, Stefan Mrozinski, *Why do States Support International Criminal Courts and Tribunals? A Neoclassical Realist Approach* (U. Cambridge Working Paper Series 2008), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1464144.

11. *Id.*

12. Eric A. Posner & John C. Yoo, *A Theory of International Adjudication* (U. Chicago Law & Econ., Olin Working Paper No. 206 2004), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=507003; see also, David Zaring, *Rulemaking and Adjudication in International Law*, 46 COLUM. J. TRANSNAT'L L. 563 (2007-08).

of encouraging states to use arbitration by providing a set of procedures for choosing arbitrators.¹³ The next step was the establishment of the Permanent Court of International Justice (PCIJ), which, along with the League of Nations, was supposed to maintain international order after World War I (1919).¹⁴ The demise of the League of Nations by the end of World War II (1945) resulted in the creation of the Charter of the United Nations.¹⁵ It also led to the sculpting of a new International Court of Justice (ICJ), the principal judicial organ of the United Nations, which continued in 1946 from where the PCIJ had left off (as its successor).¹⁶

At roughly the same time that the ICJ began its operations, drafters were putting the finishing touches on the General Agreement on Tariffs and Trade (GATT), a legal framework for international trade that eventually resulted in a relatively systematic form of arbitration.¹⁷ After several decades of operation, the GATT arbitration system gave way to the more court-like dispute settlement mechanism (DSM) of the World Trade Organization (WTO) in 1995. Unlike GATT's standard arbitration system, the DSM has compulsory jurisdiction and states are practically unable to refuse consent to the creation of the tribunals and their adjudication of the disputes.¹⁸

In the 1950s, several regional courts were created. The European Court of Justice (ECJ), created in 1952, adjudicates disputes arising under European law.¹⁹ The European Court of Human Rights (ECHR), created in 1959, adjudicates disputes involving the 1950 European Convention for the Protection of Human Rights and

13. Permanent Court of Arbitration, <http://pca-cpa.org/> (last visited Nov. 16, 2010).

14. See International Court of Justice, Permanent Court of International Justice, <http://www.icj-cij.org/pcij/index.php?p1=9> (last visited Nov. 16, 2010).

15. U.N. Charter, available at <http://www.un.org/en/documents/charter/index.shtml>.

16. See International Court of Justice, <http://www.icj-cij.org/> (last visited Nov. 16, 2010).

17. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.

18. See Laurence R. Helfer, Annie-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J., 273 (1997); see also Laurence R. Helfer, Annie-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93 CAL. L. REV. 899 (2005).

19. Europa, The Court of Justice, http://europa.eu/institutions/inst/justice/index_en.htm (last visited Nov. 20, 2010).

Fundamental Freedoms (also known as “The European Convention on Human Rights” (ECHR)).²⁰ The Inter-American Court of Human Rights, created in 1979, hears cases involving the 1969 American Convention on Human Rights.²¹ Additionally, there are similar regional courts in other parts of the world that generally deal with human rights and commercial relationships.²²

Another important development was the creation of the International Tribunal for the Law of the Sea (ITLOS) in 1996, which has jurisdiction over a range of maritime disputes governed by the United Nations Convention on the Law of Sea (UNCLOS).²³ Similarly, international adjudication has witnessed growth in the area of war crimes-related trials. The Nuremberg²⁴ and the Tokyo²⁵ tribunals, after World War II, were followed, after a long hiatus, by the International Criminal Tribunal for the former Yugoslavia (1993) and the International Criminal Tribunal for Rwanda (1994)²⁶ and several other ad hoc tribunals for Sierra Leone,²⁷ Lebanon,²⁸

20. *Id.*

21. *See* Inter American Court of Human Rights, <http://www.corteidh.or.cr/index.cfm?&CFID=666614&CFTOKEN=69520161> (last visited Nov. 16, 2010).

22. *See, e.g.,* IHRDA, African Court of Justice and Human Rights (ACJHR), <http://www.ihrda.org/african-court-of-justice-and-human-rights-acjhr/> (last visited Nov. 20, 2010).

23. United Nations Convention on the Law of Sea, Dec. 10, 1982, 1833 U.N.T.S. 3, 21 I.L.M. 1261.

24. For the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal. London, August 8, 1945, see <http://www.icrc.org/ihl.nsf/FULL/350?OpenDocument>

25. The Tokyo Trials took place on the basis of The International Military Tribunal for the Far East; see <http://www.yale.edu/lawweb/avalon/imtfech.htm>

26. *See* S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993); *see also* S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994).

27. The Special Court for Sierra Leone was set up jointly by the Government of Sierra Leone and the United Nations. It is mandated to try those who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since November 30, 1996; see <http://www.sc-sl.org/>

28. The mandate of the Special Tribunal for Lebanon is to prosecute persons responsible for the attack of February 14, 2005, resulting in the death of former Prime Minister Rafiq Hariri and in the death or injury of other persons. Pursuant to Security Council resolution 1664 (2006), the United Nations and the Lebanese Republic negotiated an agreement on the establishment of the Special Tribunal for Lebanon; Security Council resolution 1757(2007) of May 30, 2007, the provisions of the document annexed to it and the Statute of the Special Tribunal thereto attached, entered into force on June 10, 2007; see <http://www.stl-tsl.org/section/AbouttheSTL>

Iraq,²⁹ and Cambodia.³⁰ The drafters of the Rome Statute of 1998 aspired to transform these ad hoc war crimes tribunals into a permanent judicial settlement forum called the International Criminal Court (ICC).³¹

Given the proliferation of international courts and tribunals of a more diverse and specialized nature, there is concern about the coherence of international law. It is contended that a large number of such forums may create a “cacophony of views that would damage prestige of the ICJ and undermine effort to promote the effectiveness of international law.”³² Nevertheless, these other forums may not necessarily have a deleterious effect on the international legal system. Rather, they could help to expand the application of international law to disputes not likely to come up before the ICJ and provide additional opportunities to develop the law without undermining its legitimacy per se.³³

The rapid upswing in the number of international courts and tribunals can be understood in light of the increasingly complex relationships between States after the end of the Cold War.³⁴ The need for specialized expertise in new and developing areas of

29. The Supreme Iraqi Criminal Tribunal has jurisdiction over every natural person, whether Iraqi or non-Iraqi resident of Iraq, accused of committing any of the crimes listed in Articles 11, 12, 13 and 14 of the Law of the Supreme Iraqi Criminal Tribunal (Number 10 of 2005), committed during the period from July 17, 1968 to May 1, 2003, in the Republic of Iraq or elsewhere; see <http://www.ictj.org/static/MENA/Iraq/iraq.statute.engtrans.pdf>

30. The Cambodian National Assembly passed a law to create a court to try serious crimes committed during the Khmer Rouge regime 1975-1979. This court is called the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea (Extraordinary Chambers or ECCC). This special new court was created by the government of Cambodia and the UN but it will be independent of them. It is a Cambodian court with international participation that will apply international standards. See Introduction: Extraordinary Chambers in the Courts of Cambodia, http://www.eccc.gov.kh/english/about_eccc.aspx (last visited Nov. 25, 2010).

31. Rome Statute of International Criminal Court, July 17, 1998, U.N. Doc. A/CONF.183/9, available at, <http://untreaty.un.org/cod/icc/statute/rome.htm>.

32. Shane Spelliscy, *The Proliferation of International Tribunals: A Chink in the Armor*, 40 Colum. J. Transnat'l L. 143, 153 (2001); see also Michael Reisman, SYSTEMS OF CONTROL IN INTERNATIONAL ADJUDICATION AND ARBITRATION: BREAKDOWN AND REPAIR 5-6 (1992).

