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THE UNITED NATIONS DISPUTE SETTLEMENT SYSTEM AND INTERNATIONAL ENVIRONMENTAL DISPUTES

David M. Konisky

International security is increasingly considered to have a broader scope than was the case when the protection of national boundaries from external military aggressions was its focus. Today, many other facets of international security have emerged including those in the environmental domain. International environmental disputes, whether in terms of conflicts initiated from tensions over scarce resources or noncompliance with multilateral treaty obligations, pose new threats to international security. Thus, it is essential to identify and understand the institutional capacity of the world community to effectively resolve such disputes. This analysis argues that the United Nations is the international institution best-suited to take on this new challenge to international security, particularly through its dispute settlement system. The paper examines this system, identifying both its current capacity to resolve international environmental disputes and the modifications that are necessary to improve its effectiveness in addressing this emerging security concern.

David M. Konisky is a Master of International Relations and Environmental Studies candidate at the Yale Center for International and Area Studies at Yale University.

Introduction

One of the primary purposes of the United Nations according to its charter is:

> to maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace (United Nations 1945, I.1.1).

While much of the recent attention of the United Nations in terms of security concerns has focused on issues of preventive diplomacy, peace-making, and peacekeeping, which are the primary subjects of former Secretary-General Boutros Boutros-Ghali's *An Agenda for Peace* (Boutros-Ghali 1992, 1), the emerging importance of environmental concerns to international security has also been mentioned. In January 1992, the President of the Security Council stated that:

> The absence of war and military conflicts amongst States does not in itself ensure international peace and security. The non-military sources of instability in the economic, social, humanitarian, and *ecological* fields have become threats to peace and security. The United Nations membership as a whole, working through the appropriate bodies, needs to give the highest priority to the solution of these matters (United Nations 1992a, 3: emphasis added).

This statement indicates the United Nations' recognition of the changing nature of security. The concept of security has historically been narrowly interpreted as security of territory from external aggression or of national interests in foreign policy. The State, thus, has been the prevailing entity for the guarantee of security, and State-centered theories have dominated discussions of international relations, especially in the post-World War II period (Dabelko and Dabelko 1995, 3). Global developments, however, suggest that there is a need to broaden this definition, particularly to integrate new potential causes of intra- and inter-state conflict such as resource, environmental, and demographic issues (Mathews 1989, 23). For instance, former Senator Sam Nunn, once Chair of the U.S. Senate Armed Services Committee, stated in 1990 that: "There is a new and different threat to our national security emerging—the destruction of our environments. I believe that one of our key national security

objectives must be to reverse the accelerated pace of environmental destruction around the globe" (Myers 1993, 5). As this statement illustrates, nations are increasingly showing recognition of the need to widen the traditional notion of security, but international institutions must also begin to recognize that the concept of security should be reconceptualized to take into account the changing conditions of the world order.

The United Nations in many respects is leading the international community in determining the parameters of this expanded understanding of security, particularly through the promotion of the notion of human security. Although a rigorous definition of human security has yet to be developed, the United Nations Development Program (UNDP) in its 1994 Human Development Report noted its two main aspects: (1) safety from chronic threats such as hunger, disease, and repression, and (2) protection from sudden and hurtful disruptions in the patterns of daily life—whether in homes, in jobs, or in communities (UNDP 1994, 23). Although not stated explicitly, an important element of the concept of human security is protection from environmental degradation, or, as stated positively, the right to a safe environment. This was noted in Principle 1 of The Stockholm Declaration of 1972 which affirmed: "Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being . . ." (United Nations 1972, II.1).

The United Nations emphasized the relationship between environmental concerns and international security at the United Nations Conference on the Environment and Development (UNCED) which convened in June 1992 in Rio de Janeiro. Implicit in much of what was accomplished at UNCED, particularly with regard to the legal instruments that were adopted, was the recognition that nations had to act collectively to address global environmental dilemmas and to prevent the occurrence and escalation of international environmental disputes (Sands 1993, 368). The United Nations seems to be willing to take up the increasingly difficult challenge of environmental protection as it recognizes that this, too, like disarmament and economic development, is an important component of international peace and security.

The United Nations has already demonstrated its leadership in the environmental domain in terms of establishing non-binding sets of resolutions and principles, or "soft" law (e.g. Stockholm Declaration of 1972, the World Charter of Nature of 1982, the Rio Declaration of 1992), and in guiding negotiations of international treaties (e.g. Convention on the International Trade of Endangered Species of 1973, Montreal Proto-

col on Substances that Deplete the Ozone Layer of 1987, Framework Convention on Climate Change of 1992). The United Nations recognizes that environmental problems have the potential to cause tension between states, perhaps to the extent of causing or escalating international conflicts. However, it must follow through on this recognition by adapting its organizational structure to address this expanded conception of security. One of the key elements to ensure that the environmental dimensions of security can be maintained and protected is dispute settlement. The importance of strengthening or establishing institutions to facilitate the peaceful settlement of environmental disputes was recognized in Agenda 21, the program designed at UNCED in 1992. Although details were not provided, Agenda 21 noted the need for mechanisms and procedures to improve:

> the exchange of data and information, notification and consultation regarding situations that might lead to disputes with other states in the field of sustainable development and for the effective peaceful means of dispute settlement in accordance with the Charter of the United Nations including, where appropriate, recourses to the International Court of Justice, and their inclusion in treaties relating to sustainable development (United Nations 1992b, 39.10).

