Legal Aspects of Sustainable Development

Greening International Jurisprudence

Environmental NGOs before International Courts, Tribunals, and Compliance Committees

Cathrin Zengerling

Martinus Nijhoff Publishers

Greening International Jurisprudence

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Series Editor

David Freestone

This series publishes work on all aspects of the international legal dimensions of the concept of sustainable development. Its aim is to publish important works of scholarship on a range of relevant issues including conservation of natural resources, climate change, biodiversity loss and the role of international agreements, international organizations and state practice.

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By

Cathrin Zengerling

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For David Justus Raphael

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Series Editor's Preface

I am very pleased to be able to include this work by Dr Cathrin Zengerling, as the seventeenth volume in the Martinus Nijhoff series on *Legal Aspects of Sustainable Development* published under my General Editorship. The aim of this series is to publish works at the cutting edge of legal scholarship that address both the practical and the theoretical aspects of this important concept.

This volume is a revised version of her doctoral thesis at the Law School of the University of Hamburg in Germany. It looks at the ways that a range of judicial and quasi-judicial bodies, courts, arbitral tribunals and compliance committees enforce international environmental law, and in particular at the role of environmental NGOs. As Dr Zengerling points out, the enforcement of environmental law takes place at the national, regional and international levels. Within most national systems it is possible for environmental NGOs to initiate cases before national courts to enforce environmental law and, in Europe NGOs have initiated a number of important cases to enforce European environmental law obligations. The more than fifty countries who now participate in the UN Economic Commission for Europe have also gone one step further with the 1998 Aarhus Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters in which they agree to strengthen the access that individuals and NGOs have to justice in environmental matters at the national and also at the international level.

While it is certainly true to say that a considerable amount of research has been done with respect to the rights of access of citizens and environmental NGOs at the national and European level to enforce environmental laws, not much has been written yet with regard to the regional and universal international level and, as the author stresses, there has been little attempt to present a holistic picture of the judicial and quasi-judicial *fora* involved in enforcement and compliance control of international environmental laws.

This is the important task that this thoughtful and scholarly work seeks to perform. Its key strength is a rigorous and comprehensive assessment of the various ways that international environmental law issues can be brought before a very wide range of regional and international bodies, ranging from the International Court of Justice to the Kyoto Protocol Compliance Committee.

David Freestone
Washington, D.C.

Acknowledgments

This book is a subject very close to my heart and I want to thank all those who supported me in so many different ways throughout the thinking, writing, and publishing process.

In 2007, I had the opportunity to work for three months with the secretariat to the UNECE Aarhus Convention. This experience has been a rich source of inspiration and motivation for this study and I am very grateful to the "Aarhus team" of the time: Jeremy Wates, Michael Stanley-Jones, Marianna Bolshakova, Fiona Marshall, Irina Zodrow, Maricar de la Cruz and Andrea Hegedus.

Special thanks are due to my doctoral supervisor Prof. Dr. Hans-Joachim Koch, University of Hamburg, and to Prof. Dr. Martin Wickel, HafenCity University Hamburg, for their ongoing support and encouragement over the years. This book could not have been written without their active assistance. I also owe many thanks to my second supervisor Prof. Dr. Stefan Oeter, University of Hamburg, for his committed review of the work.

In order to gain deeper insight into several aspects of this study, I was fortunate to be able to interview Jeremy Wates, former Secretary to the Aarhus Convention, currently Secretary General of the European Environmental Bureau, Brussels; Christian Lindemann, Head of Division E III 1, Strategic Aspects of International Cooperation, Regional Conventions, International Law at the German Federal Ministry for the Environment, Nature Conservation and Nuclear Safety, Berlin; Prof. Dr. Markus Krajewski, Professor for Public and International Law at Friedrich-Alexander-University Erlangen-Nürnberg; and Dr. Roda Verheyen, environmental lawyer at Günther Rechtsanwälte, Hamburg. I am most grateful for their kind and generous support and valuable comments.

This study has been accepted as a dissertation by the faculty of law of the University of Hamburg. It was awarded the 2013 "Promotionspreis der Fakultät für Rechtswissenschaft der Universität Hamburg zur Förderung herausragenden wissenschaftlichen Nachwuchses" (University of Hamburg, faculty of law doctoral thesis award) sponsored by the "Förderkreis Rechtswissenschaft der Universität Hamburg e.V." (University of Hamburg association for the promotion of legal studies) and one of the 2013 "Biokratie-Preise für umweltrechtliche Forschung" ("Biocracy Prizes for research in environmental law") donated by the Hamburg entrepreneur, environmental pioneer, and founder of the Hamburg "Haus der Zukunft" ("House of the Future") Dr. Georg Winter. I feel truly honored and am most grateful to the generous donors and the selection committees for their recognition of my work.

Particular thanks also go to my friends Brita Bohman, Dr. Seyda Emek, Sophie Heldmann, Heike Krüger, Dr. Claudia Müller, and Anne Katrin Stange for discussing and proofreading various aspects and sections of this study. I am indebted to Christiane Böhm for her valued assistance and to Liz Mallows for her kind and committed editorial review of this book.

I am very pleased and honored that Prof. David Freestone and Marie M. Sheldon from Brill/Martinus Nijhoff Publishers have accepted this book for publication in the series "Legal Aspects of Sustainable Development". Many thanks are also due to Lisa Hanson and Michael Mozina from Brill/Martinus Nijhoff Publishers for their kind and valued editing support.

Last but not least, deepest thanks to my beloved family, Raphael Nöske, little David Justus Raphael and my parents for being my source of joy and strength.

Hamburg, May 2013
Cathrin Zengerling

List of Abbreviations

Aarhus Convention	1998 UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters
ACHR	1969 American Convention on Human Rights
AfCtHPR	African Court for Humans and Peoples' Rights
Afr Hum Right Law J	*African Human Rights Law Journal*
African Charter	1981 African Charter on Human and Peoples' Rights
AJLS	*African Journal of Legal Studies*
Am. J. Int'l L.	*American Journal of International Law*
Am. U. Int'l L. Rev.	*American University International Law Review*
AOSIS	Association of Small Island States
Ariz. J. Int'l & Comp. L.	*Arizona Journal of International & Comparative Law*
ASEAN	Treaty of Amity and Cooperation in Southeast Asia
ASIL-IELIG	American Society of International Law's Interest Group in International Environmental Law
ATCA	Alien Tort Claims Act
AU	African Union
AVR	*Archiv des Völkerrechts*
Basel Convention	1995 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal
BAN	Basel Action Network
BAT	best available technology
BIT	Bilateral investment treaty
BNatSchG	Bundesnaturschutzgesetz – German Federal Nature Conservation Act
BVerwGE	Entscheidung des Bundesverwaltungsgerichts – decision of the German Federal Administrative Court
Brit. J. Int'l S.	*British Journal of International Studies*
BUND	Bund für Umwelt und Naturschutz Deutschland
BYIL	*British Yearbook of International Law*
CAFTA-DR	Dominican Republic-Central America Free Trade Agreement
Cal. L. Rev.	*California Law Review*
Colum. Hum. Rts. L. Rev.	*Columbia Human Rights Law Review*
CAN	Climate Action Network
CAO	Compliance Advisory Ombudsman of the World Bank

CBD	Convention on Biological Diversity
CC	Compliance Committee
CCAMLR	Commission for the Conservation of Antarctic Marine Living Resources
CDES	Center for Economic and Social Rights
CEC	Commission for Environmental Cooperation under NAAEC
CEDAH	Center for Human Rights and Environment
CEJIL	Center for Justice and International Law
CITES	1973 Convention on International Trade in Endangered Species
CFC	Chlorofluorocarbon
CFI	Court of First Instance
CGG	Commission on Global Governance
CIEL	Centre for International Environmental Law
CLI	Climate Legacy Initiative of Vermont Law School
COE	Council of Europe
Colo. J. Int'l Envtl. L. & Pol.	*Colorado Journal of International Environmental Law and Policy*
CMP	Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol
CSD	Commission for Sustainable Development
CTE	Committee on Trade and Environment under WTO
CLRTAP	1979 UNECE Convention on Long-range Transboundary Air Pollution
DG Environment	Directorate-General Environment of the European Commission
DSB	Dispute Settlement Body of the WTO
DSU	1994 WTO Understanding on Rules and Procedures Governing the Settlement of Disputes
Duke L.J.	*Duke Law Journal*
EB	Enforcement Branch of Kyoto Compliance Committee
EBRD	European Bank for Reconstruction and Development
EC	European Community (before becoming EU)
ECHR	1950 Convention for the Protection of Human Rights and Fundamental Freedoms
ECJ	European Court of Justice
ECOSOC	United Nations Economic and Social Council
ECT	Energy Charter Treaty
ECtHR	European Court of Human Rights
EEB	European Environmental Bureau
EECCA	Eastern Europe, Caucasus and Central Asia
EEZ	Exclusive Economic Zone

e.g.	for example
EIA	Environmental Impact Assessment
EJIL	*European Journal of International Law*
elni Review	*Environmental Law Network International Review*
ELJ	*European Law Journal*
EMS	Environmental management system
ENB	Earth Negotiations Bulletin
ENGO	Environmental Non-governmental organization
Environ Pol Law	*Environmental Policy and Law*
ERT	expert review team under Kyoto Protocol
Espoo Convention	1991 UNECE Espoo Convention on Environmental Impact Assessment in a Transboundary Context
EU	European Union
EurUP	*Zeitschrift für europäisches Umwelt- und Planungsrecht*
FAO	United Nations Food and Agriculture Organization
FB	Facilitative Branch of Kyoto Compliance Committee
FDI	foreign direct investment
GATS	1995 General Agreement on Trade in Services
GATT	1994 General Agreement on Tariffs and Trade
GEF	Global Environmental Fund
Geo. Int'l Envtl. L. Rev.	*Georgetown International Environmental Law Review*
Geo. L.J.	*Georgetown Law Journal*
Geo. Wash. Int'l L. Rev.	*George Washington International Law Review*
Geo. Wash J Int Law Econ	*George Washington Journal of International Law and Economics*
GEP	*Global Environmental Politics*
Ger. L J.	*German Law Journal*
GLOBE	Global Legislators for a Balanced Environment
GMO	genetically modified organism
GRI	Global Reporting Initiative
Hague YIL	*Hague Yearbook of International Law*
Harv. Envtl. L. Rev.	*Harvard Environmental Law Review*
Harv. Hum. Rts. J.	*Harvard Human Rights Journal*
HastingsInt'l&Comp. L. Rev.	*Hastings International and Comparative Law Review*
Hum. Rts. L. Rev	*Human Rights Law Review*
Hum. Rts. Q.	*Human Rights Quarterly*
IAComHR	Inter-American Commission of Human Rights
IACtHR	Inter-American Court of Human Rights
IALANA	International Association of Lawyers against Nuclear Arms
ICAO	International Civil Aviation Organization

ICEAC	International Court of Environmental Arbitration and Conciliation
ICE Coalition	International Court for the Environment Coalition
ICEF	International Court of the Environment Foundation
ICJ	International Court of Justice
ICSID	International Centre for the Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States
IFC	International Finance Corporation
IGO	International governmental organization
IISD	International Institute for Sustainable Development
IJCSL	*International Journal of Civil Society Law*
ILC	International Law Commission
ILO	International Labour Organization
Ind. J. Global Legal Stud.	*Indiana Journal of Global Legal Studies*
INGO	International non-governmental organization
IJMCL	*International Journal of Marine and Coastal Law*
Int'l & Comp. L.Q.	*International and Comparative Law Quarterly*
Int'l Comm. L. Rev.	*International Community Law Review*
IPCC	Intergovernmental Panel on Climate Change
ISA	International Seabed Authority
ISQ	*International Studies Quarterly*
ITLOS	International Tribunal for the Law of the Sea
IUCN	International Union for Conservation of Nature
IUU fishing	illegal, unreported and unregulated fishing
J World Trade	*Journal of World Trade*
J. Int'l Econ. L.	*Journal of International Economic Law*
JAL	*Journal of African Law*
JEL	*Journal of Environmental Law*
JuS	*Juristische Schulung*
KP	1997 Kyoto Protocol to the United Nations Framework Convention on Climate Change
Law & Prac. Int'l Cts. & Tribunals	*The Law & Practice of International Courts and Tribunals*
LCA	Life Cycle Assessment
LJIL	*Leiden Journal of International Law*
MARPOL Convention	1973 Convention for the Prevention of Pollution from Ships
Max Planck UNYB	*Max Planck Yearbook of United Nations Law*
MEA	Multilateral environmental agreement

Mich. J. Int'l L.	*Michigan Journal of International Law*
MMPA	1972 US Marine Mammal Protection Act
Montreal Protocol	1987 Montreal Protocol on Substances That Deplete the Ozone Layer
MOP	Meeting of Parties
MOX	mixed oxide fuel
MqJICEL	*Macquarie Journal of International and Comparative Environmental Law*
NAAEC	North American Agreement on Environmental Cooperation
NAFTA	North American Free Trade Agreement
NCP	National Contact Point under OECD Guidelines
NGO	non-governmental organization
Non-St. Actors & Int'l L.	*Non-State Actors and International Law*
NuR	*Natur und Recht*
NVwZ	*Neue Zeitschrift für Verwaltungsrecht*
N.Y.U. Envtl. L.J.	*New York University Environmental Law Journal*
N.Y.U. J. Int'l L. & Pol.	*New York University Journal of International Law and Politics*
OAS	Organization of American States
OAU	Organization of African Unity (transformed into AU in 2002)
OECD	Organization of Economic Co-operation and Development
OECD Guidelines	Guidelines for Multinational Enterprises established by the OECD
OEEC	Organization for European Economic Cooperation
OSPAR Convention	1992 Convention for the Marine Environment of the North-East Atlantic
PCA	Permanent Court of Arbitration
PAN	Pesticide Action Network
PCIJ	Permanent Court of International Justice
PIC Convention	1998 Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade
PICT	Project on International Courts and Tribunals
POPs Convention	2001 Stockholm Convention on Persistent Organic Pollutants
PPIF Task Force	Task Force on Public Participation in International Forums under Aarhus Convention
PRTR Protocol	2003 Protocol on Pollutant Release and Transfer Registers to the Aarhus Convention
Ramsar Convention	1971 Ramsar Convention on Wetlands