33. J.I. Charney, *International Law and Multiple International Tribunals*, 271 RECUEIL DES COURS 115, 126 (1998).

34. *Id.*

international law may have been the driving force behind the creation of many new tribunals in the latter half of the twentieth century. In essence, the proliferation of international courts and tribunals is an attempt by states to maintain the viability of the international judicial system in light of the increased complexity of international relations.³⁵ The so-called moral dilemma is sought to be put to rest as it is felt that there is “no alternative to having numerous international tribunals to interpret international law; an international system with only few judicial bodies is no longer feasible.”³⁶

International environmental disputes have an impressive history. The resolution of the earliest known dispute in the Trail Smelter Arbitration (1939) has become a benchmark decision in the field of international environmental law.³⁷ The case dealt with transfrontier pollution for the first time in legal history and the tribunal established the “no harm principle.”³⁸ Numerous forums such as the International Court of Justice (ICJ),³⁹ Permanent Court of Arbitration (PCA),⁴⁰ International Tribunal on the Law of Sea (ITLOS),⁴¹ and the World Trade Organization (WTO)⁴² aid in the resolution of international environmental disputes.

Environmental Dispute Settlements

The International Court of Justice (ICJ) is the principal judicial organ of the United Nations. Article 36 (1) of its statute provides that

35. Spelliscy, *supra* note 32, at 150.

36. Jonathan I. Charney, *The Impact on the International Legal System of the Growth of International Courts and Tribunals*, 31 N.Y.U. J. INT'L L. & POL. 697, 704 (1999).

37. *United States v. Canada*, 3 R. Int'l Arb. Awards 1911 (1938), *reprinted in* 33 AM. J. INT'L L. 182 (1938); *see also* *United States v. Canada*, 3 R. Int'l Arb. Awards 1938 (1941), *reprinted in* 35 AM. J. INT'L L. 684 (1941).

38. In a pioneering effort to lay down the law, the Tribunal observed: “(U)nder the principles of international law, as well as the law of the United States, no state has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another to the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence”; *see* 35 AM. J. INT'L L. 716 (1941).

39. *See* International Court of Justice, <http://www.icj-cij.org/homepage/index.php?lang=en> (last visited Nov. 25, 2010).

40. *See* Permanent Court of Arbitration, http://www.pca-cpa.org/showpage.asp?pag_id=363 (last visited Nov. 25, 2010).

41. *See* International Tribunal for the Law of the Sea, http://www.itlos.org/start2_en.html (last visited Nov. 25, 2010).

42. *See* World Trade Organization, <http://www.wto.org/> (last visited Nov. 25, 2010).

its jurisdiction “comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.”⁴³ The ICJ has full competence to adjudicate upon any area of international law. Thus, the ICJ, in principle, could address any environmentally related dispute. In fact, the role of the Court in the settlement of international environmental disputes was established in its 1997 decision in the case concerning the Gabčíkovo-Nagymaros Project.⁴⁴ The court had an opportunity to address a wide range of international legal issues, including the law of treaties, the law of state responsibility, the law of environment and the relationships between these areas. While the Court had a golden opportunity to demonstrate its ability to master the legal and factual elements in a comprehensive legal manner, in view of the sheer technicalities of this celebrated environmental dispute, for the first time in the history of international adjudication, the full court decided to make an on-the-spot visit to the disputed site of the project in order to appropriately comprehend the dispute.⁴⁵ As a consequence, the Court ruled that Hungary was not entitled in 1989 to suspend or terminate work on the joint project solely on environmental grounds.⁴⁶

The Court also went on to find that Czechoslovakia and, subsequently Slovakia (as a successor state), was not entitled to a unilateral solution in deciding to divert the Danube (beginning in October 1992) without the agreement of Hungary.⁴⁷ The Court ruled that the construction prior to the operation was not lawful.⁴⁸ Finally, the Court held that Hungary was not entitled to terminate the 1977 Treaty in May 1992.⁴⁹ As to the future, the Court indicated the basis

43. Patrick Kelly, *The International Court of Justice*, 12 YALE J. INT'L L. 342, 342 (1987).

44. Gabčíkovo-Nagymaros Project (Hung. v. Slov.), 1997 I.C.J. 7 (Sept. 25); see also Sands, *supra* note 5, at 1626.

45. See Press Release, International Court of Justice, Visit by the Court to the site of the Gabčíkovo-Nagymaros hydro-electric dam project (Feb. 17, 1997), available at <http://www.icj-cij.org/docket/index.php?pr=262&p1=3&p2=1&case=92&p3=6>.

46. 1997 I.C.J. 7, 82.

47. *Id.* at 83.

48. *Id.*

49. *Id.*

for cooperation and agreement which it hoped the parties might pursue, suggesting that the preservation of the status quo — one barrage, not two operated jointly — would be an appropriate solution.⁵⁰ Nevertheless, the judgment fell short of the expectations of a detailed exposition on international environmental law. Moreover, given the difficulty of striking a balance between both contending states, as well as the unique nature of such environmental disputes, the case highlighted the need for a specialized environment court that could adequately promote justice.

Environmental factors have been increasingly acknowledged to be a relevant source of international tension and disputes, and even of actual threats to international peace and security. The main considerations, which seem to justify heightened attention to the prevention and settlement of environmental disputes, include the fact that there is a growing demand and need for access to natural resources, coupled with a limited, or at least shrinking, resource base.⁵¹

Further, the nature and extent of international environmental obligations has enormously increased as states assume broader and deeper commitments. The thickening web of multilateral environmental agreements (MEAs) and norms increases the likelihood that disputes might arise about how to interpret the scope of these obligations. As these increasing international environmental obligations affect national interests, and impose on states large administrative, economic, and political burdens, states that do not comply with environmental obligations are perceived to gain an unfair competitive advantage. Accordingly, as national economies are increasingly globalizing, states are more likely than ever to be dragged into international disputes caused by environmentally degrading activities of their nationals, or in defense of nationals affected by activities elsewhere.⁵²

Hence, the environment is increasingly featured as a factor in disagreements between countries in various international forums, and indeed, the number of available forums in which these disputes can be

50. 1997 I. C. J. 7; *see also* Sands, *supra* note 5, at 1630.

51. CESARE P.R. ROMANO, THE PEACEFUL SETTLEMENT OF INTERNATIONAL ENVIRONMENTAL DISPUTES: A PRAGMATIC APPROACH 163 (Kluwer Law International 2000).

52. *Id.*

heard is increasing.⁵³ The proliferation of a large number of regional and global regulatory frameworks (mainly through MEAs) has opened up the possibility of referral of a dispute to the ICJ, or to arbitration. However, in view of the very state-centric nature of the international system, environmental dispute settlement still remains largely illusive and lacking in appropriate adjudicatory mechanisms.

Special Character of Environment Disputes

In a way, it is difficult to define the term “environmental dispute” because the term “environment” is not absolute. The decisions rendered by international courts and tribunals illustrate the difficulties involved in defining international environmental disputes. Furthermore, sector-specific regimes and fragmented proliferation of MEAs, make it even more difficult to define “environmental dispute” comprehensively.

It is in this context, as well as the technical nature of environmental disputes, that it is contended that there is a need for a specialized environment court. Generalist judges in the ordinary court do not seem to have sufficient experience with the complex laws and principles that form environmental law, and are uncomfortable dealing with highly expert testimony and the necessity of balancing anticipated environmental harm and economic benefits.⁵⁴ Distinctive features of environmental law include technical/scientific complexity; challenging and rapidly developing legislative and policy bases; overlapping remedies and interests; international environmental treaties; fundamental principles such as the precautionary approach; principles concerning third-party access to environmental justice; and the emergence of the overarching principle of sustainable development.⁵⁵ The combined effect of these factors underscores the need for a specialized environment court, both at global and national

53. Sands, *supra* note 5, at 1622.

54. See GEORGE PRING & CATHERINE PRING, GREENING JUSTICE: CREATING AND IMPROVING ENVIRONMENTAL COURTS AND TRIBUNALS (THE ACCESS INITIATIVE 2009), at 14-16, available at <http://www.accessinitiative.org/resource/greening-justice> and <http://www.law.du.edu/ect-study> (available free of charge electronically at both websites).

