

INTERNATIONAL LEGAL CASES ENHANCING THE SCOPE OF ENVIRONMENTAL PROTECTION

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Abstract English: International jurisprudence has a crucial role in the development of international environmental law. There is a close relationship between legal cases and environmental protection in international environmental law. Legal cases address contemporary problems and include new legal principles and rules of international law that can develop the scope (principles, structures and implementation) of environmental protection. In this perspective, judgments, advisory opinions and decisions of the international courts and tribunals, especially the International Court of Justice, have shown that State sovereignty has always been a limitation of the global expansion of environmental protection scope. Moving from absolute State sovereignty to the rule-based equitable and reasonable use of land could be an excellent opportunity to develop this legal field. Environmental protection emerged in the Trail Smelter case of 1941 as an earlier environmental dispute which resulted in the development of the environmental protection concept in other legal cases. Based on selected cases in international environmental law, the research attempts to analyze three stages of the emergence, enhancement and evolution of the environmental protection principle.

Keywords: Environment, Environmental protection, Legal cases, International courts, International Court of Justice (ICJ).

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1. Introduction

International judgments and precedents have faced many vicissitudes in recent decades. In this context, these ample international judgments and precedents have directly or indirectly proposed environmental issues¹. Judicial judgments refer to the activities of international courts in carrying out their contentious functions, having binding effects only on the parties. In contrast, the term judicial precedent, if used without condition and in absolute terms, refers to a series of judicial decisions. So far, it has been used where the international

¹ Kwiatkowska, 1999, pp. 10-15.

courts and tribunals adopt a similar process regarding a specific legal issue, and this process will be used repeatedly by facing similar disputes. Article 38 of the Statute of the International Court of Justice (ICJ) recognized judicial judgments and precedents as secondary sources to determine the legal rules². Hence, it can be concluded that the role of the ICJ is not only to reflect the existing legal rules, but it is also effective in regarding evolving rules since it not only settles the contentious issue between the parties but also confirms the practice of States. In addition to the ICJ, there are other bodies such as arbitral tribunals, mixed commissions and some national courts with specific conditions that effectively announce the rules and regulations that influence the behavior of States. Therefore, it can be seen that international judicial judgments and precedents play an essential role in the enhancement of environmental protection scope. During this time, the development of international environmental law in the light of international judgments and precedents has been changing positively. These changes mainly include the emergence, development and stabilization of the concept of environmental protection via submitted environmental disputes in the international judicial and arbitral systems.

The available evidence shows that the environment, especially in its international dimension, can provide the ground for collaboration and cooperation among countries. The appearance of environmental pollution and the need to prevent and control pollution have made countries and the international community try to cooperate and collaborate to overcome this issue due to specific national and international interests; however, this issue might well stir the ground for disputes. Contamination arising from industrial plants, chemical materials, etc., especially within the boundaries of countries, can lead to conflicts, strained relationships and even regional and international crises³.

From an analytical perspective, there are three stages of development of international judgments and precedents regarding environmental protection. In the first stage, dispute settlement bodies participated by approving the former procedure concerning transboundary damage and presenting the concept of *Erga Omnes*⁴ rules toward the human community as a whole that is potentially

² Statute of the International Court of Justice, 1945, Article 38.

³ Kiss and Shelton, 2007, p. 12.

⁴ *Erga Omnes* rules are known as the obligations of the States towards the international community as a whole. According to the ICJ judgment in the 'Case concerning Barcelona traction, Light and power company' (Belgium v Spain) 1970: «When a State admits into its territory foreign investments or foreign nationals, whether natural or juristic persons, it is bound to extend to them the protection of the law and assumes obligations concerning the treatment to be afforded them. These obligations, however, are neither absolute nor unqualified. In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved,

applicable to some norms of international environmental law. In the second stage, the ICJ strengthened its former procedure as one of the international dispute settlement bodies. It also established a connection between environmental protection on the one hand and humanitarian international law and demarcation of boundaries rules on the other hand. In this stage, the court articulates the scope of environmental protection and its content as far as possible. The third stage considered the third step of participation of dispute settlement bodies in environmental protection development, includes recent ICJ legal cases. In this stage, the ICJ plays its role by entering and studying the contents of specific regulations and implementation of environmental protection principles.

2. Cases Involving the Concept of “Environmental Protection”

In the past, environmental protection had a narrow sense and focused on the causes and effects of transboundary damages. In other words, it was against the idea that the environment is a common heritage of humankind that should be preserved and protected by all States. The Permanent International Court of Justice in the Lotus case of 1927, in interpreting the position of the principle of state sovereignty in the international legal order, provided an insight that, considering its importance, can be called “Lotus approach to state sovereignty”. Based on this, it is only under the shadow of international law regulations that restrictions can be placed on the independence and freedom of action of governments⁵.