With this in mind, it is the objective of this paper to briefly consider the dispute settlement system of the United Nations, to examine its prior application in the environmental domain, and to consider its potential for the future resolution of international environmental disputes.

International Environmental Disputes

Prior to a discussion of the United Nations dispute settlement mechanism and its application to the environmental sphere, it is necessary to first define what is meant by an international environmental dispute. International environmental disputes can be placed into two different categories: (1) violent conflicts caused by environmental problems, or, in other words, traditional military confrontations caused by environmental factors, and (2) disputes among states with regard to noncompliance with international treaty obligations. Although this paper will predominantly focus on the latter, it is important to briefly discuss the first category.

Much of the recent scholarship with regard to the relationship between security and the environment has focused on whether there are causal links between environmental change and violent conflict (Gleick 1991; Myers 1993; Winnefeld 1994). At the forefront of this effort has been Homer-

Dixon and his colleagues working on an international research project on "Environmental Change and Acute Conflict" which identified several links between environmental scarcity and conflict (Dabelko and Dabelko 1995, 5). Homer-Dixon concluded that first, the most likely environmental problems to cause conflict were not atmospheric problems but rather disputes over forest, water, fishery, and cropland resources. Second, it was concluded that conflicts caused by environmental stress could be grouped into three potential types: simple-scarcity conflicts between states, population movement and group-identity conflicts, and economic deprivation, institutional disruption and civil strife conflicts. A complete discussion of each of these types of conflict is beyond the scope of this paper, but what is important for this analysis was Homer-Dixon's general conclusion that environmental scarcity can cause violent conflict (Homer-Dixon 1994, 18–39).

Although doubts have been raised regarding the findings of Homer-Dixon and others who have concluded that there is a causal link between environmental problems and violent conflicts (Deudney 1991, 22–28), it has been generally recognized that at least, environmental factors including population growth and the unequal social distribution of resources, can act as an "accelerator" or catalyst for conflict, particularly intra-state confrontations (Winnefeld 1994, 11). Moreover, while not every environmental problem should be considered a threat to national or international security, it is apparent that certain regional and global environmental deficiencies can produce conditions that render conflict more likely (Gleick 1991, 18–19). Although the exact relationship between environmental problems and violent conflict remains somewhat unresolved, at a minimum, it can be argued that environmental stresses can aggravate other existing tensions. Thus, as stated in the report of the World Commission on Environment and Development, *Our Common Future*, environmental stresses can be an important part of the web of causality associated with any conflict (World Commission on Environment and Development 1987, 291).

The other category of international environmental disputes are those among states with regard to noncompliance with international treaty obligations. Such conflicts are more common and will be the primary focus of this paper. The relationship between security and noncompliance with international treaty obligations is somewhat obscure if the notion of security is limited to its traditional connotation. However, if security is considered in the broader context of which it was described in the introduction, then it is quite apparent that the protection of the environ-

ment is an important element of security. The existing international approach to environmental governance is based on a loosely connected set of environmental regulations and institutions predominantly created by multilaterally-negotiated agreements. The effectiveness of this approach depends primarily on the level of compliance with the laws and obligations such agreements embody. Multilateral environmental agreements in all cases will be more effective in achieving their stated objectives with higher levels of compliance since this is a primary element of their implementation.

An international environmental dispute can thus be thought of as a conflict caused by one nation confronting another nation with respect to an actual or perceived failure to adhere to a previously agreed to standard as determined by a multilateral environmental agreement. Such an agreement should be broadly interpreted to mean any treaty among two or more parties which in some way regulates behavior with respect to the environment including issues of pollution, natural resources, biological diversity, etc. Since most environmental problems are at least transboundary in nature, if not global, failure to meet international treaty obligations can potentially pose a threat to the security of the world community, even if not in terms of direct military aggression.

When security is viewed in this context, it is evident that state compliance with international environmental obligations has become a critical issue in international affairs. Sands noted three factors that underlie the increased concern with compliance: (1) the growing demands and needs of states for access to and use of natural resources coupled with a finite, and perhaps shrinking, resource base lay the groundwork for increasing international tension and conflict, (2) as international environmental obligations increasingly affect national economic interests, states that do not comply with their environmental obligations are perceived to gain unfair competitive economic advantage over other states, and (3) the nature and extent of international environmental obligations have been transformed in recent years as states assume greater environmental treaty commitments (Sands 1993, 368). Although the environmental challenges to the international community may be somewhat new in the post-World War II period, the international legal system has developed institutions, mechanisms, and techniques for preventing and resolving international environmental disputes, most notably the dispute settlement system of the United Nations.