55. Maurice Sunkin, *Modernizing Environmental Justice: Regulation and the Role of an Environmental Tribunal*, 16 J. ENVTL. L. 307, 308 (2004).

levels.

Even as the quest for an International Environment Court (IEC)⁵⁶ is still at a nascent stage, there is a flurry of developments within the domestic jurisdiction of the states. In fact, the twenty-first century has experienced huge growth in environmental courts and tribunals. Over 350 of these specialized environmental dispute settlement forums for resolution of environmental, natural resource, land use development and related issues can now be found in several countries, in almost every region of the world.⁵⁷ A comparison could be made of three such full-fledged existing environment courts (see **Table I**): The Land and Environment Court of New South Wales, the Environment Court of New Zealand, and the National Green Tribunal of India, the latest to join the elite club of specialized environmental dispute settlement forums.

Quest for Environmental Courts in India

Preliminarily, it is pertinent to examine the legal developments that have propelled the quest for an environment court in India, the foundation of which has essentially been provided by the specific provisions of the Indian Constitution that require the state and the citizens to protect the environment. Although these provisions were absent from the original version of the constitution, there were other significant provisions that provided an initial trigger for liberalization of the rule of *locus standi*, especially in cases involving the protection of human rights.⁵⁸ The 42nd Constitutional Amendment (1976)⁵⁹

56. See, generally, Amedeo Postiglione, *A More Efficient International Law on the Environment and Setting up an International Court for the Environment within United Nations*, 20 ENVTL L. 321, 327-28 (1990). Also see ELLEN HEY, REFLECTIONS ON INTERNATIONAL ENVIRONMENTAL COURT 9 (2000).

57. PRING & PRING, *supra* note 54, at 1.

58. See INDIA CONST. art. 21 (Protection of life and personal liberty), Article 42 (Provision of just and humane conditions of work and maternity relief), art. 47 (Duty of the State to raise the level of nutrition and the standard of living and to improve public health) & art. 49 (Protection of monuments and places and objects of national importance).

59. This constitutional amendment became very ambitious in terms of a larger number of provisions that came to be amended (Preamble; Articles 31 C, 39, 55, 74, 77, 81, 82, 83, 100, 102, 105, 118, 145, 166, 170, 172, 189, 191, 194, 208, 217, 225, 227, 228, 311, 312, 330, 352, 353, 356, 357, 358, 359, 366, 368, 371 F, Seventh Schedule) as well as several provisions that were substituted (Articles 103, 150, 192, 226) and inserted new provisions that (Articles 31D, 32A, 39A, 43A, 48A, 51A, 131A, 139, 144A, 226A, 228A, 257A, 323A and 323B). The historic amendment almost led to complete revision of the constitution. It received assent of the President of India on December 18, 1976. It took place during an unprecedented internal emergency

included a Directive Principle in Article 48A [protection and improvement of the environment and safeguarding of forests and wildlife] and a Fundamental Duty in Article 51A(g) [to protect and improve the natural environment, including forests, lakes, rivers and wildlife, and to have compassion for living creatures]. Under the same Amendment, forests and the protection of wild animals and birds were brought into the Concurrent List as entries 17A and 17B.

Table –I: Comparison of Select Existing Environment Courts and Tribunals

Basic Features	New South Wales Environment Court	Environment Court of New Zealand (<i>Te Kooti Taiao o Aotearoa</i>)	National Green Tribunal of India
Act	The Land and Environment Court Act, 1979 (Court Act).	The Resource Management (Amendment) Act, 1996	The National Green Tribunal Act, 2010
Composition	Chief Judge and other judges and nine technical and conciliation assessors.	Environment Judges (at the level of District Judge) and Environmental Commissioners as technical experts.	Chairperson; Not less than ten but maximum twenty full-time judicial as well as expert members.
Jurisdiction	Merits review, judicial review, civil enforcement, criminal prosecution, criminal appeals and civil claims about planning, environmental, land, mining and other legislation.	Reference about the consents of regional and districts statements and plans; and appeals arising out of application for resource content; and consents apply for land use, sub-division, coastal permit, water permit or discharge permit or combination of these.	All civil cases involving substantial questions relating to environment; arising from implementation of the seven enactments specified in <i>Schedule I</i> of the Act.
Locus standi	Proceedings can be initiated by anyone.	Parties before the Court are usually represented by lawyers, but anyone may appear in person or be represented by an agent.	Any person, owner, legal representative, agent, representative body or organization aggrieved by any order, decision or direction or determination can appeal to the tribunal.
Procedure	Not bound by rules of evidence.	Not bound by rules of evidence.	Guided by principles of natural justice; not bound by rules of evidence in the Indian Evidence Act, 1872.
ADRS techniques	Act refers to mediation and neutral evaluation by the Court.	Encourages mediation and arbitration presided by Environment Commissioners.	Nil

period (1975-77). When the new government came to power in 1977, it repealed most the amendments. See DURGA DAS BASU, INTRODUCTION TO THE CONSTITUTION OF INDIA 458-59 (20th ed., LexisNexis Butterworths 2010).

Penalty	The Court is empowered to punish individuals guilty of contempt with fines or imprisonment and corporations with fines or sequestration orders.	Two years imprisonment or fine up to \$200,000; in case of continuing offense, \$100 per day.	For failure to comply, up to three years imprisonment or up to ten crore INR fine or both; up to twenty-five crore INR for companies.
Appeals	Only on question of law. From commissioner decision to judge under Court Act. Also allow appeal to Court of Appeal and in criminal matters to Court of Criminal Appeal.	Only on question of law to the High Court.	To the Supreme Court

Activist Judicial Approach

The Indian higher judiciary, especially the Supreme Court, has played the role of judicial activist with great finesse. In fact, a remarkable body of environmental jurisprudence has emerged in the past three decades or so. It is significant to note that judicial decisions have not only played the vanguard role in protecting the citizens' right to a wholesome environment, but have also crystallized legal principles through activist interpretation, which gradually took the form of a body of environmental law.⁶⁰ In this context, activist citizens took advantage of the liberalized rule of *locus standi* to seek judicial intervention to ensure protection of those constitutionally-recognized environmental rights that related more to "diffuse interests than to ascertainable injury to individuals."⁶¹

Adjudication of Environmental Cases

The public interest litigation in India has been primarily judge-led and, even to some extent, judge-induced. The Supreme Court and the state High Courts have often deliberately jettisoned apologist postures in regard to their active involvement in social problems, and have justified activist judicial attitudes.⁶² One of the pioneers of the apex court's jurisprudence concerning human rights and environmental matters, Justice P.N. Bhagwati, argued that, in a developing country such as India, the modern judiciary cannot afford to hide behind notions of legal justice and plead incapacity when social justice

60. Desai, *supra* note 4, at 190.

61. P. LEELAKRISHNAN, ENVIRONMENTAL LAW IN INDIA 139 (1999).

62. Bharat H. Desai, *Enforcement of the Right to Environment Protection through Public Interest Litigation in India*, 33 INDIAN J. INT'L L. 28, 28-29 (1993).

issues are addressed to it.⁶³ As a logical corollary to the activist role pursued by the higher courts, justice's center of gravity shifted from the traditional individual *locus standi* to community-oriented public interest litigation. The liberalization of the rule of *locus standi* enabled environmentally-conscious and public-spirited individuals or groups easy access to the highest court of India and judge-fashioned remedies.

The interpretation of the right to life (Article 21) took a major turn when in 1985 the Supreme Court was faced with adjudging a conflict which set environmental protection issues against industrialization in the *Doon Valley* case.⁶⁴ In that case, which involved a large number of lessees of limestone quarries, the Court ordered the closure of all but eight of the quarries.⁶⁵ The Court took notice of the fact that limestone quarrying and excavations of the limestone deposit affect the perennial water springs. Taking a serious view of this environmental disturbance, the Court recognized that the right to life includes the right to a wholesome environment.