The basis of this concept originally refers to two famous cases: “Trail Smelter” 1941 and “Lanoux Lake” 1957 arbitrations⁶. The origin of the Trail smelter case goes back to the activity of a zinc and lead metal smelting factory in the province of British Columbia. The factory’s activity after 1906, when the zinc and lead market also enjoyed an extraordinary boom due to the spread of pollutants in the air, including lead ash and other compounds of organic materials and sulfur, strongly affected the environment around the factory⁷. In this case, the Tribunal should decide whether Canada is responsible for damages to the crops and lands in Washington State caused by sulfur dioxide emissions created by the Smelter plant. The Tribunal awarded that according to the principles of international law, no State has the right to use or allow to use its territory to cause damage to other States, including the land, properties, or people of another territory. As a result,

all States can be held to have a legal interest in their protection; they are obligations *Erga omnes*». ‘Case concerning Barcelona traction, Light and power company’ (Belgium v Spain) 1970.

⁵ Özsu, 2009, pp. 29-49.

⁶ Rubin, 1970, p. 259.

⁷ Kuhn, 1938, pp. 785-788.

the Tribunal decided that Canada should pay compensation to the United States⁸. This case is purely historical. Never before has any other international judicial system delivered a decision like this to change the old meaning of sovereignty. It should be considered that the fundamental objective, as expressed in the text of the decision, is to dilute the old meaning of state sovereignty.

In 1957 another tribunal approved the narrow sense of environmental protection in a dispute between France and Spain concerning the transboundary damage of using the waters of Lake Lanoux. The Tribunal stated in its decision that the upstream country should stop generating changes in the waters of the river in a way that causes damage to the interests of the downstream country. At that time, the decision showed that the mere issue of the environment as a common heritage could not be the exclusive reason for environmental protection. The environment was protected where the behavior of one State may cause damage and losses to its neighboring States. It cannot be quickly concluded from these two cases that the environment has an intrinsic value to be protected, whether damage to another State is done or vice versa⁹. On the other hand, although the case of Lake Lanoux is an example of success in the field of peaceful settlement of international disputes, it seems that the tribunal has considered chiefly the old principle of the sovereign state rather than the effects of the implementation of the project on the environment.

The purpose of building the Gut Dam, which was partly on Canadian territory and partly on American, was to improve the shipping system. Between 1904 and 1951, as a result of the construction of the dam, changes were affecting the amount of water flowing into Lakes Ontario and Lawrence. Finally, in 1951-1952, the water level of Lake Ontario and the Lawrence River reached an unprecedented height, which caused flooding and damage to American cities located along the river. In 1968, the Tribunal in the Gut Dam case issued a decision similar to the Lake Lanoux, arguing that the government of Canada was obliged to compensate damages caused by the Gut Dam to the government of the United States. Also, the Tribunal recommended a settlement. Generally, the decision of the Gut Dam tribunal followed previous judicial precedents that each State that caused damage (responsible State) was obliged to pay the indemnity; hence, any loss and damage during the construction of the Gut Dam and after must be paid¹⁰. Although the mentioned dam was built in the territory of Canada in this respect, the classical principle of sovereignty governs in its territory, yet, therefore, upon the realization of damages, the principle of sovereignty is allocated with the no-harm rule.

On October 22nd, 1946, four British warships hit a mine while passing through the strait, and the mine explosion caused damage to the ships and killed 44

⁸ *R.I.A.A.*, 1978, pp. 1938-1941.

⁹ *Lake Lanoux Arbitration*, 1957, pp. 101.

¹⁰ Stuyt, 1983, pp. 178-186.

British officers and sailors. Following these explosions, the British government announced in a note to the Albanian government that it would like to mine the Corfu Channel. The answer of the Albanian state was negative, and it declared any mining as an attack on the sovereignty of Albania. Finally, on November 12 and 13 of the same year, British naval units started clearing mines in Albanian waters in the Corfu Strait without the consent of Albania¹¹. Although the Corfu channel case was not an environmental dispute, the ICJ, with its judgment, confirmed the principle first stated by the Trail Smelter case (as liability for the environmental damage occurs when harm is done to another State). In April 1949, which happened between England and Albania, the Court firmly states that it is the duty of every state not to knowingly allow its territory to be used for acts that are contrary to the rights of other states.¹² The court even has taken into account the principle of information, which is derived from the three historical principles of good faith, good neighborliness and cooperation.

Proceedings in the case concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v Spain) were instituted by an application of June 19th 1962, in which the Belgium government claimed political support of Barcelona Traction Co. against the Spain government to the ICJ. According to the Belgium government's claim, Spain judicial authorities, after issuing the bankruptcy verdict for Barcelona Traction Power Company, designated an administrator that permitted judicial authorities to make not only intervene in decisions for the Barcelona Traction Company but also for the property of affiliated companies to the Barcelona Traction has been seized. Then he released new shares for these companies and assets of this company. All the affiliated companies were regarded as the property of electric traction Barcelona Co. Hereafter, without strict observance of legal regulations of Spain, he attempted to auction the property of the company, resulting in the electricity supply being virtually liquidated and the assets of Barcelona Traction Company and its affiliates has been transferred to third parties. On January 1, 1970, the National Environmental Policy Act was signed into law, marking the 1970s as the Decade of the Environment. Later that year, the Environmental Protection Agency was created, consolidating the environmental programs of other agencies into a single entity. Therefore, evaluating previous judgments/decisions with hindsight is very delicate. In the mentioned case (1970), the ICJ had a lasting statement in its judgment that its importance in developing international environmental law and environmental protection could not be ignored. The court affirmed that some international obligations are *Erga Omnes* in nature. This means that all States (the international community) have an interest in respecting and supporting these commitments¹³. In this case, like the Corfu Channel case, the ICJ did not explicitly point out

¹¹ Rosenne, 2006, p. 670.