REC	Regional Environmental Centre for Central and Eastern Europe
RECIEL	*Review of European Community & International Environmental Law*
Rio Declaration	1992 Rio Declaration on Environment and Development
S. Cal. L. Rev.	*Southern California Law Review*
SGC	Stichting Greenpeace Council
SPA	special protection area
SPS Agreement	WTO Agreement on the Application of Sanitary and Phytosanitary Measures
Stan. J. Int'l L.	*Stanford Journal of International Law*
TBT Agreement	WTO Agreement on Technical Barriers to Trade
TED	turtle excluder device
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TRIPS	1994 Agreement on Trade-Related Aspects of Intellectual Property Rights
Tul. Envtl. L.J.	*Tulane Environmental Law Journal*
U. Pa. J. Int'l Econ. L.	*University of Pennsylvania Journal of International Economic Law*
UCLA J. Envtl. L. & Pol'y	*UCLA Journal of Environmental Law & Policy*
UIA	Union of International Associations
UmwRG	Umwelt-Rechtsbehelfsgesetz – German Environmental Appeals Act
UN	United Nations
UNCED	United Nations Conference on Environment and Development
UNCITRAL	United Nations Commission on International Trade Law
UNCLOS	1982 United Nations Convention on the Law of the Sea
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Programme
UNECE	United Nations Economic Commission for Europe
UNEP	United Nations Environmental Programme
UNFCCC	United Nations Framework Convention on Climate Change
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees
UNU	United Nations University
UK	United Kingdom
U.S.	United States of America
VCLT	1969 Vienna Convention on the Law of Treaties

Vienna Convention	1985 Vienna Convention for the Protection of the Ozone Layer
VMS	vessel monitoring system
WEC	World Environment Court
WHO	World Health Organization
WTO	World Trade Organization
WWF	World Wide Fund for Nature
Yale L.J.	*Yale Law Journal*
YbIEL	*Yearbook of International Environmental Law*
ZaöRV	*Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*
ZIB	*Zeitschrift für internationale Beziehungen*
ZUR	*Zeitschrift für Umweltrecht*

Table of International Instruments

1907 Hague Convention for the Pacific Settlement of International Disputes, 18 October 1907, in force 26 January 1910

1946 International Convention for the Regulation of Whaling, 2 December 1946, in force 10 November 1948

1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), 4 November 1950, in force 3 September 1953

1956 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), 18 March 1956, in force 14 October 1966

1958 Geneva Convention on Fishing and Conservation of the Living Resources on the High Seas, 29 April 1958, in force 20 March 1966

1960 Convention on the Organisation for Economic Co-operation and Development (OECD Convention), 14 December 1960, in force 30 September 1961

1969 Vienna Convention on the Law of Treaties (VCLT), 23 May 1969, in force 27 January 1980

1969 American Convention on Human Rights (ACHR), 22 November 1969, in force 18 July 1978

1971 Convention on Wetlands of International Importance Especially as Waterfowl Habitat (Ramsar Convention), 2 February 1971, in force 21 December 1975

1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), 3 March 1973, in force 1 July 1975

1973 Convention for the Prevention of Pollution from Ships (MARPOL Convention), 2 November 1973, in force 2 October 1983

1979 Convention on the Conservation of European Wildlife and Natural Habitats (Bern Convention), 19 September 1979, in force 1 June 1982

1979 UNECE Convention on Long-range Transboundary Air Pollution, 13 November 1979, in force 16 March 1983

1979 Convention on the Conservation of Migratory Species of Wild Animals (Bonn Convention), 23 June 1979, in force 1 November 1983

1981 African Charter on Human and Peoples' Rights (AfCHPR, African Charter), 27 June 1981, in force 21 October 1986

1982 United Nations Convention on the Law of the Sea (UNCLOS), 10 December 1982, in force 16 November 1994

1985 Vienna Convention for the Protection of the Ozone Layer, 22 March 1985, in force 22 September 1988

Introduction

This study analyzes how international judicial and quasi-judicial bodies such as courts, arbitral tribunals, and compliance committees enforce international environmental law, and, in particular, how environmental NGOs are involved in this enforcement. The research is based on the assumption that there is a rich body of substantive international environmental law in place, which is not yet appropriately implemented and enforced. Implementation and enforcement takes place at many levels and in informal and formal ways. Amongst the most important institutions in the formal implementation and enforcement of normative commitments are national, regional, and international judiciaries, with a growing role for international judicial and quasi-judicial bodies. Key players in the informal and formal implementation and enforcement of (international) environmental law at all levels are environmental NGOs.

To improve the enforcement of environmental laws, many national legislators enabled environmental NGOs and citizens to bring environmental cases before their national judiciaries. With the Compliance Committee of the Aarhus Convention, states parties from the UNECE region for the first time set up an international quasi-judicial review procedure that can be initiated by environmental NGOs and individuals to enforce international environmental law. The 1998 UNECE Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters[1] aims to "contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being."[2] In order to achieve this objective, parties to the Convention agreed to strengthen the access individuals and NGOs have to justice in environmental matters at national and, most notably, also at international level. This research considers this innovation in international environmental law enforcement and scrutinizes how environmental NGOs and international judicial and quasi-judicial bodies in general do currently (de lege lata) interact and should (de lege ferenda) interact to contribute appropriately to the implementation and enforcement of national and international environmental law.

The analytical structure of the study is based on four fields of discussion and research briefly outlined below: the enforcement deficit in environmental law; global environmental governance and sustainable development; the proliferation of

[1] All full titles and sources of international conventions and protocols referred to in this study are listed in the table of international instruments.

[2] Article 1 of the 1998 Aarhus Convention.

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international judicial and quasi-judicial bodies such as courts, tribunals, and compliance committees; and deliberation and democratic global governance.

I. Enforcement Deficit in Environmental Law

One of the reasons for this research project is the enforcement deficit in environmental law, a topic which has been much discussed. Responding to a wide range of environmental problems such as air and water pollution, loss of biodiversity, ozone depletion, and climate change, the body of environmental law has been steadily growing on national, regional, and universal levels throughout the last four decades.[3]

The forum chosen for the development of environmental legislation ideally resembled the regional scope of the environmental problem. For example, local point sources causing local pollution or environmental degradation, such as noise pollution or air and water pollution through emissions of heavy metals, are mainly tackled through national environmental laws. Environmental problems with a regional scope such as acid rain were addressed in international regional fora; in the case of acid rain, for example, at the regional subdivision of the United Nations Economic Commission for Europe through the Convention on Long-range Transboundary Air Pollution and its Protocols. Climate change as a universal environmental problem is dealt with on an international universal level with the United Nations Framework Convention on Climate Change and the Kyoto Protocol. Consequently, nowadays there is a multilevel patchwork of environmental regulation addressing a huge variety of sources contributing to environmental degradation and pollution.

On the national level it became clear early that for a number of different reasons environmental laws were not properly enforced. Despite considerable legislative activity, in reality there was no evident or only slow progress. "Symbolic environmental politics" became one of the key terms of this debate.[4] One reason for this enforcement deficit was that the judiciary could not be used to protect environmental interests safeguarded in environmental laws, because of the structure of environmental laws combined with judicial access rules. The vast majority of environmental laws do not confer rights on individuals that could be invoked in court. The administration was the primary steward of the environmental medium protected by the environmental legislation.

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[3] For an overview with regard to the global level see Sands, *Principles of International Environmental Law* (2003), 123 et seq.; Koch/Mielke, "Globalisierung des Umweltrechts" ZUR (2009), 403, 404 et seq.

[4] See key text on the subject Hansjürgens/Lübbe-Wolff (eds.), *Symbolische Umweltpolitik* (2000). The debate goes back to Murray Edelman's publications Edelman, *Politics as symbolic action* (1972); Edelman, *The symbolic uses of politics* (1985, originally published in 1964).

Individual actors with a standing to sue would usually use the courts to strike down, for example, costly permit conditions or limitations on resource exploitation based on environmental legislation. Actors with an interest in environmental protection would usually lack standing in courts. Consequently, for the administration – in many cases already in a weak position to deal with the manifold new tasks of environmental legislation due to political pressure, and lack of staff, expertise and financial resources[5] – it became even more difficult to enforce environmental laws.

There is also an enforcement deficit in international environmental law.[6] Reasons are manifold; they range from unwillingness or inability of governments to enact proper implementing national legislation to the abovementioned difficulties in enforcing environmental laws at the national level. In addition, economic globalization poses an extra challenge to national institutions and actors seeking to enforce environmental laws, for example, against multinational corporations.

One way of addressing this imbalanced use of the judiciary and strengthening the administration's position in enforcing environmental laws was the construction of access rules to courts for actors with an interest in environmental protection.[7] In the United States, environmental legislation from the early 1970s already included so-called citizen suit provisions that allowed private citizens to initiate lawsuits to enforce the law. In Germany, the nature conservation laws of Federal States have since the 1970s conferred standing to sue on environmental NGOs to invoke nature conservation laws in administrative courts. In the European Union, environmental NGOs can inform the Commission of a possible improper implementation of European environmental laws at a national level, which might lead to an infringement procedure against the state in question initiated by the Commission. At the regional international[8] level, for example, environmental NGOs can trigger a compliance procedure under the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention).

Whereas a considerable amount of research has been done already with respect to the access of citizens and environmental NGOs to national[9] and European

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[5] Lübbe-Wolff, "Erscheinungsformen symbolischen Umweltrechts" in Hansjürgens/Lübbe-Wolff (eds.), *Symbolische Umweltpolitik* (2000), 25.

[6] Brown Weiss, "Understanding Compliance with International Environmental Agreements: The Baker's Dozen Myths" (1998) 32 *U. Rich. L. Rev.*, 1555, 1560 et seq.

[7] See key text on the subject, Stone, "Should Trees Have Standing – Toward Legal Rights for Natural Objects" (1972) 45 *S. Cal. L. Rev.*, 450.

[8] The terms "regional international" and "universal international" are used here to differentiate between judicial and quasi-judicial bodies with a (potentially) universal and a merely regional scope (see differentiation of the analysis in chapters 3 and 4).

[9] For a European analysis focusing on Belgium, France, Netherlands, Portugal, Italy, Germany, UK, and Denmark see de Sadeleer/Roller et al., *Access to Justice in Environmental Matters and the Role of NGOs* (2005). With respect to Germany, German Advisory Council on the Environment, *Access to Justice in Environmental Matters*, German Advisory Council on the Environment (ed.) Statement No. 5 (February 2005); Schmidt/Zschiesche et al., *Die Entwicklung der naturschutz-*

judiciary[10] in order to enforce environmental laws, not much has been written yet with regard to the regional and universal international level and there has been little attempt to present a holistic picture of the judicial and quasi-judicial fora involved in enforcement and compliance control of international environmental laws.[11] Therefore, the focus of this analysis is on the regional and universal international level.

International environmental law differs significantly in content and structure from national environmental law and from other international law.[12] For example, the successful implementation of multilateral environmental agreements (MEAs) requires that as many parties as possible comply to the widest possible degree with their obligations. This entails a "coordination problem" that cannot be adequately addressed in purely adversarial, punitive procedures.[13] As a consequence, negotiators developed new fora and forms of compliance control under several MEAs, such as compliance committees and non-compliance procedures. This study is not, however, limited to these bodies but encompasses all major judicial and quasi-judicial international bodies relevant to environmental law enforcement and examines how they cope with environmental concerns protected in environmental law.

II. Global Environmental Governance and Sustainable Development

Further key aspects of this study are the concept of global environmental governance and the principle of sustainable development.

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rechtlichen Verbandsklage von 2002 bis 2006, Hochschule Anhalt/Unabhängiges Institut für Umweltfragen (eds.) (2007). An international overview is provided by Ebbesson/Okowa (eds.), *Environmental Law and Justice in Context* (2009). For an early comparative analysis on citizen suits in Germany, the United States and France see Rehbinder/Burgbacher et al., *Bürgerklage im Umweltrecht* (1972). For a recent international study focused on specialized environmental courts and tribunals see Pring/Pring, *Greening Justice*, The Access Initiative (ed.) (2009).

[10] Krämer, Environmental Justice in the European Court of Justice in Ebbesson/Okowa (eds.), *Environmental Law and Justice in Context* (2009), 195; Almqvist, "The Accessibility of European Integration Courts from an NGO Perspective" in Treves/Di Rattalma et al. (eds.), *Civil Society, International Courts and Compliance Bodies* (2005), 271; Jonas Ebbesson, "European Community" in Ebbesson (ed.), *Access to Justice in Environmental Matters in the EU* (2002), 49; Thomas Ormond, "'Access to Justice' for Environmental NGOs in the European Union" in Deimann/Dyssli (eds.), *Environmental Rights* (1995), 71. With regard to both levels Schlacke, *Überindividueller Rechtsschutz* (2008); Sußmann, *Vollzugs-und Rechtsschutzdefizite im Umweltrecht unter Berücksichtigung supranationaler und internationaler Vorgaben* (2006).