Why the United Nations?

Before discussing the dispute settlement mechanisms which are part of the United Nations system, it is necessary to understand why an international organization is in general best-suited to resolve international environmental disputes. The only other legitimate alternative institution that could potentially provide an adequate system of dispute settlement would be a regional organization. There are two primary reasons why a regional organization is not as suitable a choice as an international organization. For one, it has been firmly established that there are no "private" disputes among nations; international controversies are a concern of the world community, especially in situations when such disputes threaten security (Claude 1984, 224). This is true with respect to the environmental domain on more than a political level as most of the environmental stresses with the potential to cause an international environmental dispute are to some extent transboundary by nature. As an example, if a nation that is party to the Montreal Protocol were to blatantly refuse to comply with the treaty obligations to phase out their use of chlorofluorocarbons, the potential impacts would affect more than just that nation. In an ecologically interdependent world, an action taken by one nation has impacts on all nations. As such, an international organization which is representative of the world, as opposed to a more limited focus of a regional organization, would be better able to resolve the potential dispute.

A second reason that an international organization is better-equipped to address international environmental conflicts is the previous failure of regional organizations to address international security issues. Even in cases when the conflict is regional rather than global in nature and the threat to security is of more the traditional type such as external military aggression of one nation against another, recent experience has illustrated that regional organizations have not done well in their attempts to resolve disputes. With the exception of the Organization for American States, most regional organizations have not had notable success in the resolution of regional disputes without the assistance of the United Nations. There have even been instances when regional organizations have explicitly deferred to the capacity of the United Nations, as was the case when the Organization of African Unity declined assuming peacekeeping responsibilities in Rwanda citing the United Nations as better-equipped for the task (Sutterlin 1995, 96–97). Based on this precedent, there is little reason to believe that regional organizations would have better success addressing concerns of a broader security context.

The next question that should be answered is why the United Nations is the best international institution to address these conflicts. Trolldalen has enumerated a set of criteria for evaluating the potential for organizational success in resolving international environmental disputes. Among the most important are legitimacy and credibility, a clear specific mandate, access to appropriate scientific information and expertise, and a specific mechanism for conflict resolution (Trolldalen 1988, 29). The balance of this section illustrates that most of the criteria are possessed by the United Nations.

The United Nations has recently been criticized due to recent perceived failures in peacekeeping operations in places such as Bosnia. Yet as an institution, the United Nations maintains both its legitimacy and credibility in the sense that it is the most representative international organization in the world, with participation from nearly all of the nations of the international community, and it offers a neutral forum for discussing matters within the organization's jurisdiction, namely the General Assembly. Although the Security Council itself may not be equitable in terms of voting power as it is based on post-World War II power relations (O'Neil 1997, 59–82), the General Assembly has proven in certain cases that it has the ability to participate, or in the least, influence decisions on security matters, a role which may be bolstered as international security is increasingly interpreted to mean the security of people as well as states (Sutterlin 1997, 6).

The second important criterion is a clear, specific mandate. Undoubtedly, as mentioned earlier in this paper, the United Nations has since its inception had as one of its most fundamental purposes the maintenance of international peace and security (United Nations 1945, I.1.1). Clearly, the United Nations' commitment to this purpose is unquestionable. Moreover, since it has recently begun to conceive security in broader terms including the integration of environmental concerns into its conception of human security, the United Nations is presently the best suited international institution to facilitate the prevention and resolution of international environmental disputes.

The next important criterion is that of access to appropriate scientific information and expertise. Though there is always opportunity for improving scientific and technical aptitude, the comprehensive nature of the United Nations both in terms of representation and institutional capacity provides the organization with the necessary capability to amass and interpret the information necessary to understand complicated ecological stresses. Since almost all of the nations of the world are represented in the

United Nations, from a geographical point of view, the organization should have the ability to quickly respond to an environmental dispute wherever it may emerge. Moreover, the structure of the United Nations, specifically its relationship with its specialized agencies such as the United Nations Environment Programme (UNEP) and the UNDP, provide the institution with access to the scientific expertise that is required to effectively address environmental problems.

The final and most important criterion is the fact that the United Nations has an established system of conflict resolution. As will be discussed in the remainder of this paper, the United Nations has a well-developed and well-tested mechanism for dispute settlement. The key in terms of resolving international environmental disputes for the United Nations is adapting its present system of dispute settlement to match the changing nature of international security. The United Nations has already in some cases demonstrated that its institutional mechanisms for dispute settlement can be applied in the environmental sphere. With a few improvements, the United Nations will be able to adequately address the new environmental element of international security concerns. In sum, this established system of conflict resolution, the United Nations' legitimacy and credibility, its clear, specific mandate, and its access to appropriate scientific information and expertise, qualify it to serve as the primary international organization to facilitate the prevention and resolution of international environmental disputes.