¹² *Corfu Channel Case*, 1949, p. 4.

¹³ *Case concerning Barcelona traction, Light and power company*, 1970, pp. 6-20.

environmental issues, but it is not negligible that such statements can influence the development of environmental protection without considering a State is damaged. Hence, according to *Erga Omnes* obligations, a State cannot cause damage by its actions to the environment beyond its jurisdiction. In addition, the court implicitly created the evolutionary principle that the commitments of all States toward environmental protection are described as a commitment toward the entire international community. This rule was revealed two years later in the 1972 Stockholm Declaration because principle 21st of the declaration points that States are responsible for activities in their territory that cause damage to the environment of other states. Based on this principle, any damage to the environment results in the international responsibility of the State, even if there is no damage to the environment of another State¹⁴.

The ICJ could point to the provisions of principle 21 in the *nuclear tests case* in 1974 (that is, the French State liability for environmental damage to the Australian and New Zealand environment also included the environment of areas beyond national jurisdiction), which this case ended by compromise and the court did not succeed to comment substantively on this issue¹⁵.

In 2017, the Inter-American Court of Human Rights issued a landmark Advisory Opinion that goes some way towards answering this question. The Advisory Opinion recognized extraterritorial jurisdiction for transboundary environmental harm; the autonomous right to a healthy environment; and State responsibility for environmental damage within and beyond the State's borders¹⁶.

3. Cases Enhancing the "Environmental Protection"

In this section, cases have been mentioned to develop the scope of environmental protection. The flag State principle dictates that, apart from codified exceptions, only a flag State has jurisdiction when a ship under its flag violates an international rule whilst sailing on the high seas. In practice, the flag State principle not only bestows flag States with an exclusive right to enforce international rules.

Cases that not only reaffirmed the principle mentioned in the *Corfu Channel* and *Trail Smelter* cases (Any state is committed not to allow its territory to be used for actions contrary to the rights of other states) which particularly used in case of international environmental law but also it is introduced as a part of customary international law to further support of environmental protection. In this context, the ICJ's response to the question of the General Assembly on the *legality of the threat or use of nuclear weapons* in 1996 was the obligation pointed out in the *Barcelona Traction* case toward protecting and respecting the

¹⁴ Declaration of the United Nations Conference on Human Environment, 1972, principle 21.

¹⁵ Poorhashemi, 2020, pp. 33-39.

¹⁶ Tigre and Urzola, 2021, pp. 24-50.

environment:

However, given the current state of international law and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defense, in which the very survival of a State would be at stake¹⁷.

In this case, the court has particularly accepted that the obligation to respect and protect the environment is regarded as a commitment toward the whole human society and has given an inherent value to the environment. In other words, the ICJ failed to articulate this commitment to developing international environmental law concerning *Nuclear Tests* in 1974. Also, it could not successfully declare that the obligation to protect the environment is a commitment to the international community as a whole, whether damage occurs to another State or not. However, the ICJ recognized this obligation as part of international environmental law in the advisory opinion in 1996, although it was late and occurred under the approval of some international instruments, including environmental international treaties in this regard. Overall, the advisory opinion on the legality of the threat or use of nuclear weapons (1996) has broken the narrow concept of environmental protection, which was accepted explicitly in the *Trail Smelter Case* and implicitly in the *Corfu Channel Case*. Therefore, respecting and protecting the environment was no longer conditioned on damage to the environment of another State.

Unlike the court's opinion, which allows the use of nuclear weapons under some circumstances, such as the principles of proportionality and necessity, Judge Weeramantry¹⁸ adopted an advanced approach to protecting the global environment in his dissenting opinion. He explained that using nuclear weapons violates environmental law principles, and it should be forbidden by law. Judge *Weeramantry* also pointed out other essential principles of international environmental law that support his point of view, such as the concept of the common heritage of mankind and the precautionary principle. He also believed that the validity of the principles of environmental law does not rely on the provisions of the treaties, but they are based on customary international law¹⁹.

In the case concerning French nuclear tests, the development of the atomic bomb by France began in the early 1950s. France's first nuclear test was conducted in Algeria on February 13th, 1960, while France conducted several nuclear tests in the Sahara before transferring the nuclear test program to the South Pacific Ocean. France also conducted many atmospheric and underground nuclear tests until 1992. According to France, the tests were carried out in complete safety. In this case, Australia and New Zealand instituted separate proceedings in the

¹⁷ *Legality of the use by a state of Nuclear Weapons in Armed Conflicts*, 1996, pp. 70-82.

¹⁸ Christopher Gregory Weeramantry, AM was a Sri Lankan lawyer who was a Judge of the International Court of Justice from 1991 to 2000.

¹⁹ *Legality of the use by a state of Nuclear Weapons in Armed Conflicts*, 1996, pp. 70-82.