[11] Among the main contributions to date are Treves/Di Rattalma et al. (eds.), *Civil Society, International Courts and Compliance Bodies* (2005); Beyerlin, "The Role of NGOs in International Environmental Litigation (2001) 61 *ZaöRV*, 357; Riedinger, *Die Rolle nichtstaatlicher Organisationen bei der Entwicklung und Durchsetzung internationalen Umweltrechts* (2001), 218 et seq.

[12] A concise introduction, mainly working with the Convention on Biological Diversity as an example, is provided by Koester, "Global Environmental Agreements" (2005) 35 *Environ Pol Law*, 170.

[13] Brunnée, "The Kyoto Protocol: Testing Ground for Compliance Theories?" (2003) 63 *ZaöRV*, 255, 263.

In 1992 the United Nations established the Commission on Global Governance (CGG) with the mandate to prepare a report on the concept of global governance. Following an initiative by *Willy Brandt*, former chancellor of West Germany, the Commission was co-chaired by *Ingvar Carlsson* (then Prime Minister of Sweden) and *Shirdath Ramphal* (then Secretary General of the Commonwealth and President of the International Union for Conservation of Nature, IUCN). The CGG had 28 members and received funding through two trust funds administered by the United Nations Development Program (UNDP), nine national governments and private foundations. The CGG presented its final report "Our Global Neighbourhood" in 1995.[14]

According to the findings of the CGG

> [g]overnance is the sum of the many ways individuals and institutions, public and private, manage their common affairs. It is a continuing process through which conflicting or diverse interests may be accommodated and co-operative action may be taken. It includes formal institutions and regimes empowered to enforce compliance, as well as informal arrangements that people and institutions either have agreed to or perceive to be in their interest.[15]

With respect to governance at the global level the CGG stated that

> governance has been viewed primarily as intergovernmental relationships, but it must now be understood as also involving non-governmental organizations (NGOs), citizens' movements, multinational corporations, and the global capital market.[16]

The report does not recommend a development towards a world government or world federalism.[17] It underlines that there is no single model of global governance but that global governance is a dynamic and complex process of interactive decision-making. According to the CGG, governance must follow an integrated approach to questions of human survival and prosperity while at the same time recognizing the systemic nature of a certain problem.[18] Governance may rely on market or legal instruments, it may require centralized decision-making but subsidiarity may also be an important principle.[19]

However, the CGG does highlight a few characteristics that governance mechanisms should fulfill. They must be more inclusive and participatory, that is, more democratic, than in the past.[20] They should be built on existing intergovernmental institutions and improve their collaboration with private and independent groups. This will require a collaborative ethos based on the principles of consultation, transparency, and accountability. Finally, global governance

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[14] Commission on Global Governance*, Our Global Neighbourhood* (1995).
[15] *Ibid*. at 2.
[16] *Ibid*. at 2 et seq.
[17] *Ibid*. at 4.
[18] *Ibid.*
[19] *Ibid.* at 5.
[20] *Ibid.*

> will strive to subject the rule of arbitrary power – economic, political, or military – to the rule of law within global society.[21]

There are a vast number of existing institutions and actors that can be seen as part of the formal and informal arrangements of evolving global environmental governance. Undertaken from a legal point of view this research focuses on the formal arrangements. It is based on the opinion that the rule of law, developed and applied by legal institutions, is a key element in worldwide peace and prosperity. Informal arrangements may be just as important but they are not dealt with in this study.

As cited above, according to the CGG one goal of global governance is to subject the rule of arbitrary power to the rule of law. Within a legal context issues tend to be discussed in certain procedures by certain groups of people or institutions. Legal procedures and institutions ideally fulfill higher standards of transparency and legitimacy than other means of and forums for decision-making. Legal procedures often provide for some form of public participation to legitimize their decisions and are part of a bigger system of checks and balances, which aims to safeguard rights and interests affected thereby. However, it is important to bear in mind that the law is often made by and legal institutions often comprise people and groups of people in power. Consequently, the law and legal institutions have a tendency to safeguard existing power structures. Thus it is important to ensure equal access to legal institutions, law-making, and law-enforcement procedures in order to obtain the benefits of legal regimes.

The existing formal institutions of global environmental governance may be summarized under three groups.[22] Firstly, there are the MEAs and their institutional framework including Meeting of Parties, Conference of Parties, Secretariat, and Compliance Committee. Secondly, there are other international treaties and their institutional settings, which frequently decide upon issues relevant to the environment. These laws and institutions include the Marrakesh Agreement and further law of the World Trade Organization (WTO), the WTO dispute settlement bodies, the United Nations Convention on the Law of the Sea, and the International Tribunal for the Law of the Sea (ITLOS), to name but a few. Thirdly, several institutions of the United Nations system play key roles in global environmental governance such as, for example, the United Nations Environment Program (UNEP), UNDP, the Commission for Sustainable Development (CSD), and the Global Environmental Fund (GEF). This study analyzes access to existing judicial and quasi-judicial institutions of the first and second group mentioned above and comes up with a number of proposals to further develop these institutions.

As well as its institutional implications, the concept of global governance also takes into account the growing importance of non-state actors on the international

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[21] *Ibid.*

[22] For a general overview see Röben, "Institutions of International Environmental Law" in Morrison/Wolfrum (eds.), *International, Regional, and National Environmental Law* (2000), 71.

arena.[23] With regard to global environmental governance, environmental NGOs are crucial new actors in international law-making and law-enforcement procedures.[24] They give a voice to environmental interests and are considered to be the main stakeholders or stewards of the environment as a public common good.[25] The accessibility of judicial and quasi-judicial international institutions for environmental NGOs is therefore the focus of this study.

At the national level in modern democracies, constitutional law is usually the legal framework that reconciles sometimes conflicting substantive law and that ensures a balance between it and legal institutions. More concretely, the principle of separation of powers asks for necessary checks and balances between legislative, executive and judicial organs.[26] Substantive constitutional law and the principle of supremacy of law safeguard the consideration and balancing of competing rights. There is no such integrating force at the international level and the concept of global governance does not demand such a framework. International legal regimes grew up largely independent of each other. The fragmentation of international law is an issue that has been the subject of much debate.[27]

The concept of sustainable development – evolved through the 1987 Brundtland Report[28] and politically established in the two key outcome documents of the 1992 United Nations Conference on Environment and Development (UNCED), the Rio Declaration on Environment and Development[29] and the Agenda 21[30] – can, to a certain degree, substitute for the lack of an integrating framework and function as an integrating principle.[31] Sustainable development is defined as a

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[23] Commission on Global Governance, *Our Global Neighbourhood* (1995), 253 et seq.

[24] UNU/IAS Report, *International Sustainable Development Governance*, United Nations University Institute of Advanced Studies (UNU/IAS) (ed.) Final Report (2002), 43; Sands, *Principles of International Environmental Law* (2003), 112 et seq.; McCormick, "The Role of Environmental NGOs in International Regimes" in Vig/Axelrod (eds.), *The Global Environment: Institutions, Law and Policy* (1999), 52; Dupuy/Vierucci (eds.), *NGOs in International Law* (2008).

[25] As reflected in Principle 10 of the Rio Declaration and Articles 2(4) and (5), 3(7), 4, 6–9 of the 1998 UNECE Aarhus Convention. Under the Aarhus Convention environmental NGOs are part of "members of the public" and "members of the public concerned" with the respective rights to access to information, participation, and access to justice.

[26] With regard to the principle of separation of powers and the internationalization of law see Möllers, *Die drei Gewalten* (2008), 155 et seq.

[27] See key text on the subject, International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, United Nations (2006).

[28] *Our Common Future: Report of the World Commission on Environment and Development*, UNGA A/42/427, Annex, 4 August 1987; mandated through United Nations Resolution, Process of Preparation of the Environmental Perspective to the Year 2000 and Beyond, A/RES/38/161, 19 December 1983.

[29] Rio Declaration on Environment and Development, UNGA A/CONF.151/26 (Vol. I), Annex I, 12 August 1992.

[30] Agenda 21, UNGA A/CONF.151/26 (Vol. I), 12 August 1992.

[31] Sands, "International Courts and the Application of the Concept of 'Sustainable Development'" (1999) 3 *Max Planck UNYB*, 389, 390, 404; Zengerling, "Sustainable Development and International (Environmental) Law (2010) 8 *EurUP*, 175.

> common and mutually supportive objective which takes account of the interrelationships between people, resources, environment, and development.[32]

It consequently consists of three main pillars: economic, social, and environmental interests. Its aim is to achieve international and intergenerational justice, and

> development that meets the needs of the present without compromising the ability of future generations to meet their own needs.[33]

Politically, the concept of sustainable development is widely recognized by international institutions, including, for example, the WTO. The openness of law enforcement procedures with respect to procedural participation and substantive law that allows for holistic inclusion, weighting, and balancing are crucial for an appropriate contribution of international judicial and quasi-judicial bodies to global governance led by the principle of sustainable development. This study aims to show how institutional arrangements, access provisions, especially for environmental NGOs as the main stakeholder of environmental interests, and the case law of international judicial and quasi-judicial institutions today reflect the concept of sustainable development as an integrating force and to make suggestions for improvements.[34]

The reform of the institutional framework for sustainable development is also one of the two key themes of the Rio+20 United Nations Conference on Sustainable Development in 2012.[35] By putting this topic high on the agenda states recognize the crucial role institutional settings play in sustainable development. One goal for the further development of the institutional framework at the Rio+20 Conference is to enhance the integration of economic, social, and environmental interests, the three pillars of sustainable development. In its report on objectives and themes of the United Nations Conference on Sustainable Development for the second session of the preparatory committee in March 2011 the Secretary-General states:

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[32] United Nations Resolution, Process of Preparation of the Environmental Perspective to the Year 2000 and Beyond, A/RES/38/161, 19 December 1983, at 8(b).

[33] *Our Common Future: Report of the World Commission on Environment and Development*, UNGA A/42/427, Annex, 4 August 1987, at Chapter IV.1.

[34] See key text on global environmental governance from an institutional perspective WBGU, *Neue Strukturen globaler Umweltpolitik* (2000). For a recent broader study on institutional interaction see Oberthür/Gehring, *Institutional Interaction in Global Environmental Governance* (2006).

[35] See Report of the Secretary-General, Progress to date and remaining gaps in the implementation of the outcomes of the major summits in the area of sustainable development, as well as an analysis of the themes of the Conference, Preparatory Committee for the UNCSD, First Session, UNGA A/CONF.216/PC/2, 1 April 2010, at 20 et seq.; available at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N10/302/56/PDF/N1030256.pdf?OpenElement (all links referred to in this study have been last visited at 15 April 2013) and Report of the Secretary-General, Objective and themes of the United Nations Conference on Sustainable Development, Preparatory Committee for the UNCSD, Second Session, UNGA A/CONF.216/PC/7, 22 December 2010 at 90 et seq; available at http://ggim.un.org/docs/meetings/Forum2011/A-Conf_216-PC-7.pdf. The other key theme is the green economy.

> The institutional framework must be considered at the local, national, regional and international levels. Globally, the institutional framework has witnessed a dramatic growth in the number of institutions and agreements, with more than 500 multilateral environmental agreements currently in existence. Thus the reach of sustainable development governance has greatly expanded. Yet the continuing deterioration in the natural resource base, threats to ecosystems, global climate change and persistent poverty call into question whether the grasp of the institutional framework matches its reach.[36]
>
> There is a need to reinforce the institutions and processes involved in delivering on normative commitments made at the global level.[37]

Although international judicial and quasi-judicial bodies are not explicitly part of the institutional framework theme of the Rio+20 Conference, this agenda highlights the general need and political will to strengthen enforcement mechanisms at all levels.

III. Proliferation of International Judicial and Quasi-Judicial Institutions

Another current debate that interfaces with the research topic deals with the steadily growing number of international judicial and quasi-judicial institutions. According to the Project on International Courts and Tribunals (PICT), as of November 2004 there were 22 active international judicial bodies[38] and 64 active quasi-judicial, implementation control, and other dispute settlement bodies.[39] The PICT project defines an international judicial body as a permanent institution, composed of independent judges, adjudicating disputes between two or more entities, at least one of which is either a state or an international organization that works on the basis of predetermined rules of procedure, and renders decisions that are binding.[40] Quasi-judicial bodies do not fulfill this definition but they also play a crucial role for the enforcement, interpretation and implementation of international law.[41] All these judicial and quasi-judicial institutions have in common that they are established by international agreements and determine whether certain acts are compatible with international law.

Of the 22 active international judicial bodies listed in the PICT research, 15 deal with regional economic and political integration and trade, three with criminal and

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[36] Report of the Secretary-General, UNGA A/CONF.216/PC/7, 22 December 2010, *ibid.*, at 91.

[37] *Ibid.* at 98.

[38] 14 of these international judicial bodies are institutions of regional economic and political integration agreements, half of them located in Africa.

[39] See overview on PICT synoptic chart Version 3.0, November 2004 at http://www.pict-pcti.org/publications/synoptic_chart/synop_c4.pdf.

[40] *Ibid.*, PICT synoptic chart, p. 2. See also Romano, "Proliferation of International Judicial Bodies: The Pieces of the Puzzle" (1998) 31 *N.Y.U. J. Int'l L. & Pol.*, 709.