Dispute Settlement in the United Nations

There exists no clear consensus as to which dispute settlement method is most effective. Legal scholars have typically tended to favor procedures such as arbitration and adjudication that yield binding decisions, while social scientists have typically preferred procedures such as negotiation and mediation. A continuum of techniques has developed ranging from the use of good offices, such as non-partisan diplomatic intervention or mediation, at one end, to formal court proceedings at the other (Young 1994, 209–210). From a theoretical perspective, the following three general approaches to disputes comprise this continuum: (1) a power-based approach, (2) a rights-based approach, and (3) an interest-based approach (Ury, Brett, and Goldberg 1988). The power-based approach is characteristic of the realist perception of international relations in which disputes are settled through a power contest, the most extreme case being war. In a rights-based approach, disputing parties attempt to determine

who is right according to a standard which, in the multilateral context, is typically defined by international law and regulation. In such cases, one party generally contends that the other is in noncompliance with an agreed-upon rule such as a treaty, convention, or accepted custom. Lastly, in a interest-based approach, the disputing parties attempt to reconcile their divergent positions through discovery of mutually-acceptable solutions (Peck 1996, 10–11).

The United Nations recognized from its inception that different approaches to dispute settlement were necessary in order to be capable of meeting the challenge of maintaining international peace and security. Article 33 of the United Nations Charter states that:

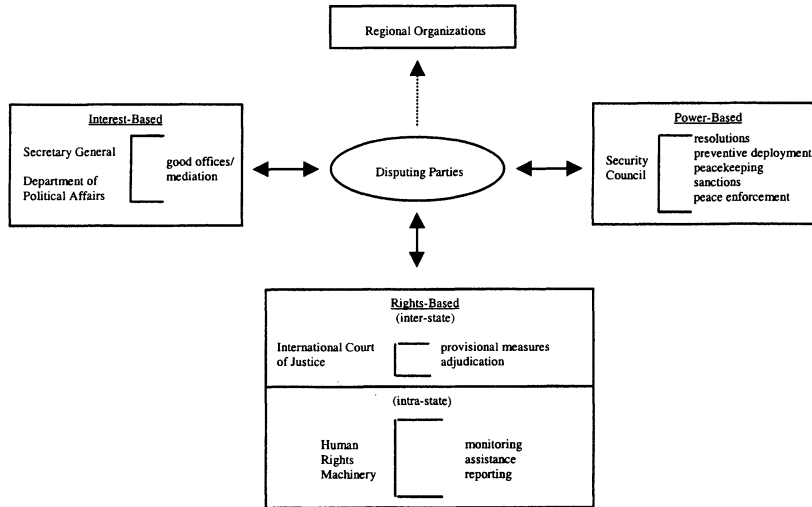
1. The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

2. The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means (United Nations 1945, IV.33)

In the above provisions, Article 33 sets forth all of the different types of approaches to dispute settlement that the United Nations hoped to encourage disputing parties to utilize, and more significantly, the United Nations developed the institutional capacity to support these various approaches.

As Peck's graphical representation illustrates in Figure 1, from an institutional viewpoint, the United Nations system has established the organizational framework to support all of the various approaches to dispute settlement. In general, it can be argued that the principal organs of the United Nations roughly correlate with each of the different approaches to dispute settlement. As depicted in Peck's schematic, good offices and mediation by the Secretary-General and his representatives fall into the category of the interest-based approach, the International Court of Justice plays the most important role for the rights-based approach, and lastly, the authority of the Security Council provides a range of power-based procedures (Peck 1996, 13). The United Nations dispute settlement system provides the opportunity to work along the continuum mentioned previously as it has the institutional capacity to apply all the different methods of conflict resolution.

Figure 1. Major UN Dispute Settlement Approaches Currently Available to Disputing Parties (Peck 1996, 14).



United Nations Dispute Settlement in the Environmental Domain

A detailed discussion of each component of the United Nations dispute settlement system is beyond the scope of this paper, yet clearly there are many different ways in which the international organization can contribute to the prevention and resolution of international environmental disputes. Of the three approaches to dispute settlement, the power-based approach likely has the least potential for utilization as a response to international environmental disputes. Although the Security Council would certainly provide a necessary option for the attempted resolution of violent conflicts caused by environmental problems, there is no precedent for its use as a mechanism to address a dispute caused by a nation's failure to comply with an international environmental agreement. The only real case where the power-based approach would be applied is when after nations have failed to resolve their dispute through the other mechanisms available in Article 33, the Security Council would intervene with sanctions or another method of enforcement. Although such an effort may be plausible in theory, especially if the environmental dispute was a direct

security concern, there is, in fact, no precedent for such an action in the environmental domain.