In 1987, the Supreme Court laid down not only principles of strict liability in the matter of an injury caused by the use of hazardous substances in *M.C. Mehta v. Union of India (Oleum Gas Leak case)*, but also for the first time, mentioned setting up specialized environment courts.⁶⁶ The Court tacitly recognized that citizens' right to life was adversely affected by the leakage of oleum gas from the premises of Shriram Foods and Fertilizers Ltd. Therefore, in addition to preventive relief, it proceeded to determine *remedial relief* under Article 32.⁶⁷ In the process, the Court radically transformed the criteria for liability and compensation under the law of torts. A Constitution Bench of the apex court unanimously articulated a new standard for the hazardous substances industry's "absolute and non-delegable

63. *Id.*; see also P.N.Bhagwati, *Judicial Activism and Public Interest Litigation*, 23 COLUM. J. TRANSNAT'L L. 566 (1985).

64. *Rural Litig. & Entitlement Kendra v. State of Uttar Pradesh*, A.I.R. 1985 S.C. 652 (The Supreme Court has issued, among others, several opinions and orders: A.I.R. 1985 S.C. 1259; 1985(2) S.C.A.L.E. 906; A.I.R. 1987 S.C. 359; A.I.R. 1987 SC 2426; A.I.R. 1988 S.C. 2187; J.T. 1988 (4) S.C. 710; J.T. 1990 (2) S.C. 391).

65. 1985(1) S.C.A.L.E. 408.

66. *M.C. Mehta v. Union of India*, A.I.R. 1987 S.C. 965; A.I.R. 1987 S.C. 982; A.I.R. 1987 S.C. 1086 (three main orders in this case).

67. A.I.R. 1987 S.C. at 1099.

duty to the community to ensure that no harm results to anyone on account of hazardous or inherently dangerous nature of activity. . . .” The Court emphatically ruled that such industry is to be subjected to strict and absolute liability without exceptions, and the measure of compensation is to be correlated to the magnitude and capacity of the enterprise.⁶⁸ The Supreme Court further advocated the establishment of specialized environment courts, stating:

We would also suggest to the Government of India that since cases involving issues of environmental pollution, ecological destruction and conflicts over natural resources are increasingly coming up for adjudication and these cases involve assessment and evolution of scientific and technical data, *it might be desirable to set up environment courts on the regional basis with one professional Judge and two experts drawn from the Ecological Sciences Research Group keeping in view the nature of the case and the expertise required for its adjudication. There would of course be a right to appeal to this Court from the decision of the environment court (emphasis added).*⁶⁹

Thereafter, in 1998, the *Ganga Pollution* case addressed the issue of river pollution caused by tanneries.⁷⁰ The Court declared that the right to life referred to in Article 21 of the Constitution included the right to free water and unpolluted air. Further, the Court observed that “we are conscious that closure of tanneries may bring unemployment, loss of revenue, but life, health and ecology have greater importance to the people.”⁷¹

The apex court again recognized the citizens’ right to fresh air and a pollution-free environment in the *Stone Crushers* case, and ordered the closure of all mechanical stone crushers in the Delhi and Faridabad area.⁷² These stone crushers were operating without requisite licenses and emitting hazardous dust around the clock. Passing strict restrictions, the Court ruled that “the quality of environment cannot be permitted to be damaged by polluting air, water and land to such an extent that it becomes a health hazard for

68. *Id.*

69. (1986) 2 S.C.C. 176, 202, para 22.

70. *M.C. Mehta v. Union of India*, A.I.R. 1988 S.C. 1037 (Tanneries); A.I.R. 1987 S.C. 1115 (Municipalities).

71. A.I.R. 1988 S.C. at 1048 (per Singh,J.).

72. *M.C. Mehta v. Union of India* (Stone Crushers case), W.P. 4677/1985 (1985).

the residents.”⁷³

Similarly, in the *Sariska Bioreserve* case, decided in 1992, the Supreme Court expressed its anguish against damage done to the environment, ecology and wildlife by mining activities in the protected forest areas.⁷⁴ It prohibited all mining activities within the Sariska National Park and the area designated as Tiger Reserve.⁷⁵

In an effort to further define what constitutes an environmental case, in *Virendra Gaur v. State of Haryana*, the Supreme Court observed that “[t]he word ‘environment’ is of broad spectrum which brings within its ambit, ‘hygienic atmosphere and ecological balance.’ Environmental protection, therefore, has now become a matter of grave concern for human existence. Promoting environmental protection implies maintenance of the environment as a whole comprising the man-made and the natural environment.”⁷⁶

Again, in 1995, in one of its landmarks rulings, *Indian Council for Enviro-Legal Action v. Union of India*, the apex court reiterated the idea of having independent specialized environment courts.⁷⁷ The case involved serious damage to the environment by certain industries producing toxic chemicals. The Court found that the water in wells and streams had turned dark and dirty, rendering it unfit for human consumption, or even for cattle and irrigation. The Court gave several directions, including the closure of industries. Due to the technicality of the subject matter, a committee of experts was appointed. The Court also took the opportunity to underscore its longstanding suggestion for the creation of specialized environment courts. It observed that, “Environmental Courts having civil and criminal jurisdiction must be established to deal with the environmental issues in a speedy manner. Further, it must be manned by legally-trained persons/judicial officers.”⁷⁸

The foundation for applying the precautionary principle, the

73. Desai, *supra* note 62, at 35.

74. Tarun Bharat Sangh, *Alwar v. Union of India*, A.I.R. 1992 S.C. 514; A.I.R. 1993 S.C. 293 (the main two orders passed in this case).

75. A.I.R. 1992 S.C. at 515 (India).

76. *Virendra Gaur v. State of Haryana*, (1995) 2 S.C.C. 577 (India).

77. *Indian Council for Enviro-Legal Action v. Union of India*, (1996) 3 S.C.C. 212; *see also*, *Indian Council for Enviro-Legal Action v. Union of India*, A.I.R. 1996 S.C. 1446.

78. 1996) 3 S.C.C. 212, 252 (emphasis added).

polluter pays principle and the new burden of proof (which shifted the burden to the person or body interfering with ecology to prove no adverse impact) was laid down by the Supreme Court in 1996 in *Vellore Citizens' Welfare Forum v. Union of India*.⁷⁹ Further, the court proposed that "the Central Government should constitute an authority under section 3(3)[of the 1986 Environmental Protection Act] headed by a retired judge of High Court and it may have other members — preferably with expertise in the field of pollution control and environmental protection — to be appointed by the Central Government."⁸⁰

The activist approach of the Supreme Court (and also of some of the State High Courts) has ranged across a gamut of other environmental issues, including banning aquaculture industries in coastal areas to prevent drinking water from becoming saline,⁸¹ issuing directions for improving air quality in the *National Capital Territory of Delhi*⁸² and protecting the *Taj Mahal*,⁸³ prohibiting cigarette smoking in public places,⁸⁴ addressing issues of solid waste management,⁸⁵ proscribing construction activities in the vicinity of lakes⁸⁶ and directing the lower courts to deal strictly with environmental offenses.⁸⁷

The demand for specialized environmental courts from the judiciary reached a crescendo with the 1998 decision of the Supreme Court in *A.P. Pollution Control Board v. Prof. M.V. Nayadu*, wherein the Supreme Court acknowledged that both it, as well as the High Courts, were experiencing considerable difficulty in adjudicating upon the correctness of technological and scientific opinions.⁸⁸ The Court, reiterating its suggestion in earlier cases, opined that "of paramount

79. *Vellore Citizens' Welfare Forum v. Union of India*, A.I.R. 1996 S.C. 2715.

80. *Id.* at 2726.

81. *S. Jagannath v. Union of India*, (1997) 2 S.C.C. 87.