ICJ, claiming that French nuclear tests in the Pacific Ocean caused the fall of radioactive material, which is a gross violation of the sovereignty of these two countries, a violation of international law and it also causes environmental damage. Before the rejection of New Zealand's application by the ICJ that the French nuclear tests would cause damage to the environment, the ICJ stated that this rejection did not compromise the State's obligations, including New Zealand and France, in order to respect and protect the natural environment. This case indicated the commitments of all States to protect the environment regardless of whether they are parties to a particular treaty or not²⁰.

The Gabčíkovo-Nagymaros project originates from a 1977 treaty between Hungary and Slovakia to build and operate the Gabčíkovo-Nagymaros system of locks. The 1977 treaty entered into force on June 30th, 1978. This treaty provides for the construction and operation of the system of locks by the parties through a joint venture. The executive and construction operations of the mentioned project were aimed at achieving goals such as the development of water resources, energy, transportation, agriculture, hydropower generation, development of shipping and navigation in the Danube River, and protection of the area adjacent to the river against floods. At the time of concluding the treaty, the countries pledged that the quality of the river water would not deteriorate due to the project implementation and that the river's natural environment would be protected²¹.

As a result of the intense criticism of the implementation of the project in Hungary, the Hungarian government decided to suspend the project on May 13th, 1989. During the project's suspension, negotiations were held between the parties, and solutions were presented, but finally, on May 19th, 1992, Hungary submitted a declaration to Czechoslovakia regarding the cancellation of the 1977 treaty. In the case concerning the *Gabčíkovo - Nagymaros Project*, 1997 (Hungary v Slovakia), the ICJ concluded that Hungary has the right to worry about its natural environment as a major benefit affected by the *Gabčíkovo - Nagymaros Project*. The court stated that since adopting the treaty on implementing the project between Hungary and Czechoslovakia in 1977, new *Erga Omnes* norms have emerged in environmental law. The court believed that parties must act according to the new norms in implementing the treaty and integrating these norms with the treaty. When the parties implement their obligations, they should consider new norms in investigating the Danube River's quality and protecting the environment²². In this case, the court first considered the natural environment as part of a country's fundamental interests. Then it confirmed the emergence of new *Erga Omnes* environmental law norms regarding implementing the 1977 treaty. The ICJ stated that the treaty's obligations should be implemented

²⁰ *Nuclear Tests Case*, 1974, p. 457.

²¹ Nakamichi, 2017, p 337.

²² *Case Concerning Gabčíkovo - Nagymaros Project*, 1997, pp. 16-20.

concerning *Erga Omne's* norms. To confirm this judgment, the court also referred to the advisory opinion on the legality of the threat or use of Nuclear Weapons in 1996 by stating that the general obligation of States to respect and protect the environment is a fundamental principle.

On the other hand, the court established the connection between economic development and environmental protection by using the following terms:

Such new norms have to be taken into consideration and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past. This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development²³.

In other words, a State that intends to operate development and economic planning must consider the existing *Erga Omnes* norms, and if any *Erga Omnes* norm emerges during the implementation activity, the new norm should also be considered in that economic activity.

In this case, the ICJ considered a customary basis for environmental protection. Judge *Weeramantry* designated a hierarchy between the environmental rules and development rights by his dissenting opinion in the case (the right to development is subject to the protection of the environment and not damaging it). He also considered environmental protection among human rights and finally insisted that States are obliged to assess the impacts of any activity on the environment before taking any action. According to Heal, the right to development cannot go so far as to cause substantial damage to the environment. In another dissenting opinion in the case concerning *Kasikili/Sedudu*, Judge *Weeramantry* stated that the delimitation of the maritime boundary must be done by considering the protection of the environment and the ecosystem's interest; and if it was necessary, they could deviate from the geometric boundary line drawn by the treaty and would adopt another solution to protect the ecosystem²⁴.

4. Cases Stabilizing the "Environmental Protection Principle"

In this section, legal cases are investigated that stabilize the principle of environmental protection and could provide the ground for further development of international environmental law and the opportunity for the participation of judicial and arbitral bodies in the evolution of environmental protection. For instance, the dispute between Argentina and Uruguay was related to the project construction of Pulp Mills on the River Uruguay (this river forms a part of the border between the two countries). This project was an essential resource for the local workers of Uruguay and composed of two eucalyptus paper mills

²³ Ibid.

²⁴ *Case concerning Kasikili/Sedudu Island*, 1999, pp. 1045.

using chlorine-freeing technology in the preliminary stage to produce dry paper. Argentina claimed that this action of Uruguay was inconsistent with the commitments of the bilateral treaty governing the river, whereas the project could result in the contamination of the river, air and residential environment of Argentina. In April 2006, Argentina instituted a proceeding against Uruguay in ICJ, claiming that Uruguay had violated the 1972 bilateral treaty's commitments (known as the Statute of the River Uruguay). Argentina seeks reparation from Uruguay due to the fault in the full implementation of the process established by the treaty, including the initial notification about the project and the need to consult with Argentina. Also, Argentina asked the project to be stopped because Argentina was concerned about the emission of toxic substances into the air and water and the release of foul-smelling steam from factories that damaged the ecosystem of the Uruguay River as well as the health of more than 300 thousand of its residents. Therefore, this project caused damage to fishery resources and the local economy²⁵.