In terms of the other two dispute settlement approaches available within the United Nations, namely, the rights-based and interest-based approaches, the application of these methods in the environmental sphere have a significant potential to facilitate the resolution of disputes. As was noted earlier, the primary aspect of the United Nations rights-based approach is the International Court of Justice (ICJ). Although the ICJ has never dealt fully with a major international environmental dispute in a strict sense, it has considered matters related to natural resource conservation and handed down judgments that establish important general guiding principles such as in the *Nuclear Test* case, an important example that will be discussed in greater detail later in this paper. Despite the lack of precedents in adjudicating international environmental disputes, the potential for the greater utilization of this institution is significant, especially considering the fact that many recently negotiated environmental agreements such as the Framework Convention on Climate Change (1992) and Convention on Biological Diversity (1992) directly provide for the use of the ICJ for this purpose (Sands 1993, 380).

Lastly, the interest-based approach of the United Nations seems to have the greatest potential to contribute to the resolution of international environmental disputes. Two parts of the United Nations system in particular are well-placed to provide interest-based options such as diplomacy or mediation to conflicting parties. For one, the good offices of the Secretary-General is a potentially vital mechanism for settling international environmental disputes. The Office of the Secretary-General has many advantages in comparison to other third-parties. These advantages include its ability to serve as a channel of communication, particularly when direct channels between adversaries are blocked or nonexistent, and its ability to transmit communication between governments that either do not have established diplomatic relations or between national political factions that do not recognize each other. Moreover, the Secretary-General may also communicate with and recruit the expertise of non-governmental organizations to participate in the dispute settlement process, a fact that is especially relevant in the environmental domain in which scientific knowledge, policy expertise, and first-hand comprehension of conditions in the field are essential for successful understanding of the complexity that characterize most environmental problems (Skjelsbaek and Fermann 1996, 94; Rubin 1993, 287).

Second, the UNEP represents another part of the United Nations system that is potentially well-placed to utilize the interest-based approach to address international environmental disputes, particularly those disputes with a low level of political tension that have yet to reach the point where they would be considered a serious security concern. Created as part of the United Nations Conference on the Human Environment held in Stockholm in 1972, UNEP's mandate is threefold: the global environmental assessment programme ("Earthwatch"), environmental management activities, and supporting organizational measures (Hurrell and Kingsbury 1992, 32). While UNEP's mandate does not explicitly charge the institution with the task of resolving international environmental disputes, it represents the only United Nations instrument with the sole purpose of addressing environmental issues of a global character (Bjorkbom 1988, 125). Moreover, UNEP has already exhibited its technical competence and strong leadership in the international environmental domain, particularly with respect to the negotiation of multilateral agreements (Young 1994, 167). There is little reason to believe that this success would not be duplicated if UNEP were provided the expanded responsibility to provide interest-based approaches disputants such as mediation or arbitration. Finally, an additional advantage of UNEP is that, unlike most of the United Nations system, it is headquartered in the developing world, Nairobi, Kenya. This geographical factor, while perhaps primarily symbolic in nature, may facilitate the bridging of the North-South divide that exists with regard to many global environmental problems.

Some have argued that the existing United Nations' institutional framework is inadequate to properly resolve international environmental disputes and that new institutions should be established to accomplish this increasingly important task. Amedeo Postiglione[1] has suggested that an International Court for the Environment must be created because "a fundamental human right, such as the environment, cannot be undefended at the international level." This proposed court would draw its moral and legal strength not from nations, but from individuals, and would have the power to decide on issues such as violations of international environmental laws (Postiglione 1989, 324–327).

Although the argument espoused by Postiglione is somewhat convincing, his suggestion for the establishment of a new institution and others like it does not provide the best solution to settling international environmental disputes. Postiglione's International Court for the Environment is, for all intents and purposes, simply a proposal that calls for the establish-

ment of a supranational authority that supersedes the national sovereignty of individual states to address global environmental problems. All past propositions similar to this have subsequently been met with disfavor as nations resist the cession of the rights and privileges traditionally granted to nation-states (Susskind 1994, 21). Moreover, the prospects for extensive supranationalism and world government remain inevitably remote (Hurrell and Kingsbury 1992, 7). A more effective and politically viable approach would be to strengthen or expand the authority of existing institutions that have been previously utilized in the capacity of environmental dispute resolution. Further evidence of the greater utility in bolstering the existing system of dispute settlement rather than creating alternatives is the fact that the United Nations has already demonstrated its capability of facilitating dispute settlement in the environmental domain.