[41] *Ibid.*

humanitarian law, and two with human rights.[42] The remaining two bodies are the International Court of Justice (ICJ) and the ITLOS. Of the 64 international quasi-judicial bodies 16 are concerned with human rights and humanitarian law, about 14 with economic, financial, and investment issues, seven with compliance review of multilateral environmental agreements,[43] and six with international claims and compensation. Governments have, therefore, established the strongest international judicial and quasi-judicial regimes to protect economic integration, trade, and investment interests followed by human rights and environmental protection interests.[44]

Whereas historically states had almost exclusive access to international courts and tribunals, nowadays, international judicial and quasi-judicial bodies are more and more accessible to non-state actors such as international organizations, individuals, peoples, NGOs, or corporations. With a growing number of potential applicants, the number of cases also grows and with it the influence and power judicial and quasi-judicial bodies have in the realm of international governance.

There is no coherent system of international judicial and quasi-judicial bodies; institutions developed independently from one another and there is usually no formal hierarchy, interaction, or interdependence between the various bodies. There is also no international system of separation of powers in which an international judiciary could be embedded. This leads to a number of questions that have been frequently addressed by scholars since international judicial bodies have grown in number and influence. Among the issues debated are, for example, the degree of loss of national sovereignty and its implications,[45] especially in countries with a precarious statehood,[46] the problem of enhanced fragmentation of international law due to the variety of international judicial and quasi-judicial bodies,[47] democratic

[42] In the meantime the African Court for Humans and Peoples' Rights became also active and has to be added to the group of international judicial bodies. Thus, there are now three active regional international human rights bodies.

[43] In addition, the compliance mechanism of the Kyoto Protocol has since become active.

[44] See also Shany, "No Longer a Weak Department of Power? Reflections on the Emergence of a New International Judiciary" (2009) 20 *EJIL*, 73.

[45] Differentiating between several degrees of sovereignty costs associated with different roles of international courts Alter, *Delegating to International Courts*, Buffett Center, Working Paper No. 07–004 (July 2007), 18, 32.

[46] With respect to international law and institutions in general Oeter, "Prekäre Staatlichkeit und die Grenzen internationaler Verrechtlichung" in Kreide/Niederberger (eds.), *Transnationale Verrechtlichung* (2008), 90.

[47] Arguing that the fragmentation should not be overestimated but rather seen as an effect of legal pluralism, Koskenniemi/Leino, "Fragmentation of International Law? Postmodern Anxieties" (2002) 15 *LJIL*, 553; Fischer-Lescano/Teubner, "Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law" (2003) 25 *Mich. J. Int'l L.*, 999. Offering solutions to deal with fragmented international law International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, United Nations (2006).

legitimacy and justification of the decision-making power,[48] and questions of equitable access and distributive justice.[49]

Insofar as this study argues in favor of enhanced access for environmental NGOs to international judicial and quasi-judicial bodies and the creation of a new international environmental court, the author is aware that wider access and more institutions render the international judiciary more powerful and that it thus becomes even more important to address and solve the problematic implications outlined above. However, such proposals are only briefly dealt with in this research.[50] The focus of this study is on questions of equitable access and distributive justice, which at the same time contributes to the legitimacy of international adjudication and compliance control.

IV. Deliberation and Democratic Global Governance

This aspect is closely connected with the fourth area of intensive scholarly debate, which has influenced this study: the question of what legitimate governance on an international, beyond-state level could and should look like.[51] Among the values for the global neighborhood the Commission on Global Governance recommended a "global civic ethic" and stressed the importance of democracy as a part of it. However, the CGG did not go into further details apart from noting that governance mechanisms must be more participatory and inclusive than in the past.[52] The concept of deliberative democracy, drawing on – for example, in its different forms – public reason as advanced by *John Rawls*, ideal discourse as developed by *Jürgen*

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[48] v. Bogdandy/Venzke, "Zur Herrschaft internationaler Gerichte: Eine Untersuchung internationaler öffentlicher Gewalt und ihrer demokratischen Rechtfertigung" (2010) 70 *ZaöRV*, 1.

[49] Vierucci, "NGOs Before International Courts and Tribunals" in Dupuy/Vierucci (eds.), *NGOs in International Law* (2008), 155, 155. For questions of environmental justice see Fitzmaurice, Environmental Justice through International Complaint Procedures?" in Ebbesson/Okowa (eds.), *Environmental Law and Justice in Context* (2009), 211; Hey, "Distributive Justice and Procedural Fairness in Global Water Law" in Ebbesson/Okowa (eds.), *Environmental Law and Justice in Context* (2009), 351. Highlighting some pitfalls in access to self-governance models, Tully, "Access to Justice within the Sustainable Development Self-Governance Model" in Odell/Willett (eds.), *Global Governance and the Quest for Justice* (2008), 117.

[50] The question of legitimacy is dealt with in context of the WTO dispute settlement, since this is one of the most powerful international judicial regimes, see chapter 4.I.B.5.a. For a collection of strategies to address many of these issues within the international judiciary see v. Bogdandy/Venzke, "Zur Herrschaft internationaler Gerichte: Eine Untersuchung internationaler öffentlicher Gewalt und ihrer demokratischen Rechtfertigung" (2010) 70 *ZaöRV*, 1, 26 et seq.

[51] Habermas, *Die postnationale Konstellation* (2006); Kreide/Niederberger (eds.), *Transnationale Verrechtlichung* (2008); Held/Koenig-Archibugi (eds.), *Global Governance and Public Accountability* (2007); Baber/Bartlett, *Global Democracy and Sustainable Jurisprudence* (2009); Cohen/Sabel, "Global Democracy" (2004) 37 *N.Y.U. J. Int'l L. & Pol.*, 763; Schmalz-Bruns, "Deliberativer Supranationalismus. Demokratisches Regieren jenseits des Nationalstaats" (1999) 6 *ZIB*, 185.

[52] Commission on Global Governance, *Our Global Neighbourhood* (1995), 5, 57 et seq., 65 et seq.

Habermas, and full liberalism as proposed by *Amy Gutman*,[53] and originally developed for democracy on a national scale, appears to promote a number of ideas and principles that can be used to render global governance more democratic.[54]

Joshua Cohen, a student of *John Rawls*, and one of the main representatives of the concept of deliberative democracy, defines it as follows:

> democracy, on the deliberative view, is a framework of social and institutional conditions that facilitates free discussion among equal citizens – by providing favorable conditions for participation, association, and expression – and ties the authorization to exercise public power (and the exercise itself) to such discussion – by establishing a framework ensuring the responsiveness and accountability of political power to it through regular competitive elections, conditions of publicity, legislative oversight, and so on.[55]

As regards the global level *Joshua Cohen* and *Charles F. Sable* argue for a deliberative polyarchy as the right way to democratically furnish what they call a new form of global politics.[56] Accountability is at the heart of deliberative polyarchy.[57] They understand

> [a]ccountability as a common name for the process norms arising from the organization of interdependence and cooperation (including transparency, reason giving, and standing of those affected).[58]

In advancing their arguments for deliberative polyarchy, *Cohen* and *Sable* did not directly refer to the role of judicial and quasi-judicial procedures within global politics. However, it is argued here – in a somewhat similar vein to the way that *von Bogdandy* and *Venzke* built on *Habermas'* "Weltinnenpolitik" to discuss the authority of international courts – that the access of environmental NGOs to international judicial and quasi-judicial procedures enhances the latters' accountability towards the global demos and therefore positively contributes to establishing democratic global governance.[59]

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[53] For an introduction into these different approaches see Baber/Bartlett, *Global Democracy and Sustainable Jurisprudence* (2009), 11 et seq.

[54] Cohen/Sabel, "Global Democracy" (2004) 37 *N.Y.U. J. Int'l L. & Pol.*, 763; Baber/Bartlett, *Global Democracy and Sustainable Jurisprudence* (2009); Kreide, "Ambivalenz der Verrechtlichung" in Kreide/Niederberger (eds.), *Transnationale Verrechtlichung* (2008), 260.

[55] Cohen, Procedure and Substance in Deliberative Democracy" in Benhabib (ed.), *Democracy and Difference* (1996), 95, 99.

[56] Cohen/Sabel, "Global Democracy" (2004) 37 *N.Y.U. J. Int'l L. & Pol.*, 763, 779.

[57] *Ibid.*

[58] *Ibid.* at 771 et seq.; *Rawls* himself did not further develop his concept of distributive justice on a global scale; for a brief overview in the context of global environmental justice see Brunnée, Climate Change, Global Environmental Justice and International Environmental Law" in Ebbesson/Okowa (eds.), *Environmental Law and Justice in Context* (2009), 316, 319 et seq. For a cosmopolitan vision of another student of Rawls, Thomas Pogge, especially with regard to ecology and democracy see Pogge, *World Poverty and Human Rights* (2010), 189 et seq.

[59] See v. Bogdandy/Venzke, "Zur Herrschaft internationaler Gerichte: Eine Untersuchung internationaler öffentlicher Gewalt und ihrer demokratischen Rechtfertigung" (2010) 70 *ZaöRV*, 1, 27 et seq., 32 et seq., 34 et seq.

The study focuses on the institutional arrangements, access rules, and environmental case law of international judicial and quasi-judicial bodies to obtain an insight into transparency, access of those interests affected, and the informed developing and giving of reasons, and therefore the main elements of accountability according to the concept of deliberative polyarchy.

V. Structure of the Analysis

Environmental NGOs and international judicial and quasi-judicial institutions are the central objects of this analysis. They are scrutinized with a view to how they interact and should interact to successfully contribute to the implementation and enforcement of national and international environmental law within a broader concept of global democratic governance for sustainable development.

Chapter 1 introduces environmental NGOs as actors in environment-related law-making and law-enforcement on the international level. It gives some factual background on how NGOs were and are involved in detecting and tackling environmental problems. The main political commitments to enhance the role of NGOs on the international level are then summarized and the relevance, definition, and legal status of NGOs under international law are outlined. The meaning and relevance of legitimacy and accountability in the context of this study are also discussed and the legitimacy and accountability of NGOs addressed. Chapter 2 scrutinizes the enforcement of international environmental law on the national and European Union level to identify opportunities as well as constraints and thereby cases for international judicial and quasi-judicial procedures. Laying the basis for the structure of the analysis in chapters 3 and 4, it also identifies the main differences between judicial dispute settlement, arbitration, and compliance control, the latter being specifically relevant for dealing with cases of non-compliance with multilateral environmental agreements.

Chapters 3 and 4 form the core of this study. A total of eleven international judicial and quasi-judicial bodies, each with a special relevance for the implementation and enforcement of international environmental law, are analyzed in depth and another three are presented in brief. The criteria for the evaluation and the roadmap for conclusions and recommendations are derived from the four pillars of context as outlined above. The overall question therefore is: Does the respective body appropriately contribute to the realization of democratic regional or global governance for sustainable development? In particular: Are the procedure and, to a certain degree, also the substantive applicable law appropriately accessible and penetrable to the interests protected in (international) environmental law? Do those environmental interests appropriately enter the decision-making process of the respective body? Are environmental interests transparently, comprehensively, and appropriately weighted and balanced against other relevant interests? Are the judicial and

quasi-judicial procedures that involve environmental interests and their outcomes transparent, i.e. open to the public?

Addressing these questions, the eleven bodies that are analyzed in depth are described and evaluated with regard to jurisdiction, applicable law, institutional arrangements, access, and environmental case law. Following the evaluation, with respect to each body a concluding subchapter summarizes its main strengths and weaknesses and makes concrete recommendations for further improvements. The section on institutional arrangements encompasses information on the transparency of the proceedings and outcomes. The section on access addresses the access of potential participants as parties, amici curiae, and experts. These roles are, of course, inherently different. However, they all have in common that they can introduce environmental concerns into the decision-making process. As regards the role of NGOs as parties, NGOs are envisaged as potential applicants, and thus initiators or triggers, of a judicial or quasi-judicial procedure, similar to citizen suits or 'Verbandsklagen' at the national level.[60] Conferring the right to initiate judicial and quasi-judicial review procedures on NGOs helps to safeguard the possibility for breaches of international environmental law to be brought to the attention of the judiciary in the first place. As amici curiae environmental NGOs function as "friends of the court" providing factual or legal information on environmental matters relevant to the case at issue.[61] The section on environmental case law scrutinizes how environmental interests safeguarded in international environmental law are dealt with in the decision-making process and reflected in the decision.

Chapter 3 focuses on judicial and quasi-judicial bodies that operate within a regional international scope; chapter 4 deals with those of a universal international scope. The judiciary of the European Union, the European Court of Justice and the Court of First Instance, is not dealt with in the regional international chapter because the European Union is a supranational organization *sui generis* with a unique character and insofar not comparable with the rest of international regional adjudicative

[60] To address the enforcement deficit of environmental law legislators at the national level empowered citizens or environmental NGOs to bring law suits against the administration or private polluters; see, for example, citizen suit provision in U.S. Clean Air Act at 42 USC § 7604. The German legislator conferred standing on certain accredited environmental NGOs in § 64 BNatSchG (German Federal Nature Conservation Act) and § 2 UmwRG (German Environmental Appeals Act).