82. *M.C. Mehta v. Union of India*, (1998) 8 S.C.C. 648 (introducing lead free petrol); *M.C. Mehta v. Union of India*, (1998) 8 S.C.C. 206 (phasing out commercial vehicles older than 15 years).

83. *M.C. Mehta v. Union of India*, (1996) 8 S.C.C. 462 (Taj Trapezium Case).

84. *Murli S. Deora v. Union of India*, (2001) 8 S.C.C. 765.

85. *Almitre H. Patel v. Union of India*, (1998) 2 S.C.C. 416; *B.L. Wadhwa v. Union of India*, (1996) 2 S.C.C. 594.

86. *M.C. Mehta v. Union of India*, (1997) 3 S.C.C. 715 (matter relating to Badkal and Surajkund Lakes).

87. *U.P. Pollution Board v. Mohan Meakins Ltd.*, (2000) 3 S.C.C. 745.

88. *Andhra Pradesh Pollution Control Bd. v. M.V. Nayudu* (1999) 2 S.C.C. 718.

importance was the need to establish environmental courts, authorities and tribunals for providing adequate judicial and scientific inputs rather than leaving such complicated disputes to be decided by officers drawn from the executive.”⁸⁹

In *A.P. Pollution Board (II) v. Prof. M.B. Nayadu*, the Supreme Court referred to the serious differences in the constitution of appellate authorities under plenary, as well as delegated legislation, and pointed out that except in one state where appellate authority was manned by a retired judge of the High Court, in other states they were manned only by bureaucrats.⁹⁰ Accordingly, the Court suggested that the government of India amend the environmental statutes, rules and notifications to ensure that in all environmental courts, tribunals and appellate authorities, there is always a judge of the rank of a High Court Judge or a Supreme Court Judge sitting or retired, and a scientist or group of scientists of high ranking and experience to help in the proper and fair adjudication of disputes relating to the environment and pollution.

The difficulty on the part of courts in appreciating scientific evidence is not limited to Indian courts, but is a global phenomenon. There is an ongoing debate among scholars regarding the need and justification for a specialized International Environment Court (IEC) to adjudicate the growing number of environmental disputes. Several arguments have been advanced to justify the establishment of an IEC. These arguments include the many pressing environmental problems that humans are facing and the need for a specialized adjudicatory bench comprised of experts in international environmental law to consider these problems,⁹¹ the need for international organizations to be able to be parties to disputes related to the protection of the environment,⁹² the need for individuals and groups to have access to environmental justice at the international level⁹³ and the need for

89. *Id.* (emphasis added).

90. *Andhra Pradesh Pollution Control Bd. v. M.V. Nayuda* (2001) 2 S.C.C. 62.

91. Sunkin, *supra* note 55, at 308.

92. Peddy Rodgers Kalas, *International Environmental Dispute Resolution and the Need for Access by Non-State Entities*, 12 COLO. J. INT'L ENVTL. L. & POL'Y 191, 219 (2001).

93. Amedeo Postiglione, *A More Efficient International Law on the Environment and Setting up an International Court for the Environment within United Nations*, 20 ENVTL L. 321, 327-28 (1990).

dispute settlement procedures that enable the common interest in the environment to be addressed.⁹⁴ Each of these arguments has its own merit.

Thus, it can be said that the emergence of public interest litigation, as well as the “activist” approach of the higher judiciary, especially the Supreme Court in India, has provided an important tool for the enforcement of the fundamental right to environmental protection. While clarifying its role, the apex court has often asserted its goal is simply to uphold the constitution and ensure the statutory rights of citizens. The court’s role in expanding public interest litigation, then, might be better explained in terms of its active enforcement of statutory and constitutional rights rather than any “activist posturing” per se. It has always been a judge or a bench of the court that has shown active assertion of the quest to render social justice rather than the apex court as a whole performing such a role. This has been demonstrated with ups and downs in the court’s handling of such “public interest” litigation.

However, it could not have been possible without liberalization of the traditional rule of *locus standi*,⁹⁵ which facilitated *access to justice*⁹⁶ by invoking the writ jurisdiction. The strong rationale for this

94. ELLEN HEY, REFLECTIONS ON INTERNATIONAL ENVIRONMENTAL COURT 9 (2000).

95. The trigger for this inclination of the Supreme Court to liberalize the issue of “standing” before it came from its basic presumption that procedure is merely hand maiden of justice and therefore should not stand in the way of access to justice to the weaker sections of society. As such, the Court went on to devise ways and means to expand the concept of *locus standi*, rejecting the need for personal stake or injury in the traditional doctrine of standing. This paved the way for “citizen suits” by allowing any member of the public or social action group to seek judicial redress under Article 32 or Article 226 of the Constitution for a legal wrong or legal injury caused to a person or to a determinate class of persons “(who) by reason of poverty or disability or socially or economically disadvantaged position (are), unable to approach the Court for relief.” See S.P. Gupta v. Union of India, A.I.R. 1982 S.C. 149.

96. The Supreme Court has been particularly concerned – while liberalizing *locus standi* – with facilitating ‘access to justice’. The Court jettisoned alarm raised by many concerning its invoking of writ jurisdiction based on mere letters addressed (even to individual judges) to the Court. It emphatically observed: “We do not think that it would be right to reject a letter addressed to an individual Justice of the Court merely on the ground that it is not addressed to the Court or to the Chief Justice and his companion Judges...If the Court were to insist (on that)...it would exclude from the judicial ken a large number of letters, and in the result deny access to justice to the deprived and vulnerable sections of community...We are of the view that...it should be entertained, provided of course, it is by or on behalf of a person in custody, or on behalf of a woman or child or a class of deprived or disadvantaged persons...Nor should the Court

given by the Court was based on the ground that if no one can maintain an action for redress of a public wrong or public injury, it would be disastrous for the rule of law. In the absence of such liberal *locus standi*, the state or a public authority could act with impunity beyond the scope of its power or in breach of a public duty owed by it. In order to enforce its directions, the apex court had to devise a monitoring and reporting mechanism, which sometimes was tantamount to taking over the administrative functions of the public authority implicated in a particular matter. This caused much consternation in the executive. The Court wielded its judicial power with considerable finesse in some of the big environmental litigations (for instance, *Ganga Pollution* and *Taj Mahal* cases).

In these marathon litigations, the apex court issued show cause notices to concerned industries and municipal bodies through newspapers, closing them down for failure to enforce statutory requirements and passing strictures or even bringing actions against authorities for contempt of court. Since environmental cases are technical in nature, the apex court realized quite early on that it required the assistance of neutral scientific experts. In this respect, the court's recommendation in the *Delhi Oleum Gas Leakage* case for the setting up of environmental courts has remained the basic reference point for subsequent judgments of the Supreme Court, as well as the Law Commission of India.

Law Commission Recommendation

Based on the foregoing, the Law Commission of India in 2003 proposed a structure in which environmental courts could be established at the state level with flexibility to have one court for more than one state.⁹⁷ The 186th Report of the Law Commission summarized the major recommendations relating to the composition, powers and procedures of the proposed courts. In fact, it sought to derive its mandate and justification for the proposal from some

adopt a rigid stance that no letters will be entertained unless they are supported by an affidavit." See *M.C. Mehta v. Union of India*, A.I.R. 1987 S.C. 1090.

97. LAW COMMISSION OF INDIA, 186TH REPORT ON PROPOSAL TO CONSTITUTE ENVIRONMENT COURTS 142 (2003), available at <http://lawcommissionofindia.nic.in/reports/186th%20report.pdf>.

celebrated judgments of the Supreme Court of India.⁹⁸

The Law Commission stated that the proposed environment court was to consist of a chairperson and at least two other members. The chairman and other members were suggested either to be retired Judges of the Supreme Court or of the High Court, or have at least twenty years experience as practicing advocates in any High Court. The term of the chairperson and members was to be for five years. More significantly, each environmental court was to be assisted by at least three scientific or technical experts known as commissioners. Each commissioner must have (1) a degree in environmental sciences, together with at least five years experience as an environmental scientist or engineer; or (2) adequate knowledge of, and experience to deal with, various aspects of problems relating to the environment, and in particular, the scientific or technical aspects of environmental problems, including the protection of the environment and environment impact assessments. However, the commissioner's role was to be advisory only and a minimum quorum for hearing a case was to be two members, including the chairperson.