Case Studies of United Nations Involvement in International Environmental Disputes

The above analysis indicates that the United Nations has the institutional structure in place to employ both the rights-based and interest-based approach to resolve international environmental disputes. In the future, the opportunities for the United Nations to fully employ the interest-based approach, whether those of the Secretary-General in terms of good offices or UNEP in terms of mediation or arbitration, will likely be significant as diplomatic intervention may prove crucial to resolving international environmental disputes that have security implications. To this point, however, these services have not been exercised to resolve an international environmental dispute as defined in this paper. The United Nations system has, however, demonstrated the capability to address international environmental disputes with the rights-based approach, and most particularly in terms of cases brought before the ICJ. A couple of case studies will illustrate its effective use of this approach.

Iceland's Fisheries Jurisdiction

Disputes over fishery rights have occurred for many centuries, but such resource conflicts have intensified in many parts of the world in recent decades due to the depletion of fishery resources. In response, there have been many attempts through the years, including efforts by the United Nations, to establish regulations of state rights to fisheries. Despite these attempts, little was resolved until the multilateral gathering of nations to negotiate a Law of the Sea Treaty, a conference convened under the auspices of the United Nations.

The First United Nations Conference on the Law of the Sea in 1958 failed to reach an agreement on two key issues: the breadth of the territorial sea and a proposed concept of exclusive fishery zones which had been aggressively pursued by a number of coastal states with a dependence upon fishery reserves in their adjacent waters. As a result, some nations decided to implement their own regulations. Iceland, for instance, unilaterally issued new regulations which established a 12-mile exclusive fisheries zone around its coasts, stating publicly that it viewed this measure as simply a first step towards its ultimate objective of creating a fishery zone that would extend over its entire continental shelf. This unilateral action taken by Iceland led to a dispute with other nations with fishery interests in the region, namely the United Kingdom and the Federal Republic of Germany (West Germany). Two years later, the Second United Nations Conference on the Law of the Sea in 1960 also fell short of reaching a determination on the two issues noted above. In response, the United Kingdom and West Germany each concluded provisional agreements with Iceland in which they recognized Iceland's preferential rights in return for Iceland's acknowledgment of their certain fishing rights in the region in question. These bilateral agreements established a legal mechanism which would allow for the future involvement of the ICJ under certain circumstances (Rosenne 1995, 206).

On 14 July 1971, Iceland again took unilateral action and extended its exclusive fishery zone to 50 miles declaring the previous bilateral agreements invalid. These new regulations were to become effective on 1 September 1972. Not surprisingly, Iceland's action spurred outward opposition from both the United Kingdom and West Germany, which had utilized these fishery regions based on bilateral agreements for over a decade. After the failure to reach an interest-based resolution through negotiations, the matter was submitted to the ICJ for a rights-based approach as the United Kingdom brought proceedings before the ICJ on 14 April 1972. The case was delayed for over a year at the ICJ, in large measure due to the refusal of Iceland to participate in the proceedings since it did not recognize the court's jurisdiction in the matter. Despite Iceland's failure to cooperate, the ICJ took an active role in an attempt to resolve the dispute, and in response to the preliminary question of jurisdiction, ruled twice by votes of fourteen to one that it indeed possessed the jurisdiction to deal with the case at hand (Rosenne 1995, 206–207).

After this initial judgment, the dispute intensified resulting in the "cod wars" which involved minor incidents between Icelandic fishery patrol vessels and British naval units assigned to protect British fishing trawlers. These conflicts accelerated the proceedings before the ICJ as the dispute

threatened to move beyond the political into the military arena. The ICJ finally delivered a formal ruling on the case on 25 July 1974 in what has become known as the *Fisheries Jurisdiction* case *(United Kingdom v. Iceland)*, and judged by a vote of ten to four that Iceland had no right to unilaterally exclude British and West German fishing vessels from areas between 12-mile and 50-mile limits or to unilaterally impose restrictions on their activities in this area. The judgment went a step further and established guidelines to facilitate resolution of future disputes as it indicated various factors that were to be taken into account in future negotiations. These factors included the preferential rights of Iceland (as the coastal state), the established rights of United Kingdom and West Germany, the conservation of fishery resources, and the joint examination of the measures required for this (Rosenne 1995, 207-208). The ICJ observed:

> It is one of the advances in maritime international law, resulting from the intensification of fishing, that the former *laissez-faire* treatment of the living resources of the sea in the high seas had been replaced by a recognition of a duty to have due regard to the rights of other States and the needs of conservation for the benefit of all. Consequently, both Parties have the obligation to keep under review the fishery resources in the disputed waters and to examine together, in the light of scientific and other available information, the measures required for the conservation and development, and equitable exploitation, of these resources, taking into account any international agreement in force between them, such as the North-East Atlantic Fisheries Convention of 24 January 1959, as well as such other agreements as may be reached in the matter in the course of further negotiation (ICJ-1974, 31).