[61] According to the original meaning, amici curiae do not have personal interest in the outcome of a case. Here the role of amici curiae is understood in the more modern sense as reflected in the practice of international courts and tribunals or at the national level, for example, the United States Supreme Court. Amici curiae here may have an interest in the outcome of a case, as their role further developed from mere friendship to advocacy of certain interests. With respect to the changing role at the national level in the United States see Krislov, "The Amicus Curiae Brief: From Friendship to Advocacy" (1963) 72 *Yale L.J.*, 694; for the role of amici curiae at the international level see Razzaque, "Changing Role of Friends of the Court in the International Courts and Tribunals" (2001) 1 *Non-St. Actors & Int'l L.*, 169 and Bartholomeusz, "The Amicus Curiae before International Courts and Tribunals" (2005) 5 *Non-St. Actors & Int'l L.*, 209.

bodies.[62] Both, chapter 3 and 4 differentiate between judicial dispute settlement, arbitration, and non-compliance procedures since these forms of adjudication and compliance control vary significantly in their roles, structures, competences, institutional arrangements, procedures, access rules, and outcomes. This horizontal and vertical systematization allows for a differentiated view on the selected bodies and is also mirrored in the conclusions and recommendations. Chapter 5 summarizes the main conclusions of this research in the form of theses. This encompasses the main arguments for arriving at the conclusions as well as references to the section of the study, which deals in depth with the respective issue. Chapter 5 thus aims to provide a comprehensive summary of core contents, results, and claims of this study.

[62] The contribution of the European Court of Justice to the enforcement of international environmental law is scrutinized in Chapter 2.III.

Chapter 1

ENGOs, Environmental Problems, International Law, and Politics

The number of international environmental treaties has been growing rapidly since the Stockholm Conference in 1972. To date there are more than 2,000 international environmental agreements, taking into account bilateral and multilateral environmental treaties.[1] Environmental NGOs and other private actors were actively involved in the global environmental conferences.[2] This chapter examines the question if and how environmental NGOs should contribute to compliance control and the enforcement of international environmental law.

It starts with an overview of the main environmental problems that require multilateral action and gives some examples of the role of international environmental NGOs in the development and implementation of MEAs aiming to tackle them (I). Subchapter I describes the commitment of NGOs to finding solutions to such environmental problems and their potential ability to contribute to compliance control. The next subchapter examines political commitments to enhance the role of NGOs at international level, in order to demonstrate the existing political support or lack of it (II). In subchapter III, the relevance, definition, and legal status of NGOs under international law are explored in order to establish if there are any legal constraints to strengthening the role of ENGOs with regard to compliance control. Finally, subchapter IV addresses the question if and how legitimacy and accountability are affected through enhanced involvement of ENGOs in compliance control and the enforcement of international environmental law before international judicial and quasi-judicial bodies. Conclusions are drawn in subchapter V.

[1] As of April 2011 a search on ECOLEX, one of the core databases of environmental law run jointly by UNEP, FAO and IUCN, reveals 2,141 bi- and multilateral environmental treaties, see http://www.ecolex.org/.

[2] According to *Yamin* around 400 NGOs attended the Stockholm Conference on the Human Environment in 1972, and some 10,000 NGOs were reported to have attended the Rio Conference in 1992, Yamin, "NGOs and International Environmental Law: A Critical Evaluation of their Roles and Responsibilities" (2001) 10 *RECIEL*, 149, 151.

Cathrin Zengerling, Greening International Jurisprudence, pp. 17–42.
ISBN 978-90-04-25730-6.

I. ENGOs and Environmental Problems

Several environmental problems are characterized by the fact that they have either regional or global causes or regional or global effects and thus cannot be tackled effectively by one or a few countries alone. The large number of bi- and multilateral environmental agreements shows that states have repeatedly felt compelled to common action. The global and regional environmental problems highlighted here in a short survey belong to the core of what policy makers today consider as regional and global environmental problems.[3] Some examples aim to show the vital role that NGOs have played and still play in tackling these problems within the state-built institutional regime.[4] At all stages of the policy cycle – agenda setting, negotiation, and implementation – they can contribute significantly.[5]

One of the first serious environmental problems with regional effects was transboundary air pollution. In the 1960s and 1970s, as a result of the so-called high-chimney policy, pollution from smoke stacks in Germany, for example, caused acid rain and forest death in the Nordic countries. Since the problem was on a regional rather than global scale, states chose the United Nations Economic Commission for Europe (UNECE) as the forum to negotiate an environmental agreement. The 1979 UNECE Convention on Long-range Transboundary Air Pollution (CLRTAP) became

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[3] WBGU, *Grundstruktur globaler Mensch-Umwelt-Beziehungen* (1993), 24. See also Buck/Verheyen, "Umweltvölkerrecht" in Koch (ed.), *Umweltrecht* (2010), 1, 2 et seq.

[4] For a concise overview see Raustiala, "States, NGOs, and International Environmental Institutions" (1997) 41 *ISQ*, 719. See also Wolfrum, "International Environmental Law: Purposes, Principles and Means of Ensuring Compliance" in Morrison/Wolfrum (eds.), *International, Regional, and National Environmental Law* (2000), 3, 5.

[5] For an in depth analysis with regard to international environmental co-operation, see Oberthür/Werksmann, *Participation of Non-Governmental Organisations in International Environmental Co-operation*, Umweltbundesamt, Berichte 11/02 (2002). On international environmental law making and enforcement see Riedinger, *Die Rolle nichtstaatlicher Organisationen bei der Entwicklung und Durchsetzung internationalen Umweltrechts* (2001). With regard to the influence of NGOs on the negotiation processes under several MEAs such as the Kyoto Protocol and the Cartagena Protocol on Biosafety, see for example, Betsill/Corell (eds.), *NGO Diplomacy* (2008). With a focus on international environmental litigation, see Beyerlin, "The Role of NGOs in International Environmental Litigation (2001) 61 *ZaöRV*, 357, and especially on compliance control with MEAs see Epiney, "The Role of NGOs in the Process of Ensuring Compliance with MEAs" in Beyerlin/Stoll et al. (eds.), *Ensuring Compliance with Multilateral Environmental Agreements* (2006), 319; Pitea, "NGOs in Non-Compliance Mechanisms under Multilateral Environmental Agreements: From Tolerance to Recognition?" in Treves/Di Rattalma et al. (eds.), *Civil Society, International Courts and Compliance Bodies* (2005), 205; Pitea, "The Legal Status of NGOs in Environmental Non-Compliance Procedures" in Dupuy/Vierucci (eds.), *NGOs in International Law* (2008), 181. For an overview of how NGOs contribute to the position of the European Union in MEA negotiations and compliance control see Bombay, "The Role of NGOs in Shaping Community Positions in International Environmental Fora" (2001) 10 *RECIEL*, 163. See also Yamin, "NGOs and International Environmental Law: A Critical Evaluation of their Roles and Responsibilities", 10 *RECIEL* (2001), 149, Faure/Lefevere, "Compliance with International Environmental Agreements" in Vig/Axelrod (eds.), *The Global Environment: Institutions, Law and Policy* (1999), 138, 142; McCormick, "The Role of Environmental NGOs in International Regimes" in Vig/Axelrod (eds.), *The Global Environment: Institutions, Law and Policy* (1999), 52.

one of the first multilateral environmental agreements. It now has 51 parties and has been amended by eight protocols. Although the CLRTAP regime does not provide any procedural rules for NGO participation, probably due to the time at which it was developed, NGOs informally contribute to the regime in various ways.[6] For instance, the International Institute for Applied Systems Analysis,[7] an international, non-governmental research organization, developed the RAINS model of acid deposition used under several Protocols of the CLRTAP regime and chaired official working groups within CLRTAP.[8]

The destruction of the stratospheric ozone layer, a global common, by CFCs became another pressing environmental problem in the 1970s and 1980s. To combat this global environmental problem, the 1985 Vienna Convention for the Protection of the Ozone Layer was negotiated under the global framework of UNEP. The Vienna Convention was amended by several protocols, the 1987 Montreal Protocol being the first to set legally binding reduction targets for CFCs. The Convention and the Montreal Protocol by now have been ratified by 196 countries.[9] Article 11(5) of the Montreal Protocol explicitly grants observer status to international NGOs, qualified in fields relating to the protection of the ozone layer, at meetings of the Parties unless one third of the Parties present object.

In the late 1980s when industrialized countries tightened their environmental regulations, "toxic traders" began to ship hazardous wastes to developing countries and Eastern Europe, posing another significant environmental risk with causes and effects that can occur on a global scale. The 1995 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal aims to tackle this problem. 172 countries ratified the Basel Convention. One of the key non-governmental actors with respect to toxic trade is the U.S. based Basel Action Network (BAN).[10] BAN acts on a global scale and frequently participates as an NGO expert in UNEP policy deliberations on toxic wastes. It acts as an observer under the Basel Convention and promotes the ratification of the Ban Amendment to the Convention.

The loss of biodiversity is another pressing global environmental problem.[11] The main international treaty to protect endangered species is the 1973 Convention on

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[6] Raustiala, "States, NGOs, and International Environmental Institutions" (1997) 41 *ISQ*, 719, 733.

[7] More information on the institute is available at http://www.iiasa.ac.at/.

[8] The successor of the model is called GAINS and still applied under CLRTAP, see http://gains.iiasa.ac.at/index.php/gains-europe and Guidelines for Developing National Strategies to Use Air Quality Monitoring as an Environmental Policy Tool, Committee on Environmental Policy, ECE/CEP/2009/10, 14 October 2009; see also Raustiala, "States, NGOs, and International Environmental Institutions" (1997) 41 *ISQ*, 719, 727.

[9] On 16 September 2009, they became the first treaties in the history of the United Nations to achieve universal ratification.

[10] More information on the activities of BAN is available at http://www.ban.org/.

[11] See Secretariat of the Convention on Biological Diversity, *Global Biodiversity Outlook 3* (2006), 9 et seq.

International Trade in Endangered Species (CITES), now with 175 member states. It explicitly grants NGOs observer status at the Conferences of Parties. Article IX of CITES states as follows:

> Any body or agency technically qualified in protection, conservation or management of wild fauna and flora, in the following categories, which has informed the Secretariat of its desire to be represented at meetings of the Conference by observers, shall be admitted unless at least one-third of the Parties present object:
>
> (a) international agencies or bodies, either governmental or non-governmental, and national governmental agencies and bodies; and
> (b) national non-governmental agencies or bodies which have been approved for this purpose by the State in which they are located. Once admitted, these observers shall have the right to participate but not to vote.

The language used here became a model for many following MEAs. For instance, the United Nations Framework Convention on Climate Change (UNFCCC), the Convention on Biological Diversity (CBD) and the Basel Convention contain similar provisions.[12] In addition to observer status, states allowed NGOs, though in a very limited number of cases, to give formal statements to the plenary.[13] With respect to implementation, the NGO network TRAFFIC (Trade Records Analysis of Flora and Fauna in Commerce) amongst others supported CITES through wildlife trade monitoring.[14]

The 1992 Convention on Biological Diversity (CBD) has a much broader scope than CITES and aims to protect biodiversity as a whole. It has now 193 Parties and the 2000 Cartagena Protocol on Biosafety 157. The International Union for Conservation of Nature (IUCN) played a crucial role in the development of the CBD, for example, by preparing a draft on which the Convention is based.[15] The current Strategic Plan for the Convention on Biological Diversity explicitly highlights, under strategic goal E, target 18, the full and effective involvement of indigenous and local communities and in paras 17 and 24 also the cooperation with other non-governmental stakeholders in the process of implementation of the CBD.[16] For instance, the World Wide Fund for Nature (WWF), together with the UNEP World Conservation Monitoring Center, developed the "Living Planet Index" as an indicator of the state of the world's natural ecosystems. Also with respect to the CBD's work on protected areas many

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[12] Raustiala, "States, NGOs, and International Environmental Institutions" (1997) 41 *ISQ*, 719, 722f.

[13] According to *Raustiala, ibid.* at 723, four such formal statements were made at the Rio Conference in 1992.

[14] For current activities see http://www.traffic.org/. For a case study with regard to NGOs and CITES see Oberthür/Werksmann, *Participation of Non-Governmental Organisations in International Environmental Co-operation*, Umweltbundesamt, Berichte 11/02 (2002), 142 et seq.

[15] Wolfrum, "International Environmental Law: Purposes, Principles and Means of Ensuring Compliance" in Morrison/Wolfrum (eds.), *International, Regional, and National Environmental Law* (2000), 3, 5.

[16] Strategic Plan for the Convention on Biological Diversity 2011–2020, COP 10, Decision X/2.

NGOs such as BirdLife International, Wildlife Conservation Society, WWF, IUCN, and the World Resources Institute are closely involved in implementing the goals of the Convention.[17]

The pollution and exploitation of the world's seas is yet another serious environmental problem with global implications. The 1982 United Nations Convention on the Law of the Sea (UNCLOS) is the main international treaty governing economic and environmental aspects of the use of the seas. NGOs contributed in various ways to the UNCLOS negotiation process; for instance, they brought independent experts to meet delegates or helped developing countries to close the knowledge gap.[18] Although NGOs did not – until recently – ask to submit briefs as amici curiae to the International Tribunal for the Law of the Sea (ITLOS), they were frequently present in the courtrooms and informed the public about the factual backgrounds to and proceedings of the ITLOS cases.[19]

One of the most challenging global environmental problems today is global warming. From the beginning of the debate in the 1980s, environmental NGOs have been highly active in this field.[20] For example, the NGO the Centre for International Environmental Law (CIEL) provided substantial support to the Association of Small Island States (AOSIS) and the Caribbean Community Regional Group in world climate conferences.[21] The 1992 United Nations Framework Convention on Climate Change, like the CBD, was open for signature during the Rio Conference, attended by about 2,400 representatives of NGOs.[22] According to Article 7(6) of the UNFCCC, NGOs

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[17] For more detailed information see http://www.cbd.int/cooperation/organizations.shtml.