According to the treaty of 1975, Uruguay has sovereignty rights. Simultaneously, it has two obligations, including preventing pollution and adopting measures in this regard to comply with applicable international standards²⁶. Based on Argentina's claims, the treaty of 1975 has merged with international environmental standards, and the court would find this opportunity to clarify the nature of the environmental protection standards and to use this situation to assess the contents of some valid norms of international environmental law and even the expression of the special relationship between the environmental treaties and customary international law. Argentina asked for provisional measures aimed at halting the Uruguayan project, which the ICJ rejected²⁷.

On April 20th 2010, the ICJ issued its judgment regarding this case. The court reminded the obligations of the parties such as international cooperation, negotiation and environmental protection. It also concluded that Uruguay had breached the procedural rules over the pulp mills construction for not notifying Argentina. However, in terms of substantive law, Uruguay was not sentenced for failing to prove losses and environmental damages by the court²⁸. In this case, the court has explicitly considered the issue of environmental protection and principles of international environmental law²⁹.

The second case going to be investigated in this section is the Aerial Herbicide Spraying Case 2008, in which Ecuador instituted a proceeding against Colombia in ICJ, claiming that Colombia had sprayed aerial toxic herbicides over the poppy farms in the borderline and the adjacent areas which have caused

²⁵ *Pulp mills on the River Uruguay*, Application instituting proceedings, 2006, pp. 5-10.

²⁶ Statute of the River Uruguay, 1975, pp. 340-347.

²⁷ *Pulp mills on the River Uruguay*, Provisional Measures, 2006, p. 113.

²⁸ *Pulp Mills on the River Uruguay*, 2010, p. 14.

²⁹ Zarei, Poorhashemi, and Pournouri, 2017, pp. 195-216.

severe damage to human health, property, environment and the biodiversity of Ecuador, emphasizing on the possibility of danger increase in the future. Ecuador stated that the border area is residential for some indigenous people, and their life depends on their natural environment. The majority of this population is impoverished, living on farming and traditional products and are also marked with underdeveloped infrastructure and rudimentary health care. Ecuador thus requested the court to declare that Colombia violated its obligations under international law³⁰. The court investigated the hierarchy among various norms of international law as far as necessary because Colombia's action of aerial spraying of farms was aimed at fighting the plantation and trafficking of narcotics. Colombia might justify its action by claiming a situation of necessity in which the court shall assess the issue of a fundamental conflict of interests between the two States (the fundamental interests of Ecuador are related to the environment, and the fundamental interests of Colombia are related to the necessity of fighting with the plantation and trafficking poppy and other narcotics). It is given that the court's jurisdiction is optional. It means that referring the dispute to the ICJ and accepting its decision depends on the parties' determination. Ecuador and Colombia decided to take this dispute out of court. Hence, the ICJ failed to implement one of its main functions in this case: the development of international environmental law³¹. This case could be a valuable opportunity for the court to clarify the content of the case and to express the implementation capacities of several customary norms of international environmental law.

In the case concerning whaling in the Antarctic (Australia vs. Japan), the Australian government instituted a proceeding against the government of Japan in the ICJ. Australia in its application, claimed that Japan breached specific provisions of the International Convention for the Regulation of Whaling (ICRW) and other international obligations on the protection of marine mammals and the marine environment by continuing the long-term whaling program in the South Pole about the second phase of its research program on the Antarctic (JARPA II). Australia explicated in its application that a moratorium on commercial whaling under article 5(1) (e) of the aforementioned convention, which stabilized zero whaling quotas per season, was adopted by the International Whaling Commission (IWC) in 1982. However, the government of Japan conducted large-scale whaling in the Antarctic contrary to the conventional and customary international law on the pretext of whaling for JARPA scientific research. In fact, the arguments of the Australian government, in this case, were based on Japan's violations of the obligations mentioned in the International Convention for the Regulation of Whaling (1946). These obligations are to observe in good faith the catch limit concerning the killing whales for commercial purposes inserted in paragraph 10 (e) and to act in good faith to refrain from undertaking

³⁰ *Aerial herbicide spraying*, Application instituting proceedings, 2008, pp. 4-26.

³¹ *Aerial Herbicide Spraying*, 2013, pp. 278-279.

commercial whaling in the Southern Ocean Sanctuary mentioned in paragraph 7 (b)³². Moreover, the government of Japan has violated the following obligations in different conventions continuously: (1) the basic principles included in Articles II and III of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (1973), in conjunction with the introduction of the sea apart from exceptional cases and in connection with catch off in whales; (2) provisions of articles 3, 5 and 10 of the Convention on Biological Diversity (1992), (3) commitments to ensure that activities within their jurisdiction or control would not cause danger to the environment of other countries or regions outside of their national territory; (4) cooperation with the other parties, either directly or through a competent international organization and taking necessary measures to prevent or minimize the negative impacts on biodiversity. By considering the above reasons and arguments, the Australian government requested the court for compensation by the Japanese government³³.