In addition to this important element of the ICJ's decision, the Court also ruled that, in general, all parties concerned were under a duty to enter into meaningful negotiations to reach an agreement on the reconciliation of Iceland's preferential rights and the legitimate interests of Britain and West Germany (Rosenne 1995, 208).

These judgments delivered by the ICJ had far-reaching significance. Not only had the direct question been resolved—although tension over fishery resources in the disputed region did not cease entirely—but the determination by the ICJ also furthered the negotiations on the regime of governance for the sea in general. The judgments themselves were published in the middle of the second session of the Third United Nations Conference on the Law of the Sea in which one of the many unresolved

issues was the extent and nature of coastal states' jurisdiction over the natural resources of the sea. The pronouncement of the ICJ provided a meaningful clarification for the eventual Law of the Sea Treaty of 1982 as it recognized the right of the coastal state to exercise preferential or exclusive jurisdiction over natural resources in the maritime regions adjacent to its coasts (exclusive economic zone) while ensuring that other nations' rights were also recognized (Rosenne 1995, 208). Lastly, the ICJ emphasized the environmental component of fishery use through its recognition that the conservation of depleting fisheries was an important concern that had to be addressed. The ICJ determined that the law pertaining to fisheries must accept the primacy of the requirement of conservation based on scientific data (Singh 1988, 183).

Thus, the ICJ utilized its rights-based approach to dispute resolution by not only settling the international environmental conflict at hand, but also establishing a system for the future resolution of similar disputes. Moreover, the ICJ acted as a steward for the environment in its inclusion of conservation as a requirement for settling fishery disputes. This proactive manner of conflict resolution established an important precedent for the future resolution of international environmental disputes as the ICJ first, articulated its view that it had jurisdiction over such matters; second, recommended that disputants first attempt to settle conflicts with interest-based approaches; and third, illustrated that, if necessary, it would utilize its rights-based approach to both resolve disputes and further clarify international environmental law.

French Nuclear Tests in the South Pacific Ocean

At the same time that the *Fisheries Jurisdiction* case was being considered, the ICJ was presented with another opportunity to resolve an important international environmental dispute, this time with regard to state responsibility for transboundary radioactive pollution. On 9 May 1973, Australia and New Zealand called upon the ICJ to declare that French nuclear-weapon testing in the South Pacific Ocean, which hazarded downwind populations, constituted a violation of international environmental law in what is now known as the *1974 Nuclear Test* case (Stone 1993, 61). Similar to the case with Iceland with regard to the fisheries dispute, France refused to formally participate in the proceedings by claiming that the ICJ lacked jurisdiction in the matter. Despite France's lack of cooperation, the ICJ took a first step to reduce the high-level of tension which surrounded the issue when on 22 June 1973 it granted Interim Orders. This called upon the disputants involved to ensure, in general, that no action was taken

which might aggravate or extend the conflict before the ICJ had an opportunity to formally consider the case, and in particular, the ICJ called upon France to avoid nuclear tests causing the deposit of radioactive fall-out on Australian territory or on the territory of New Zealand, the Cook Islands, Niue, or the Tokelau Islands (Rosenne 1995, 209).

The next stage in the ICJ's approach to resolving the dispute was eliminating the ambiguity on the question of the court's jurisdiction, an issue which unfortunately was never clarified. Despite this shortcoming and France's continual refusal to participate formally in the proceedings citing the ICJ as "manifestly not competent" in the case, the French government announced that it would discontinue its atmospheric nuclear tests following completion of the series of tests already planned for the summer of 1974. France decided instead to limit its future tests of nuclear weapons to an underground facility in French Polynesia. As a result of this pronouncement, the ICJ ruled on 20 December 1974 that since the objective of Australia and New Zealand in involving the court for dispute resolution was to obtain a cessation of further atmospheric nuclear tests, and this issue had been resolved by the French declaration to discontinue, the ICJ had no reason to deliver a judgment on the matter (Rosenne 1995, 210). Consequently, the important issue of ICJ jurisdiction was not determined, nor was the important question of whether France was liable for the deposition of radioactive fallout on other nations.

There is little doubt, however, that if the case had not been withdrawn by the ICJ following France's declaration that it would only conduct underground nuclear tests, the judges would have succeeded in identifying a legal principle on which to base a decision (Birnie 1988, 112). Moreover, the decision of France to discontinue its nuclear testing in the South Pacific was undoubtedly in large part due to the availability of the ICJ as a rights-based dispute resolution mechanism. Although the ICJ did not deliver a formal judgment on the issue, Australia's and New Zealand's action of bringing the case to the attention of the ICJ, and thus indirectly to the international community as a whole, helped amass public attention to the case which pressured France to change its nuclear testing policy.