The commission suggested that the proposed court have jurisdiction over all environmental issues⁹⁹ and incorporate the definition of "environment" and "environmental pollution," as provided in Section 2(a) and Section 2(c) of the 1986 Environment (Protection) Act, respectively. It was also suggested that the court have original jurisdiction in environmental disputes, with all powers of a Civil Court, as well as the power to grant all relief which the latter can grant under the 1908 Code of Civil Procedure or other statutes such as the 1963 Specific Relief Act. Further, the court was to have all appellate powers now conferred under the 1974 Water (Prevention & Control of Pollution) Act, the 1981 Air (Prevention & Control of

98. See *M.C. Mehta vs. Union of India*, (1986) 2 S.C.C. 176, 202. This was reiterated by the Supreme Court in *Indian Council for Enviro-Legal Action vs. Union of India*, (1996) 3 S.C.C. 212. Finally, the need for such Environment Courts was referred to in *A.P. Pollution Control Board vs. M.V. Naidu*, (1999) 2 S.C.C. 718. In fact, in the follow up case of *A.P. Pollution Control Board II vs. M.V. Naidu*, (2001) 2 S.C.C. 62, the Court required the Law Commission to examine this question.

99. It was suggested that this could cover (a) protection of the right to safe drinking water and the right to an environment that is not harmful to one's health or well being; and (b) power to have the environment protected for the benefit of present and future generations so as to: (i) prevent environmental pollution and ecological degradation; (ii) promote conservation; and (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

Pollution) Act, and on the appellate authorities constituted under the various Rules of the 1986 Environment (Protection) Act.

In the process of demystifying the concerted quest for specialized environmental courts, it must be noted that environmental dispute settlement is not a mere mechanical exercise of applying hard core legal principles to resolve competing claims. In fact, it could be regarded as an effort to develop a legal order conducive to issues of social justice and a concern for sound environmental management, as well as to affect an institutionalized mechanism to trace the sustainable developmental process, as understood in each country. It could also necessitate realization of the need for judges to have the right values and attitudes in giving effect to constitutional and legal rights and ensures the tools and techniques to develop preventive jurisprudence to avert irreversible environmental damage.

Thus, the explicit recommendations of the Law Commission of India also provided a somber reminder that it could not muster enough courage to provide for independence of the proposed court from the executive, as well as give the court teeth to enforce its decisions. It became a matter of concern especially in view of the delayed response of the executive in the implementation of environmental law in India.

Quest for Specialized Environment Courts

Following in the footsteps of the recommendations of the Supreme Court, and subsequently the Law Commission, the Union Parliament announced initiatives to combat further degradation of the environment. In this respect, there have been several successive efforts to establish such specialized environment courts in India (see **Table II**). The progress has been very slow due to reservations about the proposal that such special courts be comprised not only of judicial members, but also technically-qualified experts. The idea for a specialized court was not new in the Indian legal system, as it has been long practiced in areas such as income tax and customs matters. The effort, with the initial suggestion of the Supreme Court in the five-judge Constitution Bench judgment in the *Delhi Oleum Gas Leakage* case (1986), has spanned almost twenty-five years and has been subject to twists and turns, as well as half-hearted efforts such as the

National Environment Tribunal Act (NETA) (1995) and the National Environmental Appellate Authority Act (NEAA) (1997). It finally culminated in the relatively progressive step of the National Green Tribunal Act (NGT Act) (2010) that received assent of the President of India on June 2, 2010, and was quickly notified (unlike NETA that was never notified for a full fifteen years) on October 18, 2010.¹⁰⁰

Table II: Comparative Picture of Evolution of Indian Environment Courts

Characteristic	NETA, 1995	NEAA, 1997	NGT, 2010
Nature of Complaints	Application for the claim of compensation	Only appeals from orders granting environmental clearances by the MoEF	Initial complaints as well as appeals against any order or decision or direction or determination.
Composition	Chairperson; such number of vice-chairperson, judicial and technical members as the Central Government may deem fit.	Chairperson, Vice-Chairperson and such other members not exceeding three as the Central Government may deem fit.	Chairperson; Not less than 10 but maximum 20 full time judicial as well as expert members (in both cases).
Scope	Liability to pay compensation where death of or injury to any person (other than a workman) or damage to any property or environment resulting from any accident; as per the 14 heads as specified in the Act.	To hear appeals with respect to restriction of areas in which any industries, operations or processes or class of industries, operations or processes shall not be carried out or shall be carried out subject to certain safeguards under the Environment Protection Act, 1986, and for matters connected therewith or incidental thereto.	All civil cases involving substantial question relating to environment; arising from implementation of the seven enactments specified in <i>Schedule I</i> of the Act: (i) Water (Prevention and Control of Pollution) Act, 1974 (ii) The Water Cess Act, 1977 (iii) The Forest (Conservation) Act, 1980 (iv) The Air (Prevention and Control of Pollution) Act 1981 (v) The Environment (Protection) Act 1986 (vi) The Public Liability Insurance Act 1991 (vii) The Biological Diversity Act 2002.
Locus Standi	Any person who has (a) sustained injury (b) by the owner of the property to which the damage has been caused; (c) where death has resulted from the accident, by all or any of the legal representatives of the deceased; (d) by any agent duly authorized (e) by any representative body or organization, functioning in the field of environment and recognized in this behalf by	Any person aggrieved by an order granting environmental clearance	Any person, owner, legal representative, agent, representative body or organization central or state government or authorities under their control aggrieved by any order, decision or direction or determination can appeal to the Tribunal.

100. The National Green Tribunal Act, No. 19 of 2010, available at see <http://moef.nic.in/downloads/public-information/NGT-fin.pdf>.

	the Central Government or (f) by the Central Government or a State Government or a local authority.		
Relief	Compensation/damages for death of or injury to a person and damage to property and the environment	Orders as the Authority may deem fit	Relief for damage suffered, compensation and ordering measures to remedy the damage.
Penalty	Failure to comply with an order; imprisonment up to three years and/or fine up to ten lakh Rupees or both.	Failure to comply with an order; imprisonment up to seven years and/or fine up to one lakh Rupees or both.	Failure to comply with an order; up to three years of imprisonment and/ or fine of ten crore Rupees or both for individuals; up to twenty-five crore Rupees for the companies.
Procedure	Not bound by procedure laid down in the Code of Civil Procedure, 1908; guided by principles of natural justice and Indian Evidence Act, 1872.	Not bound by procedure laid down in the Code of Civil Procedure; guided by principles of natural justice and Indian Evidence Act.	Guided by principles of natural justice; not bound by the Indian Evidence Act or the Code of Civil Procedure.

National Environment Tribunal Act

This statute provided for *strict liability* for damages arising out of any accident occurring while handling any hazardous substance, and for the establishment of the tribunal for “effective and expeditious disposal of cases arising from such accident, with a view to giving relief and compensation for damages to persons, property and the environment and for matters connected therewith or incidental thereto.”¹⁰¹ Liability under the act is based on the “no fault” principle.

The composition included a chairman and such members as vice-chairpersons/judicial members and technical members, as the central government deemed fit. The chairman was to be a person who is, or has been, a judge of the Supreme Court or High Court, or has at least has been vice-chairman for two years. A vice-chairman was to be a person (a) who is or has been a judge of a High Court or was a secretary to the government of India for at least two years, or has held any other post in the central or state government, carrying a scale of pay which is not less than that of a secretary to the government of India, or (b) held the post of additional secretary in the government of

101. National Environment Tribunal Act, No. 27 of 1995 (Preamble), available at <http://www.envfor.nic.in/legis/others/tribunal.html>.