In this context, the court declared in its judgment that the permits issued by Japan in the framework of JARPA II are not subjected to the provisions of Article VIII of the ICRW. Based on the court's opinion, Japan did not act by its commitments and timetable mentioned in the appendix of ICRW by issuing special permits for killing, catching and curing three species of whales in the Antarctic under the name of JARPA II. Eventually, the court decided that Japan shall revoke any existing permits under JARPA II and refrain from granting any further permits in pursuance of the program in the future³⁴.

This decision indicated a positive performance of the ICJ on the protection of the environment. Special attention to the three environmental conventions, like CITES Convention, Biodiversity Convention and ICRW in this case, showed that the ICJ judges give great importance to their jurisdiction over environmental issues. In this case, the court took an *Erga Omnes* approach. The decisions of the court managed to be a powerful tool for the implementation of environmental conventions. In cases where these conventions do not have adequate and proper enforcement, the decisions of the ICJ could desirably cover this gap.

The following case concerns certain activities carried out by Nicaragua in the border area (*Costa Rica vs. Nicaragua*). In the late afternoon of November 18th, 2010, the government of Costa Rica instituted a proceeding against Nicaragua in the ICJ with a claim of invasion, occupation and use of Costa Rica's territory by the Nicaraguan Army to breach obligations based on several international conventions and treaties toward Costa Rica. Costa Rica believed that the constant presence of Nicaraguan military forces would violate Costa Rica's Territorial integrity and damage the ecosystem and national protected areas of Costa Rica, which is not acceptable for this country. To support its sovereignty, territorial integrity and

³² International convention for the regulation of whaling, 1946, Article 5.

³³ *Pulp Mills on the River Uruguay*, 2010, p. 14.

³⁴ *Whaling in the Antarctic*, 2014, p. 226.

the right to non-interference over the San Juan River, as well as the protection of lands, protected environmental areas and water flow of the Colorado River, Costa Rica required an interim order to be issued by the court. Costa Rica requested the court to call Nicaragua to do the following items: (1) withdraw its troops from Costa Rican territory, (2) prevent digging canals in Costa Rica's territory, and (3) stop cutting trees, removing vegetation and dredging rivers immediately. Because Nicaraguan troops have threatened protected regions and forests in addition to violating Costa Rican sovereignty rights, dredging the San Juan River would cause some risks to the water flow of the Colorado River. Nicaragua should not be allowed to dig canals and put the court and Costa Rica in a situation of *fait accompli*³⁵.

Hence, in this case, the ICJ issued the interim order on November 22nd, 2013. It stipulated that Nicaragua should refrain from any dredging and other activities, in particular, any operation within the two new artificial waterways in the disputed area, and has to fill the canal in two weeks and to provide the report containing all details for the court within one week after its completion. On the other hand, Costa Rica could take appropriate measures about the two new waterways after consultation with the Secretariat of the Ramsar Convention and prior notice to Nicaragua, as much as it is essential to prevent irreversible damage to the environment and, of course, in the adoption of such measures, should refrain from imposing any incompatible effects on the San Juan River. The parties should make the court aware of the terms of complying with court orders regularly and every three months³⁶.

In this case, Costa Rica sought to protect the sovereignty of Isla Portillos, the right of territorial integrity and the right to protect the environment of areas under its sovereignty. Conversely, on December 21st, 2011, Nicaragua submitted a petition against the government of Costa Rica to the ICJ. In this case, the government of Nicaragua has stated in the submitted petition that Costa Rica has provided preliminary environmental degradation by implementing a project regarding the construction of a parallel road very close to the southern shore of the border river of San Juan and expanding it to at least 120 km distance of Los Chiles in the West to the Delta in the East. In addition, it was proposed that the river's sediments have caused imminent peril to water quality, aquatic life and rare species and diversity of fauna and flora on the mentioned border river. So, the project's implementation by the Costa Rica government threatened the environment and the ecosystem. Nicaragua believed that the government of Costa Rica had violated the customary and conventional international law especially bilateral treaties and, in particular, the bilateral agreement between Nicaragua and Costa Rica in terms of Border Protected Areas in 1990; international environmental

³⁵ *Certain Activities carried out by Nicaragua in the Border Area*, Application instituting proceedings, 2010, pp. 2-18.

³⁶ *Certain Activities carried out by Nicaragua in the Border Area*, 2013, p. 354.

conventions, in particular, Ramsar Convention (1971); the Convention on the Protection of the World Cultural and Natural Heritage (1972); the Declaration of the United Nations Conference on the Human Environment in Stockholm (1972); the Convention on Biological Diversity, the Rio Declaration (1992); and the Convention on the Conservation of Biodiversity and Wildlife General Areas in Central America in 1992 and accordingly, it requested compensation from the delinquent government³⁷.

Finally, on December 13th, 2013, the ICJ rejected the request to issue an interim order. The court stated that the interim order would be issued if at least the rights claimed by the applicant were plausible, and the court believed that in this stage of the proceedings, it is not required to ensure the existence of the rights demanded by the claimant. The rights claimed by Nicaragua referred to immunity from transboundary damage originating from the rights of sovereignty and territorial integrity.