Since the underlying issues of the dispute had not been settled by the ICJ in its proceedings, it was believed at the time that there was little likelihood that the court would play any further role in the resolution of the conflict (Rosenne 1995, 210). However, France's decision in 1995 to resume nuclear testing in the South Pacific reinvolved the ICJ in the matter. Although the new set of nuclear tests were proposed as underground tests instead of atmospheric, nations of the South Pacific Ocean still feared the potential impacts of radioactive pollution. New Zealand led

the opposition to the resumption of testing, viewing such action as unacceptable and contrary to the legal, environmental, and political developments of the two-decade interim period. New Zealand considered different mechanisms to challenge the testing and decided the best mechanism for resolving the dispute was again to turn to the ICJ for adjudication. The case from the outset was recognized as having little chance of success because of the extra-jurisdictional hurdles arising from France's withdrawal from the compulsory jurisdiction of the court in 1973. This withdrawal precluded New Zealand from bringing a new case against France, and the only legal option that remained was to reopen the previous case (New Zealand MFAT 1996, 7).

The ICJ's decision focused on two primary questions: (1) whether it was possible to reopen the 1973 case, and (2) whether the 1973 case could be broadened to include underground nuclear testing. The Court decided in the affirmative to the first question, but ruled against New Zealand with regards to the second. Thus, although the ICJ dismissed the case, its decision was based on technical jurisdiction issues and did not represent in any way an endorsement of France's policy of nuclear testing. Despite the ICJ's failure to resolve the dispute directly, as was the case in 1973, the availability of a dispute resolution mechanism within the United Nations system provided a forum for New Zealand to bring the issue to the attention of the international community. This option forced France to attempt to justify its nuclear testing and its right to potentially expose adjacent nations with radioactive fallout before the world, which in the end contributed to the pressure on France to cease testing. Moreover, the ICJ, as it did in the *Fisheries Jurisdiction* case, utilized the opportunity to further the development of international environmental law. This was accomplished through its dissenting judgments which addressed international environmental issues in a general manner, and further clarified outstanding ambiguities of the ICJ's jurisdiction in the environmental domain (New Zealand MFAT 1996, 7–8).

Discussion and Conclusion

The *Fisheries Jurisdiction* case and the *Nuclear Tests* case represent international environmental disputes that the United Nations system has effectively addressed through its rights-based dispute-settlement mechanism, and specifically through the ICJ. Although these case studies provide illustrative examples of the historical application of the United Nations dispute settlement system, this international organization has the opportunity to utilize all of its conflict resolution mechanisms to prevent and resolve future international environmental disputes. In fact, it is primarily

due to the success of the United Nations implementation of Article 33 of its Charter in terms of creating the institutional capacity to resolve disputes using any of the three approaches, namely, power-based, rights-based, and interest-based, that the organization has the opportunity to be an effective resource for disputants.

As was noted previously, the potential to use power-based approaches, and particularly the Security Council, is seemingly limited unless the international environmental dispute in question is expected to lead to a violent conflict. Fortunately, in an era in which environmental problems are an important security concern, other components of the United Nations system are well-placed to facilitate the resolution of international environmental disputes. Ideally, the United Nations will first attempt to utilize its interest-based dispute resolution mechanisms before turning to rights-based approaches. It is certainly in the best interests of the parties involved in an international environmental dispute, as well as the world community, that such conflicts are settled effectively, and the chances for this are augmented when disputants first attempt to reach a mutually-agreeable resolution. If necessary though, the ICJ has demonstrated that it has the capacity to address competently such disputes, and furthermore, has illustrated the ability to use this authority to make clarifications regarding legal ambiguities.

Although to a certain extent the United Nations dispute settlement remains untested, from an institutional perspective, there now exists sufficient precedent, particularly with regard to the rights-based approach, to suggest that the international system has available a number of mechanisms to deal with environmental disputes that constitute a threat to international peace and security (Sands 1993, 383). A further challenge that the United Nations system is well-placed to address is the political will to effectively deal with potential international environmental disputes. There have recently been numerous formal reports issued by the United Nations on various security issues, most notably, Boutros-Ghali's *An Agenda for Peace.* The United Nations could effectively establish a formal policy on international environmental dispute resolution through an analogous report issued from the level of the Secretariat. Such a report should enumerate the dispute settlement mechanisms available to a state involved in an environmental conflict with recommendations as to which approaches are best-suited for different types of situations. The value of a report of this nature extends beyond an institutional exercise, as it would clarify to the international community that the United Nations is not only willing, but able to effectively facilitate the resolution of international environmental disputes.

In conclusion, as the next century approaches, international environmental disputes can be expected to increase in both number and intensity. The United Nations has the opportunity to adapt its dispute settlement to these new environmental security concerns to ensure that such disputes do not go unaddressed. More importantly, it is incumbent on the United Nations to do so if it wishes to continue its effective maintenance of international peace and security in a changing world order.

Notes

[1]Amedeo Postiglione is a Supreme Court Judge in Italy and the coordinator for the *Congress on a More Efficient International Law on the Environment and Setting up an International Court for the Environment Within the United Nations.*

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