India for five years and has acquired knowledge of, or experience in, legal, administrative, scientific or technical aspects of the problems relating to the environment or has at least three years experience as a judicial member or a technical member; or (c) a judicial member must be one who is, or has been, qualified to be a judge of a High Court or has been a member of the Indian Legal Service, and has held a post in grade I of that service for at least three years. A technical member was defined as a person who has adequate knowledge of, or experience in, or capacity to deal with, administrative, scientific or technical aspects of the problems relating to the environment.

It is ironic that this important legislation was never notified due to the sheer neglect and/or lack of political will to take the risk on the part of the executive to pave the way for the establishment of such a specialized environment tribunal. Further, it had a very narrow scope in that it was authorized only to grant compensation in cases involving accidents that occurred during the handling of hazardous substances. Additionally, there was no power given to it to enforce its decisions. Thus, this half-hearted initiative remained on paper and did not see the light of day. The advent of the National Green Tribunal Act (2010) has officially given it a decent burial by repealing it from the statute book.¹⁰²

National Environment Appellate Authority Act

The rationale behind this act was to provide for the establishment of a National Environment Appellate Authority (NEAA) to "hear appeals with respect to restriction of areas in which any industries, operation or process (or class of industries, operation or processes) were to be carried out or were not to be carried out subject to safeguards under the 1986 Environment (Protection) Act and for matters connected therewith or incidental thereto."¹⁰³

The Appellate Authority was to consist of a chairperson, a vice-chairperson and such other members not exceeding three, as the

102. The National Green Tribunal Act § 38(1) (repealing the National Environment Tribunal Act); see Ministry of Environment and Forests, Government of India, <http://www.envfor.nic.in>.

103. National Environment Appellate Authority Act, (No.22 of 1997) (Preamble), available at <http://www.envfor.nic.in/legis/others/envapp97.html>; see The Green Tribunal Act (repealing the National Environment Appellate Authority Act).

central government deemed fit. The chairperson was to be a judge of the Supreme Court or the chief justice of a High Court. The vice-chairman was required to have held the post of secretary to the government of India for two years, or any other post under the central/state government carrying a scale of pay which is not less than that of a secretary to the government of India, and have expertise or experience in administrative, legal, management or technical aspects of problems relating to environmental management law or planning and development.

Though this appellate authority was effectuated, it dealt with very few cases and after expiry of the term of the first chairman, no further appointment was made. The NEAA's failure could be attributed to the ill-conceived and piecemeal nature of the legal reform vis-à-vis environment protection, as well as the slackness and indifference shown by the administrative machinery. The NEAA also was repealed by the new NGT Act.¹⁰⁴

National Green Tribunal Act

Following the previous two dismal attempts to establish green courts, the NGT Act was finally notified¹⁰⁵ on October 18, 2010, and Justice Lokeshwar Singh Panta, then judge of the Supreme Court, was appointed its first chairperson.¹⁰⁶ The NGT marks the first time a tribunal has been established with a broad mandate exclusively

104. The National Green Tribunal Act § 38(1) (repealing the National Environment Tribunal Act); see Ministry of Environment and Forests, Government of India, <http://www.envfor.nic.in> (last visited Nov. 25, 2010).

105. Press Release, Ministry of Environment & Forests, Government of India, Launch of the National Green Tribunal (Oct. 19, 2010), available at <http://moef.nic.in/downloads/public-information/ngt-launch-press-note.pdf> (stating, "The National Green Tribunal marks the first time a tribunal exclusively dedicated to environmental issues has been set up. This Body, established by an Act of Parliament (being the National Green Tribunal Act of 2010) will have circuit benches across the country to try all matters related to and arising out of environmental issues. The Tribunal which shall also consist of members who are experts in the field of environmental and related sciences, has been empowered to issue directions for the compensation and restitution of damage caused from actions of environmental negligence. In doing so, this is the first body of its kind that is required by its parent statute, to apply the polluter pays principle and the principle of sustainable development").

106. See *id.*; see also Jairam Ramesh launches National Green Tribunal, TIMES OF INDIA, Oct. 20, 2010, <http://timesofindia.indiatimes.com/videos/news/Jairam-Ramesh-launches-National-Green-Tribunal/videoshow/6778625.cms>.

dedicated to environmental issues. This initiative is taken by the Union Ministry of Environment and Forests (MoEF). The NGT Act (2010) was drafted and introduced in the Parliament in response to the recommendations of the Supreme Court and the Law Commission, especially in view of the pendency of a large number of environment related cases throughout India. Significantly, the NGT Act will result in the repeal of the National Environment Tribunal Act (1995) as well as the National Environment Appellate Authority Act (1997). Furthermore, the new tribunal will have *circuit benches* across the country to try all matters related to and arising out of environmental issues.

The preamble to the act sets out objectives for the effective and expeditious disposal of cases relating to environment protection and conservation of forests and other natural resources. Moreover, it seeks to provide for enforcement of any legal right relating to the environment, giving relief and compensation for damages to persons, property, and environment. In a sense, its scope is quite broad compared to the previous NETA (that was never brought into force), as well as the NEAA (that hardly heard any cases).

The act has sought to restrict access to justice in environmental matters by taking away an individual right.¹⁰⁷ Once the environment has been recognized as part of Article 21, any issue relating to the environment could fall within the public domain. As such, every person would have a duty to protect the environment, as well as a corresponding right to question the adverse impact on environment and human health. Further, there is no straightjacket formula to ascertain the gravity of damage to the environment and public health. The “environmental consequences” under the act are not restricted to either “specific activity or to a point source of pollution,”¹⁰⁸ because

107. Section 2(m) provides:

“substantial question relating to environment” shall include an instance where;

(i) is a direct violation of a specific statutory environmental obligation by a person by which:

(A) the community at large other than an individual or group of individuals is affected or likely to be affected by the environmental consequences; or (B) the gravity of damage to the environment or property is substantial; or (C) The damage to public health is broadly measurable;

(ii) the environmental consequences relate to a specific activity or a point source pollution...

108. *Id.*

non-point sources and a bundle of industrial activities are also major contributors to pollution. Such an approach to environmental questions and affected persons seems to be quite unethical and parochial.

The composition¹⁰⁹ of the tribunal will include appointed retired judges and bureaucrats as judicial and expert members.¹¹⁰ In that sense, it is questionable how much dynamism and zeal such members (mostly retired at the age of sixty or sixty-five) would have to steer the tribunal toward effective green initiatives. The subtle inequality between judicial and expert members is also palpable.¹¹¹ Instead of making such unfair differentiation, the act could have rather prescribed more rational criteria, for example, that “no judicial or expert member can hold office for more than five years or an age of seventy years, whichever is earlier.”

The government does not seem to have learned adequate lessons from earlier attempts that miserably failed to realize a set objective to usher in an era of “green courts” in India. Interestingly, a person with administrative experience of fifteen years in environmental matters can be appointed as an expert member. Had people with such experience been eager and willing to act with their competence, the government departments/institutions where they served would have been instrumental in rising to the occasion of protecting the environment. It is this lack of a professional approach, as well as

109. Section 4(1) provides:

The Tribunal shall consist of: (a) a full time Chairperson; (b) not less than ten full time Judicial Members as the Central Government may, from time to time, notify; (c) not less than ten full time Expert Members as the Central Government may, from time to time, notify.

(2) The Chairperson of the Tribunal may, if considered necessary, invite any one or more person having specialised knowledge and experience in a particular case before the Tribunal to assist the Tribunal in that case.