According to the principles of international law and the Charter of the United Nations 1945, States have, on the one hand, the sovereign right to exploit their resources by their environmental policies and, on the other hand, the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction³⁸. Furthermore, according to the recent practice of States, conducting environmental impact assessment is an obligation of international law by assuming that there is a risk of such significant damage caused by industrial activities. Thus, in this respect, Nicaragua's claim to get immunity from transboundary environmental damage is plausible. From the court's point of view, Nicaragua could not prove an actual and imminent peril causing irreparable damage to its rights. In addition, Costa Rica affirmed that it should be committed not to damage by activities under its jurisdiction and to take required measures to prevent such environmental damage³⁹.

In the case concerning the Construction of a Road in Costa Rica along the San Juan River, the ICJ declared in its decision that Nicaragua could not prove the point that the construction of the road caused significant transboundary damage and that Costa Rica has sovereignty over the mentioned territory. On the other hand, in the case concerning Certain Activities carried out by Nicaragua in the

³⁷ It is important to note some legal instruments and international cases in this issue such as: 'Convention on Wetlands of International Importance especially as Waterfowl Habitat' 1971; 'Declaration of the United Nations Conference on Human Environment' 1972; 'Convention Concerning the Protection of the World Cultural and Natural Heritage' 1972; 'Convention for the Conservation of the Biodiversity and Protection of the Main Wild Life Sites in Central America' 1992; 'Convention on Biological Diversity' 1992; 'Declaration of the United Nations Conference on Environment and Development' 1992.

³⁸ Accepted by the principle 21 of the *Stockholm declaration* 1972.

³⁹ *Construction of a Road in Costa Rica along the San Juan River*, 2013, p. 398.

Border Area, the court found that military presence on Costa Rican territory is a violation of the territorial sovereignty of Costa Rica, and Nicaragua must compensate Costa Rica for damages caused by Nicaragua's unlawful activities⁴⁰.

According to the abovementioned cases, the States of Costa Rica and Nicaragua seem to prefer sovereignty rights and interests to environmental protection. It can be said that Costa Rica and Nicaragua, and most of the states respect the environment. In contrast, their sovereignty faces some risks, and they would claim their rights and interests, such as sovereignty and territorial integrity, under environmental protection in international courts, like ICJ. However, it is worth noting that environmental protection can be a strong reason for action in international courts. The table shows a summary of the relationship between legal cases and protecting the environment in international environmental law:

TABLE: A SUMMARY OF THE DETAILED CONTENT

Legal Cases	Year	Nature of Arbitral/Judicial Bodies	Cases Involving the Concept of "Environmental Protection"	Cases Enhancing the "Environmental Protection"	Cases Stabilizing the "Environmental Protection Principle"
Lotus	1927	PCIJ	its title to exercise jurisdiction rests in its sovereignty.	×	×
Trail Smelter	1938-1941	Tribunal	Responsibility for environmental damage is when damage is caused to another state	×	×

⁴⁰ *Certain Activities carried out by Nicaragua in the Border Area & Construction of a Road in Costa Rica along the San Juan River*, 2015, pp. 75-77.

Corfu channel	1949	ICJ	The Court did not explicitly refer to environmental issues, but the potential of such a statement to develop regulations and protect the environment cannot be ignored, regardless of whether the state suffered damage.	x	x
Lake Lanoux Arbitration	1957	Tribunal	The environment has an inherent value to protect and protect, whether damage has been done to another state or vice versa.	x	x
Gut Dam	1968	Tribunal	It is a continuation of the international judicial procedures that the damaging governments must compensate and any losses caused by the construction of the Ghat dam during the construction period and after it must be paid.	x	x

Barcelona traction	1970	ICJ	Based on general obligations, a government cannot cause damage to the environment in areas beyond its jurisdiction with its actions, and implicitly, the court made this development that the obligations of governments to protect the environment have the characteristics of an obligation towards the entire international community.	×	×
Legality of the use by a State of Nuclear Weapons in Armed Conflicts	1996	ICJ	×	It expresses the commitment of all governments regardless of whether they are party to a particular treaty on environmental protection or not.	×

Gabcikovo - Nagymaros Project	1997	ICJ	x	<p>The new norms and standards of international environmental law should be taken into account both when governments intend to carry out new activities and when continuing activities that have started in the past. The necessity of compromise between economic development and environmental protection lies in the concept of sustainable development. In other words, a government that intends to carry out economic and development operations must first take into account the existing rules, and if a new rule appears during the implementation of economic activity, the new rule must be taken into account in the implementation of that activity.</p>	x
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Pulp mills on the River Uruguay	2006	ICJ	x	x	In this judgment, the court has explicitly considered the issue of environmental protection and the principles of international environmental law.
whaling in the Antarctic	2010	ICJ	x	x	The issued verdict shows the positive performance of the court in relation to environmental protection.