[18] Koh, *The Negotiation Process of UNCLOS III*, Outline; available at http://untreaty.un.org/cod/avl/pdf/ls/Koh_T_outline_2.pdf. For a list of NGOs that deal with oceans and the law of the sea, see http://www.un.org/Depts/los/Links/NGO-links.htm. A case study mainly focusing on NGO participation with regard to waste disposal at sea is provided by Stairs/Taylor, "Non-Governmental Organizations and the Legal Protection of the Oceans: A Case Study" in Hurrell/Kingsbury (eds.), *The International Politics of the Environment* (1992), 110.

[19] Gautier, "NGOs and Law of the Sea Disputes" in Treves/Di Rattalma et al. (eds.), *Civil Society, International Courts and Compliance Bodies* (2005), 233, 241.

[20] For a case study on NGOs in the climate change regime see Oberthür/Werksmann, *Participation of Non-Governmental Organisations in International Environmental Co-operation*, Umweltbundesamt, Berichte 11/02 (2002), 117 et seq. and Gulbrandsen/Andresen, "NGO Influence in the Implementation of the Kyoto Protocol: Compliance, Flexibility Mechanisms, and Sinks" (2004) 4 GEP, 54.

[21] Chayes/Chayes, *The New Sovereignty* (1998), 260 et seq.

[22] See UNCED summary chart at http://www.un.org/geninfo/bp/enviro.html; according to the same source 17,000 people attended the parallel NGO Forum. *Yamin* states that around 400 NGOs attended the Stockholm Conference on the Human Environment in 1972, and that some 10,000 NGOs were reported to have attended the Rio Conference in 1992; Yamin, "NGOs and International Environmental Law: A Critical Evaluation of their Roles and Responsibilities" (2001) 10 *RECIEL*, 149, 151. For a participation breakdown regarding all COPs and CMPs under the UNFCCC and the KP see http://unfccc.int/files/parties_and_observers/ngo/application/pdf/participation_breakdown_cop_1-16.pdf. In recent years between 4,000 and 5,000 observers attended the meetings, usually more than state representatives. COP 15/CMP 5 in Copenhagen had an extraordinarily high participation with just over 10,000 representatives of states, more than 13,000 observers and more than 3,000 media representatives.

can be admitted to sessions of the Convention bodies as observers.[23] Competent intergovernmental and non-governmental organisations may also submit relevant factual and technical information to the enforcement and facilitative branches of the compliance committee established under the Kyoto Protocol.[24] Environmental NGOs have contributed significantly to the design of the compliance mechanism during negotiations.[25] The Climate Action Network (CAN), a network of over 550 NGOs with seven regional offices worldwide, for instance, contributes in many ways to shaping climate negotiations and surveying state implementation.[26]

Another seemingly small but important contribution from the NGO sector to international environmental negotiations lies in their reporting activities.[27] For instance, the Earth Negotiations Bulletin (ENB) provides daily information from multilateral negotiations on environment and sustainable development and gives a concise overview of each day's statements, proposals, and decisions.[28] The ENB was established in 1992 at the Rio Conference by three individual NGO members and continues its work under the International Institute for Sustainable Development (IISD). The IISD Reporting Service also issues MEA bulletins to report on the negotiations under dozens of major MEAs. Its timely reports and archives are helpful resources for citizens, experts, and officials.

Larger environmental NGOs like Greenpeace and Friends of the Earth are active in virtually all of the fields of global environmental policy mentioned above. NGO networks like the Climate Action Network, Pesticide Action Network (PAN), Regional Environmental Centre for Central and Eastern Europe (REC), Global Legislators for a Balanced Environment (GLOBE), or, on a European scale, the European Environmental Bureau (EEB) help coordinate NGO positions and strengthen their influence.[29]

Overall, NGOs have been actively involved at all stages of the policy cycle of MEAs. As at national level, they create publicity, inform citizens, enhance knowledge bases, contribute to capacity-building, give expert advice, and give input to or even trigger control procedures.[30] All major MEAs contain rules for NGO participation.

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[23] For a current list of admitted NGOs see http://maindb.unfccc.int/public/ngo.pl.

[24] For an overview on NGO influence on implementation of the Kyoto Protocol see Gulbrandsen/Andresen, "NGO Influence in the Implementation of the Kyoto Protocol: Compliance, Flexibility Mechanisms, and Sinks" (2004) 4 GEP, 54.

[25] *Ibid.* at 61 et seq., 67.

[26] For recent activities see http://www.climatenetwork.org/category/wordpress-tag/kyoto-protocol. With regard to implementation see Climate Change Performance Index, Results 2010, issued by Germanwatch and CAN Europe; available at http://www.climateactionnetwork.ca/e/publications/ccpi-2010.pdf.

[27] Raustiala, "States, NGOs, and International Environmental Institutions" (1997) 41 *ISQ*, 719, 730.

[28] The ENB is published by the International Institute for Sustainable Development (IISD), http://www.iisd.ca/.

[29] See also Yamin, "NGOs and International Environmental Law: A Critical Evaluation of their Roles and Responsibilities" (2001) 10 *RECIEL*, 149, 152.

[30] For a concise table of core functions of NGOs in environmental co-operation see Oberthür/Werksmann, *Participation of Non-Governmental Organisations in International Environmental Co-operation*, Umweltbundesamt, Berichte 11/02 (2002), 4.

The state-built institutional framework acknowledges NGOs as important partners in handling with global environmental affairs.

II. ENGOs in International Political Commitments

This subchapter explores international political and legal commitments to strengthen the role of environmental NGOs in international judicial and quasi-judicial procedures. It examines more closely the two main soft law outputs of the UNCED, the Rio Declaration and Agenda 21. The Malmö Ministerial Declaration and the UNEP Montevideo Programmes are also considered. As regards the regional international level, efforts undertaken within the regime of the 1998 UNECE Aarhus Convention on Access to Information, Public-Participation in Decision-making, and Access to Justice in Environmental Matters are scrutinized.

A. *Rio Declaration and Agenda 21*

Although the UNCED was groundbreaking with respect to the participation of NGOs from all over the world, none of the political outcome documents precisely demands more involvement of NGOs in international environmental law enforcement and compliance control. Only Principle 10 of the Rio Declaration states in rather broad terms that "[e]nvironmental issues are best handled with the participation of all concerned citizens, at the relevant level" and thus includes the international level.[31] The more concrete postulations in Principle 10 that each individual shall have appropriate access to information, the opportunity to participate in decision-making processes, and effective access to judicial and administrative proceedings in environmental matters, explicitly refer only to the national level.[32]

Principles 26 and 27 of the Rio Declaration should at least also be mentioned in this context. According to Principle 26 "[s]tates shall resolve all their environmental disputes peacefully and by appropriate means in accordance with the Charter of the United Nations." Thus, there is no reference to a possible role for NGOs in international environmental dispute resolution. Principle 27 generally states that "[s]tates and people shall cooperate in good faith and in a spirit of partnership in the fulfillment of the principles embodied in this Declaration and in the further development of international law in the field of sustainable development."

Similarly, Agenda 21 does not contain an explicit postulation to widen the access of citizens and NGOs to international enforcement and compliance review procedures. Chapter 27 deals with strengthening the role of NGOs as partners in sustainable development and provides for the strongest language in this regard. In particular, it

[31] Principle 10, Rio Declaration.
[32] *Ibid*.

constantly refers to the important role of NGOs with respect to the implementation of Agenda 21.

Paragraph 3 of chapter 27 underlines that NGOs "possess well-established and diverse experience, expertise and capacity in fields which will be of particular importance to the implementation and review of environmentally sound and socially responsible sustainable development, as envisaged throughout Agenda 21" and therefore, their global network "should be tapped, enabled and strengthened in support of efforts to achieve these common goals."

According to paragraph 5 of chapter 27 of Agenda 21, society, governments and international bodies "should develop mechanisms to allow non-governmental organizations to play their partnership role responsibly and effectively in the process of environmentally sound and sustainable development." Slightly more concretely, paragraph 8 states that "[g]overnments and international bodies should promote and allow the participation of non-governmental organizations in the conception, establishment and evaluation of official mechanisms and formal procedures designed to review the implementation of Agenda 21 at all levels."

Although these paragraphs can be interpreted very narrowly as merely referring to the role of NGOs within the capacity building process and policy review procedures, the language does not require such a narrow interpretation. Review of implementation might equally encompass formal compliance mechanisms and dispute resolution.

Chapter 38 of Agenda 21 refers to international institutional arrangements and states in paragraph 7 as the overall objective the "integration of environment and development issues at national, sub regional, regional and international levels, including in the United Nations system institutional arrangements." Paragraph 43 spells out what the United Nations system, including international finance and development agencies, should do in this regard. They should take measures to

> a. Design open and effective means to achieve the participation of non-governmental organizations, including those related to major groups, in the process established to review and evaluate the implementation of Agenda 21 at all levels and promote their contribution to it;
> b. Take into account the findings of review systems and evaluation processes of non-governmental organizations in relevant reports of the Secretary-General to the General Assembly and all pertinent United Nations agencies and intergovernmental organizations and forums concerning implementation of Agenda 21 in accordance with the review process.

Chapter 39 of Agenda 21 focuses on international legal instruments and mechanisms and states in paragraph 2 that the "overall objective of the review and development of international environmental law should be to evaluate and to promote the efficacy of that law and to promote the integration of environment and development policies through effective international agreements or instruments taking into account both universal principles and the particular and differentiated needs and concerns of all countries."

Paragraph 3 h) formulates the specific objective to "study and consider the broadening and strengthening of the capacity of mechanisms, inter alia, in the United Nations system, to facilitate, where appropriate and agreed to by the parties concerned, the identification, avoidance and settlement of international disputes in the field of sustainable development, duly taking into account existing bilateral and multilateral agreements for the settlement of such disputes." NGOs are not mentioned here. In paragraph 8 b) the parties agree to consider ways in which relevant international bodies, such as UNEP, might contribute towards the further development of review mechanisms.

The subchapter that deals with disputes in the field of sustainable development equally does not explicitly refer to NGOs. Nevertheless, in paragraph 10 parties agree that "[s]tates should further study and consider methods to broaden and make more effective the range of techniques available at present, taking into account, among others, relevant experience under existing international agreements, instruments or institutions and, where appropriate, their implementing mechanisms such as modalities for dispute avoidance and settlement." With respect to dispute settlement, recourse to the International Court of Justice is mentioned.

B. *Malmö Ministerial Declaration*

At the First Global Ministerial Environment Forum held in 2000 in Malmö, ministers of environment and heads of delegation adopted the Malmö Ministerial Declaration which addresses major environmental challenges of the 21st century and also includes a chapter on civil society and environment.[33] With respect to access to justice it states:

> The role of civil society at all levels should be strengthened through freedom of access to environmental information to all, broad participation in environmental decision-making, as well as access to justice on environmental issues. Governments should promote conditions to facilitate the ability of all parts of society to have a voice and to play an active role in creating a sustainable future.[34]

Since it refers to "civil society at all levels", this political statement may be interpreted as encompassing the strengthening of environmental NGOs with regard to access to justice at international level.

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[33] The First Global Ministerial Environment Forum was held in pursuance of UNGA resolution 53/242 of 28 July 1999 to enable the world's environment ministers to review emerging environmental issues. The Malmö Ministerial Declaration was adopted 31 May 2000 and is available at http://www.unep.org/malmo/malmo_ministerial.htm.

[34] *Ibid.* at 16.

C. *UNEP Montevideo Programmes*

The effectiveness of (international) environmental law is also a key topic in the UNEP Montevideo Programmes. Currently, UNEP is implementing Montevideo III, the Programme for the first decade in the twenty-first century, which was adopted in February 2001 by the UNEP Governing Council and reviewed in 2004.[35] In order to contribute to effective implementation of environmental law, according to the Montevideo III Programme, UNEP will also

> [e]xplore options for advancing the effective involvement of non-State actors in promoting implementation of, and compliance with, international environmental law and its enforcement at the domestic level; [. . .]
>
> Encourage, during the development of new international environmental legal instruments, consideration of the implementation and enforcement aspects of those instruments.[36]

Thus, the UNEP Montevideo Programme III underlines the cautious approach to the involvement of non-state actors in enforcement procedures at international level, since it also explicitly refers only to the domestic level.[37]

D. *Aarhus Convention and Almaty Guidelines*

The Aarhus Convention, as the regional multilateral agreement implementing Principle 10 of the Rio Declaration, primarily addresses rights for citizens and NGOs in environmental matters at national and European level. With respect to the international level, Article 3, paragraph 7 of the Aarhus Convention states that

> [e]ach Party shall promote the application of the principles of this Convention in international environmental decision-making processes and within the framework of international organizations in matters relating to the environment.

In May 2005, the Parties to the Convention adopted a set of guidelines in this regard at their second meeting in Almaty, Kazakhstan (Almaty Guidelines).[38] They also established a Task Force to consult with international forums. At their third meeting in Riga in June 2008, the Parties renewed the mandate of the Task Force on Public Participation in International Forums (PPIF Task Force) for a further three years.[39]

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[35] Decision 21/23 of the UNEP Governing Council of 9 February 2001.

[36] Montevideo III Programme, *ibid.*, at I 1. (i) and (k).

[37] See also Rest, "Enhanced Implementation of International Environmental Treaties by Judiciary" (2004) 1 MqJICEL, 1, 3. As far as is currently foreseeable, this will not change in the Montevideo IV Programme. The current draft provides for a clause with almost identical language, Draft fourth Programme for the Development and Periodic Review of Environmental Law (Montevideo Programme IV), I A (k), Annex I UNEP/Env.Law/MTV4/IG/2/2.