110. Section 5(1) of the NGT provides for appointment of the chairperson or judicial member from the pool of a serving or retired judge of the Supreme Court of India or Chief Justice of the High Court. As per the prevailing practice, such an appointment, generally, takes place only *after* the retirement, i.e., either 65 years (in case of the Supreme Court) or 62 years (in case of the High Court.)

111. Section 7 provides that the expert member cannot hold office as a member of the NGT after attaining the age of 65 years whereas the judicial member could hold office until the age of 70 years (for a retired Supreme Court judge) or 67 years (for a retired High Court judge).

inadequacy and ineffectiveness of institutionalized processes, that have resulted in the handling of environmental matters in a casual and non-serious manner.

In fact, the MoEF (if one does not talk about the concerned ministries and departments at the State level) is critically dependent upon a professional approach, i.e., the willingness to induct non-official experts in the policy-making process of the ministry, the efficiency and broad-mindedness of the MoEF secretary as well as the farsightedness and assertiveness of the Union Environment Minister. Whenever either or both of the top MoEF functionaries (the secretary and the minister) have been firmly in place, the ministry has been able to deliver better results. The very fact that the NETA was not notified for fifteen years, and it took twenty-five years for the first full "green court" to see the light of day, underscores the problem of outdated mindsets as well as the malaise that has set in. Moreover, the provision of inclusion of expert members of a technical and scientific background has failed to include experts with relevant experience from fields such as public health and environmental law.

With regard to the NGT's *jurisdiction*, the act sets out a time period of six months, when it will be determined whether or not environmental and public health damage has taken place. Furthermore, the act stipulates that application for a grant of compensation or relief, or restitution of property or environment has to be made within a period of five years. Environmental damage is a continuous process. As shown in the case of the horrific tragedy of the *Bhopal Gas Leakage*, the adverse effects of asbestosis, radiation exposure, climate change, desertification, loss of biodiversity, etc., could take more than five years to manifest itself. The new law needs to take cognizance of this issue of public health and safety of the citizens, and the long term environment damage.

The legislators have watered down the effect of this act by making every offense under it *non-cognizable*. The seriousness of environment-related crimes has been literally mashed and the idea of justice seems to have been thwarted. This is a matter of concern even as India is rapidly making big strides to harness nuclear energy. Use of radioactive substances and nuclear waste, as well as the risks flowing from them, could increase manifold in the years to come. Cumulatively, these considerations call for taking not only the policy and lawmaking seriously, but also for ensuring a fair, speedy and

effective dispute settlement mechanism.

There are genuine concerns as regards the increase in chances of man-made disasters like the Bhopal gas leakage (1985) and the Delhi Oleum gas leakage (1984). How “green,” as well as how effectively and expeditiously the NGT may deliver justice when it is confronted with a Bhopal type case, is open to question.¹¹² Similarly, the act requires the tribunal to apply the principle of “no fault” in an accident case. Interestingly, since contours of the “no fault” principle have not yet been fully subjected to a test, the act could have adopted the principle of “strict and absolute” liability, which was laid down by the unanimous verdict of the five-judge Constitution Bench in the *Delhi Oleum Gas Leakage* case,¹¹³ and reaffirmed (rejecting the argument that the law stated therein was *obiter*) in the *Indian Council for Enviro-Legal Action* case.¹¹⁴ There also is no apparent justification for the omission of the “public trust” doctrine — laid down by the Supreme Court in the *M.C. Mehta v. Kamal Nath* (1997) case¹¹⁵ — in this progressive piece

112. See generally Bharat H. Desai, *The Bhopal Gas Leak Disaster Litigation: An Overview*, 3 ASIAN Y.B. INT’L L. 163 (providing a detailed analysis of the Bhopal gas leakage disaster litigation).

113. See *M.C. Mehta v. Union of India* (Delhi Oleum Gas Leakage case), A.I.R. 1987 S.C. 1086.

114. See *Indian Council for Enviro-Legal Action v. Union of India* (Bichhri case), A.I.R. 1996 S.C. 1446, 1465.

115. See *M.C. Mehta v. Kamal Nath* (Beas River Case: Imposition of Exemplary Damages), A.I.R. 2002 S.C. 1515, available at <http://www.elaw.org/node/1360> (India). In this case, the Supreme Court gave landmark directions as follows: “(1) The public trust doctrine, as discussed by us in this judgment is a part of the law of the land. (2) The prior approval granted by the Government of India, Ministry of Environment and Forest by the letter dated 24.11.1993 and the lease deed dated 11.4.1994 in favour of the Motel are quashed. The lease granted to the Motel by the said lease deed in respect of 27 bighas and 12 biswas of area, is cancelled and set aside. The Himachal Pradesh Government shall take over the area and restore it to its original-natural conditions. (3) The Motel shall pay compensation by way of cost for the restitution of the environment and ecology of the area. The pollution caused by various constructions made by the Motel in the riverbed and the banks of River Beas has to be removed and reversed... (4) The Motel through its management shall show cause why pollution fine in addition be not imposed on the Motel. (5) The Motel shall construct a boundary wall at a distance of not more than 4 metres from the cluster of rooms (main building of the Motel) towards the river basin... The Motel shall not

of legislation. In fact, its inclusion could have provided a ray of hope for effective “green justice,” and served as a deterrent against any administrative, as well as ministerial, indiscretion in failing to protect the public interest and the environment as a “sacred trust” for the people of India.

Conclusion

The genesis of the development of international environmental law underscores the marathon regulatory process at work. The sheer diversity of the issues, including the concern for national interest of the sovereign states, uncertainties of science, past colonial exploitation of natural resources, environment-development interface, as well as growing complexities in the multilateral lawmaking process, has set the stage for a flurry of international environmental disputes. There are already some suits being dealt with by existing structures for international environmental dispute settlement. Without going into the merits or inadequacies of these structures, it is noteworthy that a movement is afoot for the establishment of an International Environment Court (IEC). Our preliminary study underscores the fact that there is a need to take international environmental dispute settlement more seriously. The best way to do so could be to provide an appropriate forum for a specialized environment court for that purpose.

The growth and thickening of the web of multilateral regulatory tools has gradually had its effect at the national level too. As a result, a large number of states have put into place policies, legislation and enforcement agencies. In view of the perennial quest and struggle to strike a balance between developmental requirements and environmental considerations, there has been a huge increase in environment-related litigations at the national level and it seems that a large number of countries have made an effort to deal with this litigation. How environmental cases are treated varies from country to country, ranging from designation of a special judge or a bench, to a fixed-day hearing in environmental matters, to the constitution of a special court

encroach/cover/utilize any part of the river basin...The river bank and the river basin shall be left open for the public use. (6) The Motel shall not discharge untreated effluents into the river.” See also *M.C. Mehta v. Kamal Nath* (1997) 1 S.C.C. 388 (India).

or tribunal.

Still, there are very few countries that have sought to establish specialized environment courts. It appears that the momentum is moving towards such specialized forums to handle the increasing volume of environmental cases. India is the latest to join this movement with a special “green tribunal,” created after the failure of two earlier efforts. This tribunal is the culmination of the emphatic suggestion of the Supreme Court of India in 1986. This quest for “green courts” in India has been premised upon the bedrock of a sound legal jurisprudence, laid down by the apex court, as well as a substantial body of environmental policies and legislations, and enforcement machinery. The advent of the National Green Tribunal (with the notification of October 18, 2010) *prima facie* provides reason to cheer, in spite of its shortcomings. At a minimum, it could be described as a *first step* in an effort to take environmental dispute settlement more seriously. How “green” the NGT turns out to be — in terms of providing effective justice as well as rising to the occasion to remove existing cobwebs — remains to be seen. In order to set the NGT firmly on the path of rendering fair and just adjudication of environmental disputes, existing gaps, and shortcomings in the law will need to be quickly filled. It is a good beginning for the quest for environment courts in India and a trend setter for the global quest for such specialized environmental dispute settlement forums. However, it will require a concerted effort to make it work effectively.