5. Conclusion

The jurisprudence of the Permanent Court of International Justice (PCIJ) and the International Court of Justice (ICJ), as the principal judiciary body of the United Nations, is instructive in determining the nature of the damage in international environmental law. For this purpose, from the first era of the judgments, advisory opinions and decisions of the international courts and tribunals, as seen in the Corfu Channel case 1927, international courts stipulated that the State's obligation is subject to damage to other States by expressing general terms. Still, with the advent of *Erga Omnes* rules, a significant development occurred in the environmental protection scope. Although the implementation of *Erga Omnes* obligations failed in the case of France's nuclear tests, its effect is evident in the Stockholm declaration on the human environment in 1972⁴¹. In recent cases, the participation of the international courts, particularly the ICJ, in developing environmental protection can be summed up. Thus, the general obligation of governments is to ensure that the environment of other States and the environment beyond their national jurisdiction are respected in activities within their territory, as rooted in customary international law. In other areas

⁴¹ Article 21 expresses the commitment to respect and protect the environment of other States or beyond national jurisdiction.

of international law, environmental considerations should be considered. For example, the principles of necessity and proportionality are to be respected in an attack on a legitimate military target that may cause damage to the environment, and such considerations should not be overlooked while an operation is done for economic development. In some judgments, dissenting opinions are issued like Judge Weeramantry, who considered some critical issues, for instance, the customary obligation of States to assess the effects of large-scale projects on the environment, the right to the environment as a human right, restrictions on the right to economic development and the relationship between treaty and customary law in the field of environment.

The political determination of States influences the ICJ's failure to establish a chamber for environmental matters and cannot be attributed to the court's judges. Although the specific structure of the court likely is one of the reasons concerning the prolongation of the proceedings in the court, one of the reasons for turning to arbitration to settle disputes concerning the environment can be the speed of arbitration and the importance of faster dispute resolution for countries.

The International Court of Justice looked at environmental protection issues with suspicion and missed the opportunities needed to develop environmental protection scope by adopting such an approach. For example, in the advisory opinion of the ICJ, concerning the threat or use of nuclear weapons (1996) and the France nuclear tests case (1974), the conservative views of the court on the mentioned cases persisted. In the case of the Gabčíkovo-Nagymaros project (1997), the court's view on the destruction of the environment as a violation of *Erga Omnes* rules was considered with suspicion, while in the New York Convention (1997) on the non-navigational uses of international watercourses and the Rome Statute of the International Criminal Court (1998), the issue of large scale environmental destruction was considered as a violation of *Erga Omnes* rules⁴². This indicates that in the final study, international treaties are preferred to international legal cases in the evolution and development of environmental protection. However, it seems that the ICJ gradually gets far from its traditional approach based on the primacy of State sovereignty. So far, judgment about how much the legal cases and the ICJ's judgments could lead to environmental protection governance needs more time.

Despite the significant efforts at the national, regional and international levels to implement the principles and rules on environmental protection, there is no doubt that the destructors of the environment are doing their acts freely and without feeling any threats of the effective pursuit of justice in most parts of the world and the lack of international mechanisms to address cases of environmental violations is felt. Therefore, one of the most critical difficulties of environmental

⁴² United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses, 1997; Rome Statute of the International Criminal Court, 1998.

protection development and the State liability systems is the absence of a specific and competent legitimate reference on the international scale.

The conducted analyses show that all decisions except a few exceptional cases, such as the Trail Smelter, taken by international courts could not play a significant role in the development of environmental law and environmental protection area. However, a few international disputes admitted in the ICJ are dedicated to environmental issues⁴³. However, by analyzing the same number of cases issued by settlement, dispute bodies can conclude that the decisions of the international courts have been issued by a cautious approach due to some problems and obstacles. Most of these obstacles refer to the State's sovereignty and political and economic challenges inherent in such disputes, which expose the court to problems or doubt in taking a more assertive stance in support of the environment. Among proposals that can be presented in this regard are as follows:

- The international community requires a potent global agent that consolidates the motivation of international environmental protection and reinforces access to efficient judicial mechanisms at the global level.
- Settlement dispute bodies, especially the International Court of Justice, can play an interpretive role in environmental issues. As an institution to revise environmental judgments, the court can practically increase its support for the environment. By playing this role, the court can participate in coordinating environmental policies in international jurisprudence. In addition, the court can respond to concerns regarding violations resulting from various institutions' contradictory judicial procedures. To carry out this task, the court can interpret the United Nations Charter in environmental cases in a way that the appeal has been granted to the court so far.
- It can create an independent structure or judicial agent separate from the International Court of Justice using a particular procedure for the settlement of environmental disputes.
- The creation of an independent judicial or quasi-judicial structure in the form of the International Court, similar to particular branches of courts with special powers to handle environmental disputes.
- Codification and adoption of a legally binding treaty in the light of the Vienna Convention on the Law of Treaties to accept complete jurisdiction of the ICJ or the special court to handle environmental disputes by delegating sovereignty of States in the cases that national sovereignty is assumed as an obstacle to a free and fair trial in the ICJ.
- Determining the conditions for the election or appointment of the courts' judges or special courts to handle environmental disputes that are specialized in the environment or at least have enough experience.
- Training international environmental law to international judges and referees.

⁴³ Obviously, major disputes refer to commercial issues between States and institutions.

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