[38] Decision II/4, Promoting the Application of the Principles of the Aarhus Convention in International Forums, in Report of the Second Meeting of the Parties, Addendum, ECE/MP.PP/2005/2/Add.5 as of 20 June 2005 (Almaty Guidelines), available at http://www.unece.org/env/documents/2005/pp/ece/ece.mp.pp.2005.2.add.5.e.pdf.

[39] For an instructive summary of the efforts undertaken under Article 3(7) of the Aarhus Convention see Dannenmaier, "A European Commitment to Environmental Citizenship: Article 3.7

The Almaty Guidelines aim to provide general guidance to Parties on promoting the application of the principles of the Convention in international forums in matters relating to the environment, paragraph 1 Almaty Guidelines. International forums encompass the negotiation and implementation of MEAs and other agreements if decisions or actions undertaken relate to the environment or may have a significant effect on the environment, paragraph 4 lit. a and b Almaty Guidelines. International access means public access to international forums, paragraph 10 Almaty Guidelines. Several paragraphs of the general provisions carefully consider wider public access to justice at international level:

> Access to information, public participation and access to justice in environmental matters are fundamental elements of good governance at all levels and essential for sustainability.[40]
>
> There may be a need to adapt and structure international processes and mechanisms in order to ensure meaningful and equitable international access.[41]
>
> In any structuring of international access, care should be taken to make or keep the processes open, in principle, to the public at large.[42]
>
> Processes and mechanisms for international access should be designed to promote transparency, minimize inequality, avoid the exercise of undue economic or political influence, and facilitate the participation of those constituencies that are most directly affected and might not have the means for participation without encouragement and support.[43]

Paragraph 40 of the Almaty Guidelines reflects the Parties' consensus with respect to review procedures in environmental matters:

> Each Party should encourage the consideration in international forums of measures to facilitate public access to review procedures relating to any application of the rules and standards of each forum regarding access to information and public participation within the scope of these guidelines.

Interestingly, in its draft of the Almaty Guidelines the expert group proposed much more concrete wording. It explicitly addressed public involvement in review, compliance, and dispute settlement mechanisms in several paragraphs. It stated:

> Members of the public should have access to review procedures to challenge any act or omission of any international forum, including its secretariat:

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of the Aarhus Convention and Public Participation in International Forums" (2007) 18 *YbIEL*, 32. The PPIF Task Force supported by the Secretariat disseminated a questionnaire to ninety-seven international forums seeking information about how they provide access to information, decision-making processes, and justice; forty-eight provided completed responses. With respect to access to justice only two forums stated that formal procedures were available to non-state actors, the International Fund for Agricultural Development and the European Bank for Reconstruction and Development; see *Dannenmaier, ibid.* at 57, 60.

[40] Decision II/4, Promoting the Application of the Principles of the Aarhus Convention in International Forums, in Report of the Second Meeting of the Parties, Addendum, ECE/MP.PP/2005/2/Add.5 as of 20 June 2005 (Almaty Guidelines) at 11.

[41] *Ibid.* at 13.

[42] *Ibid.* at 14.

[43] *Ibid.* at 15.

(a) In the provision of information or in the process of public participation in the forum's processes, within the framework of its rules and standards; and
(b) Concerning compliance with rules and standards relating to the environment.

Such procedures should be impartial, fair, equitable, open and transparent.[44]

[Public involvement in international implementation review [and] [compliance] [and dispute settlement] mechanisms could help to ensure the accountability within such mechanisms and contribute to monitoring the implementation of rules related to environmental issues. It could also strengthen the quality of the representation of public interests. The modalities of public involvement may vary depending on the rules and procedures of the international forums but could include, in the case of compliance mechanisms, providing for participation of the public in the development of such mechanisms and [in the process of appointing the members of the relevant bodies (e.g. by providing an entitlement to nominate members), as well as] providing for the mechanism to be triggered by submission of petitions or communications, including amicus curiae briefs by the public. Parties should consider and, where appropriate, promote such methods of involving the public in international implementation review [and] [compliance] [and dispute settlement] mechanisms.][45]

[A broad interpretation of the concept of "standing" or its equivalent in the context of international forums in proceedings involving environmental issues could further the objective of the Convention and should be applied].[46]

Although parties followed the recommendations of the expert group in many respects, they completely rejected this chapter and inserted paragraph 40 cited above instead.[47]

Nevertheless, the Almaty Guidelines are the most concrete international soft law that touches on the further development of public access to review procedures in international forums. However, the parties to the Aarhus Convention could merely agree to "encourage the consideration" of measures to facilitate public access. Thus, even within this limited regional international group of state representatives who established the Aarhus Convention as the most far reaching international environmental treaty to date strengthening the role of environmental NGOs in law enforcement and compliance control, there is only a vague recognition of the need to further consider access to justice in the case of international law enforcement procedures.

III. Relevance, Definition, and Legal Status of NGOs in International Law

There is no clear answer as to the definition and the legal status of NGOs in international law. Nevertheless, from the early beginnings of international law, NGOs have played a vital role in its development and implementation. The number of

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[44] *Ibid.* at 53.
[45] *Ibid.* at 54.
[46] *Ibid.* at 55.
[47] Dannenmaier, "A European Commitment to Environmental Citizenship: Article 3.7 of the Aarhus Convention and Public Participation in International Forums" (2007) 18 *YbIEL*, 32, 56.

international NGOs engaged in global politics has been rising constantly, especially in the environmental sector. At different periods in time different international political and legal documents conferred certain tasks and rights on NGOs, but there is no coherent framework defining them or their role in international law. The following subchapters give insight into history and current debate on the relevance, definition, and legal status of NGOs in international law.

A. *Relevance of NGOs in the International Arena*

Non-governmental organizations have been involved in international politics for over 150 years. The first international NGO (INGO) is said to be Anti-Slavery International, established in 1839.[48] The International Workingmen's Association was founded in 1864, the International Peace Bureau in 1891, and the International Alliance of Women in 1902.[49] Already at the Hague Conferences in 1899 and 1907, INGOs were involved in lobbying activities.

The Union of International Associations (UIA) based in Brussels is a research institute and documentation center that registers NGOs in all fields and on all levels. It was founded in 1907 and since then has recorded a steady growth of the number of INGOs.[50] In 1909 the UIA recorded 176 internationally active NGOs,[51] by the year 2006 there were about 7,300.[52] However, one has to be cautious with analysis based on such numbers. On the one hand, the number depends very much on the definition of an INGO, and on the other hand, the dissolution of INGOs and their fragmentation also have to be taken into account when assessing the growth of international NGOs.[53] Internationally, non-governmental organizations are mainly active in the field of human rights, accounting for a quarter of all NGOs.[54] The second most important field of activity is the environmental sector.[55]

Globalization and the development of global governance give rise to further fields of activity and enhance the importance of INGOs. For example, the World Social Forum became an important platform for civil society organizations opposed to a

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[48] Davies, *The Rise and Fall of Transnational Civil Society*, City University London, Center for International Politics, Working Papers on Transnational Politics (April 2008), 7.

[49] *Ibid.*

[50] Arguing for a development in waves: Davies, *The Rise and Fall of Transnational Civil Society*, City University London, Center for International Politics, Working Papers on Transnational Politics (April 2008).

[51] Martens, "Examining the (Non-) Status of NGOs in International Law" (2003) 10 *Ind. J. Global Legal Stud.*, 1, 4.

[52] Union of International Associations, Yearbook of International Organizations (2005/2006), 2966, Appendix 3 table 1.

[53] See variety of classification at UIA, *ibid.*; see also Davies, *The Rise and Fall of Transnational Civil Society*, City University London, Center for International Politics, Working Papers on Transnational Politics (April 2008).

[54] Martens, "Examining the (Non-)Status of NGOs in International Law" (2003) 10 *Ind. J. Global Legal Stud.*, 1, 4.

[55] *Ibid.* at 5.

world dominated by capital to debate ideas and make proposals within the international governance arena.[56] In the environmental field, NGOs have participated in large numbers in international environmental world conferences since 1972. As mentioned above, about 2,400 representatives of NGOs joined the Earth Summit in Rio in 1992. Their important roles within several MEAs have been described by way of example in subchapter I above.

National and international NGOs engage in international politics in many different ways.[57] Through participation in international conferences[58] and reporting back to their communities, NGOs can exert influence on the official negotiators. They can also contribute to the transparency of decision-making processes. But they are not only outside observers at international conferences. NGO members can have an important influence on legal documents when they are part of government delegations or function as advisors to governments or, for example, the secretariat of an international convention. In addition to their influence on the law-making process, they are also actively involved in law implementation and compliance control processes. Numerous international conventions draw on (international) NGOs' expertise in capacity building activities. Finally, and central to this study, they can hold governments accountable to their legal obligations in their capacity as watchdogs.

B. *Definition of NGOs under International Law*

The Charter of the United Nations is the earliest and most central international document using the term "non-governmental organization".[59] It was signed in June 1945, in San Francisco, at the conclusion of the United Nations Conference on International Organization, and came into force in October 1945. Article 71 of the UN Charter states that

> [t]he Economic and Social Council may make suitable arrangements for consultation with non-governmental organizations which are concerned with matters within its competence. Such arrangements may be made with international organizations and, where appropriate, with national organizations after consultation with the Member of the United Nations concerned.

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[56] For an overview of these activities see http://www.forumsocialmundial.org.br.

[57] For a concise overview for functions of NGOs in international environmental co-operation in general see Oberthür/Werksmann, *Participation of Non-Governmental Organisations in International Environmental Co-operation*, Umweltbundesamt, Berichte 11/02 (2002), 4. With regard to the functions of *NGOs in International Law* in general see Charnovitz, "Nongovernmental Organizations and International Law" (2006) *Am. J. Int'l L.*, 348, 352 et seq. See also Çakmak, "Civil Society actors in International Law and World Politics: Definition, Conceptual Framework, Problems" (2008) *IJCSL*, 7, 23 et seq.

[58] For a comparison of the participation of NGOs in different UN World Conferences see *Clark/Friedman et al.*, The Sovereign Limits of Global Civil Society World Politics (1998), 1. See also Lindblom, *Non-Governmental Organisations in International law* (2005), 446 et seq.

[59] See also Lindblom, *ibid.* at 36 et seq.

Several civil society organizations contributed to the development of the UN Charter and Article 71 meant to acknowledge these efforts. Unfortunately, the UN Charter does not define the term "non-governmental organization". Article 71 grants primarily but not exclusively consultative status to international NGOs. After consultation with the member state, national NGOs can also participate in consultative processes.

Currently, UN ECOSOC Resolution 1996/31 regulates the consultative relationship between the United Nations and non-governmental organizations, as provided for in more detail under Article 71 of the UN Charter. In paragraphs 9 to 13 it sets out some standards for non-governmental organizations. According to these the NGO shall:

- be of recognized standing within the particular field of its competence or of a representative character [...];
- have an established headquarters, with an executive officer;
- have a democratically adopted constitution, a copy of which shall be deposited with the Secretary-General of the United Nations, and which shall provide for the determination of policy by a conference, congress or other representative body, and for an executive organ responsible to the policy-making body;
- have authority to speak for its members through its authorized representatives [...];
- have a representative structure and possess appropriate mechanisms of accountability to its members, who shall exercise effective control over its policies and actions through the exercise of voting rights or other appropriate democratic and transparent decision-making processes. Any such organization that is not established by a governmental entity or intergovernmental agreement shall be considered a non-governmental organization for the purpose of these arrangements, including organizations that accept members designated by governmental authorities, provided that such membership does not interfere with the free expression of views of the organization.
- The basic resources of the organization shall be derived in the main part from contributions of the national affiliates or other components or from individual members. Where voluntary contributions have been received, their amounts and donors shall be faithfully revealed to the Council Committee on Non-Governmental Organizations. [...]

In 1946 the council granted consultative status to 41 NGOs, and by 1992 this had risen to more than 700 NGOs.[60] Since then the number has been steadily increasing to 3,336 organizations in 2010.[61]

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[60] For more details on the consultative process, especially the three different categories of participation, see Martens, "Examining the (Non-) Status of NGOs in International Law" (2003) 10 *Ind. J. Global Legal Stud.*, 1, 17 et seq.

[61] United Nations Department on Economic and Social Affairs, NGO branch, available at http://esango.un.org/paperless/Web. For a list of NGOs with consultative status as of 1 September 2010 see http://esango.un.org/paperless/reports/E2010INF4.pdf.

There has as yet been no further attempt to define NGOs at the international level.[62] Generally, on the international as on the national level, the negative definition "non-governmental" organization allows for very broad interpretations.[63] Nevertheless, this is not a reason for not officially recognizing NGOs as a group of actors in law. As the UN resolution cited above as well as many other international and national laws show, there are ways to include NGOs into legal processes if there is sufficient political will to do so.[64] This study focuses on NGOs, which fulfill the standards of UN ECOSOC Resolution 1996/31 cited above.

C. *Legal Status of NGOs under International Law*

For most authors, the classic doctrinal question here is whether NGOs are "subjects" of international law.[65] The classic answer is no or partially.[66] There are other authors who consider the subject-object dichotomy "not particularly helpful" to begin with.[67] This analysis does not reiterate the usual debate but focuses on two aspects: legal personality and the rights and duties of NGOs under international law. The legal personality of an NGO is crucial for attributing rights and duties to it, such as, for instance, standing before international courts.[68] An overview of the rights and duties of NGOs under current international law will show a variety of options for assigning

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[62] The Council of Europe also established a consultative status for NGOs but did not define the term NGO in its resolutions, see Lindblom, *Non-Governmental Organisations in International Law* (2005), 40.

[63] See Martens, "Examining the (Non-) Status of NGOs in International Law" (2003) 10 *Ind. J. Global Legal Stud.*, 1, 2; Yamin, "NGOs and International Environmental Law: A Critical Evaluation of their Roles and Responsibilities" (2001) 10 *RECIEL*, 149, 149 et seq.; Bakker/Vierucci, "Introduction: A Normative or Pragmatic Definition of NGOs" in Dupuy/Vierucci (eds.), *NGOs in International Law* (2008), 1, 14; Çakmak, "Civil Society Actors in International Law and World Politics: Definition, Conceptual Framework, Problems" (2008) *IJCSL*, 7, 14 et seq.

[64] A comprehensive study on the status of NGOs in international law is provided by Lindblom, *Non-Governmental Organisations in International Law* (2005).

[65] For an overview on this debate see Bakker/Vierucci, "Introduction: A Normative or Pragmatic Definition of NGOs" in Dupuy/Vierucci (eds.), *NGOs in International Law* (2008), 1, 1; for an in depth analysis see Lindblom, *Non-Governmental Organisations in International Law* (2005), 53 et seq.

[66] See, for example, Hobe, *Einführung in das Völkerrecht* (2008), 159 et seq., 162; Hobe, "Individuals and Groups as Global Actors: The Denationalization of International Transaction" in Hofmann/Geissler (eds.), *Non-State Actors as New Subjects of International Law* (1999), 115, 133. For a comprehensive study concluding that INGOs are partially subjects of international law Hummer, "Internationale nichtstaatliche Organisationen im Zeitalter der Globalisierung" in Dicke (ed.), *Völkerrecht und Internationales Privatrecht in einem sich globalisierenden internationalen System* (2000), 45. Concluding that INGOs are subjects of international law, see Hempel, *Die Völkerrechtssubjektivität internationaler nichtstaatlicher Organisationen* (1999), 192.

[67] Charnovitz, "Nongovernmental Organizations and International Law" (2006) *Am. J. Int'l L.*, 348, 355; Higgins, "Conceptual Thinking about the Individual in International Law" (1978) 4 *Brit. J. Int'l S.*, 1, 5; see also Borchard, "The Access of Individuals to International Courts" (1930) 24 *Am. J. Int'l L.*, 359, 364.

[68] See also Charnovitz, "Nongovernmental Organizations and International Law" (2006) *Am. J. Int'l L.*, 348, 355.

a role to NGOs and thus makes clear that the international "legal status" of NGOs is rather a question of political will than of legal doctrine.[69]

1. *Legal Personality*

National NGOs gain their legal personality under the relevant national law. NGOs acting internationally have to choose a country in which to register. For example, the main legal entity of Greenpeace International is "Stichting Greenpeace Council" (SGC) based in Amsterdam and registered with the Dutch Chamber of Commerce.[70] A Dutch Stichting is a form of foundation. National and regional offices of Greenpeace establish legal entities in different countries as required, under the relevant legal framework. The WWF is a foundation constituted under Swiss law and registered in the Commercial Register of Nyon, Canton of Vaud, Switzerland.[71] In general NGOs can be organized as unincorporated and voluntary associations, trusts, charities, foundations, companies not for profit, or entities formed under special non-profit laws.[72]

When NGOs act across borders, they often struggle with conflicting laws and the problem that their legal status in one country is not sufficient for a range of activities in another country. There have been several attempts on the international level to solve this problem; four draft conventions are presented in short here.[73] As early as 1910, the Institut de Droit International and the International Law Association started to promote a convention to grant legal personality to international NGOs and the 1st World Congress of International Associations requested the preparation of a draft convention on the legal status of international associations.[74] In 1912,

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[69] Similarly, Dupuy, "Conclusion: Return on the Legal Status of NGOs and on the Methodological Problems which Arise for Legal Scholarship" in Dupuy/Vierucci (eds.), *NGOs in International Law* (2008), 204, 215. This approach is also compatible with *Lindblom's* conclusion that it is ultimately up to states as the creators of international law to confer legal status on NGOs Lindblom, *Non-Governmental Organisations in International Law* (2005), 112. She defines "legal status" as "a broad concept, which embraces all kinds of provisions and practices which explicitly take account of NGOs or which can be used by these organizations for acting in the international legal context, irrespective of which field of international law the material belongs to", Lindblom, *ibid.* at 116.

[70] See legal structure of Greenpeace International at http://www.greenpeace.org/international/en/about/how-is-greenpeace-structured/legal-structure/.

[71] See WWF Statutes at http://wwf.panda.org/who_we_are/organization/statutes/.

[72] Stillman, *Global Standard NGOs: Essential Elements of Good Practice* (2007), 13 et seq.

[73] For a list of draft conventions and more background information see UIA http://www.uia.be/node/164117. See also Martens, "Examining the (Non-)Status of NGOs in International Law" (2003) 10 *Ind. J. Global Legal Stud.*, 1, 20. At the national level, Belgian law is often cited as a good example for dealing with international NGOs. It states that foreign international associations may exercise the rights accruing from their national status in Belgium. For more information and critique see Martens, "Examining the (Non-)Status of NGOs in International Law" (2003) 10 *Ind. J. Global Legal Stud.*, 1, 22 and Merle, *International Non-Governmental Organizations and their Legal Status*, UIA (ed.) International Associations Statutes Series (1988).

[74] Report to the 2nd World Congress of International Associations (Brussels, 1913), Appendix 3.1 of the International Associations Statutes Series vol. 1, UIA eds (1988). See also Charnovitz, "Nongovernmental Organizations and International Law" (2006) *Am. J. Int'l L.*, 348, 356.

a first Draft International Convention on International Associations was presented as a follow up to the request.[75]

In 1923 the Institut de Droit International unanimously approved a Draft Convention on International Associations presented by *Nicolas Politis*.[76] According to Article 1 of this Draft Convention, contracting parties shall either refer a new legal status to an international association or recognize the one it has in another country. Under Article 4 of the Draft Convention, International associations are to register with a Permanent Commission set up in Brussels. If a state party refuses to recognize the legal personality of an association in a particular case, Article 7 allows the association to contest this before the Permanent International Court of Justice. In 1950 the Institut de Droit International adopted another proposal for a draft convention presented by *Suzanne Bastid*.[77] In contrast to the earlier draft, Article 1 of the 1950 Draft Convention provided that the contracting parties agree to grant to international associations recognition of rights as defined in this Convention. Article 12 states that disputes arising from the interpretation or the application of the Convention which are not settled through negotiation or arbitration shall be subject to the compulsory jurisdiction of the International Court of Justice in conformity with its Statute. This refers to states and does not grant associations standing before the ICJ. Despite this considerable work in the international arena, states have shown no interest in either of these drafts.

The only Draft Convention at least some states showed an interest in is the European Convention on the Recognition of the Legal Personality of International Non-Governmental Organizations developed under the auspices of the Council of Europe.[78] It was opened for signature in 1986 and came into force in 1991. Only three ratifications are required to bring the Convention into force amongst the contracting states. The Convention was signed by Austria, Belgium, Greece, Portugal, Switzerland, and the UK in 1986. Slovenia signed in 1993 and France in 1996. All parties except France also ratified the Convention and thus it is binding among seven parties. With respect to the legal personality of an NGO, Article 2(1) states that the legal personality and capacity, as acquired by an NGO in the party state in which it has its statutory office, shall be recognized as of right in the other states. Thus, the

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[75] Draft International Convention on International Associations, Follow-up to 1st World Congress of International Associations (1910), Appendix 4.2 of the International Associations Statutes Series vol 1, UIA eds (1988).

[76] Draft Convention on International Associations, Institute of International Law, Nicolas Politis, Appendix 4.5 of the International Associations Statutes Series vol 1, UIA eds (1988).

[77] Resolution on granting of international status to associations established by private initiative Institute of International Law, Suzanne Bastid, Appendix 4.8 of the International Associations Statutes Series vol 1, UIA eds (1988).

[78] European Convention on the Recognition of the Legal Personality of INGOs, Council of Europe, Appendix 4.11 of the International Associations Statutes Series vol 1, UIA eds (1988). See also Lindblom, *Non-Governmental Organisations in International Law* (2005), 40 et seq.

convention does not establish a new international legal personality for INGOs. There is no clause on dispute resolution.

From a universal international perspective, therefore, the situation with respect to the legal personality of international NGOs is much the same as it was about a century ago. Although the lack of an international legal personality remains a problem, NGOs which work internationally manage to operate without it.[79] As the following subchapter will examine more closely, this lack of an international legal personality did not prevent states from conferring rights and duties on NGOs in international contexts.

2. *Rights and Duties*

As there is no international convention defining a legal personality for international NGOs, there is no international treaty providing a framework of rights and duties of NGOs in the international arena. International treaties and resolutions of intergovernmental organizations mainly confer rights and duties on states. However, in several cases, non-state actors such as intergovernmental organizations, private companies, and even NGOs are addressees of international law.[80]

Article 71 of the UN Charter grants different types of consultative status with ECOSOC to non-governmental organizations, and many other intergovernmental organizations adopted similar regulations.[81] The Geneva Conventions explicitly grant some privileges and immunities to the International Committee of the Red Cross and other impartial humanitarian organizations.[82] Numerous bilateral investment treaties (BITs) and also multilateral treaties such as the Energy Charter Treaty grant private investors, whose rights under the treaty have been violated, the right to initiate an international arbitration procedure, for example under the auspices of the International Centre for the Settlement of Investment Disputes (ICSID).[83] Article 34

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[79] Charnovitz, "Nongovernmental Organizations and International Law" (2006) *Am. J. Int'l L.*, 348, 356.

[80] A comprehensive analysis of role of NGOs in international law is provided by Lindblom, *Non-Governmental Organisations in International Law* (2005), 134 et seq.

[81] For instance, the Organization of American States (OAS) adopted Guidelines for the Participation of Civil Society Organizations, OAS Permanent Council, CP/Res. 759 (1217/99) in 1999; NGOs such as the International Association of Antarctica Tour Operators participate in the consultative process of the Antarctic Treaty, Charnovitz, "Nongovernmental Organizations and International Law" (2006) *Am. J. Int'l L.*, 348, 359.

[82] See for instance, Articles 2, 9, 10, 11, 23, and 26 of the Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949. It is important to note that it is only the International Committee of the Red Cross that receives rights under an international agreement here. It is not the whole organization of the Red Cross; the Committee is only one of its three main parts. The Committee is also not really international in its organization. Its legal personality derives from Swiss private law and its members are exclusively Swiss citizens. For a good summary see Hobe, *Einführung in das Völkerrecht* (2008), 156 et seq.

[83] See for example Article 26 of the Energy Charter on the settlement of disputes between an investor and a contracting party. For more details see Chapter 4.III.B.

of the European Convention on Human Rights grants NGOs a right to bring a case to the European Court of Human Rights (ECtHR) when they claim to be the victim of a violation by one of the party states of the rights set forth in the Convention.[84] Decision I/7 on the review of compliance with the UNECE Aarhus Convention entitles "members of the public", including NGOs, to bring communications concerning a party's compliance with the Convention before the Compliance Committee.[85] All major MEAs listed in chapter 1.I above, for example, the 1973 CITES, 1992 CBD, 1992 UNFCCC, and 1995 Basel Convention explicitly confer observer status on NGOs, and all of these MEAs have an almost global membership.

This non-exhaustive list shows that international law, in some cases dating back many years – the Geneva Conventions date from 1949, the first BIT from 1959 –, does confer rights and duties on non-state actors whenever there is sufficient political will to do so. With regard to enforcement procedures, this mainly happened in favor of human rights protection but also to better safeguard economic interests. The opening of the Aarhus Compliance Committee to environmental NGOs represents a first step towards allowing environmental interests a meaningful voice in a regional international compliance control procedure. Chapters III and IV will provide an in-depth analysis with respect to access rights before international courts, arbitral tribunals, and compliance committees. The actual and potential roles focused on are NGOs as initiators of procedures before these bodies and NGOs as amici curiae. In concluding this section, it is important to note that questions of the legal status of non-state actors have not prevented states in the above examples from conferring rights and duties on them.

IV. Legitimacy and Accountability

As already pointed out in the introduction, this study is based on the assumption that the access of environmental NGOs to international judicial and quasi-judicial procedures enhances the latters' accountability towards the global demos and therefore positively contributes to establishing democratic global governance.[86]

Critiques have argued that the influence of NGOs on international law and institutions is illegitimate because NGOs are often advocates of a very limited agenda and special interests and do not represent anybody in the sense of democratic

[84] See Chapter 3.I.B.1.

[85] Article 18 of the Structure and Functions of the Compliance Committee and Procedures for the Review of Compliance, Annex to Decision I/7 on the Review of Compliance, adopted at the first meeting of the Parties in October 2002, ECE/MP.PP/2/Add.8, 2 April 2004. See Chapter 3.III.

[86] See also v. Bogdandy/Venzke, "Zur Herrschaft internationaler Gerichte: Eine Untersuchung internationaler öffentlicher Gewalt und ihrer demokratischen Rechtfertigung" (2010) 70 *ZaöRV*, 1, 27 et seq., 32 et seq., 34 et seq.

representation.[87] They are neither elected nor controlled by citizens, sometimes even their inner organization structure is not democratic, and some NGOs engage in activities of civil disobedience. Non-transparent financial support is also often cited as a reason for the illegitimacy of NGOs and their influence.[88] These arguments are not rejected here. However, they are not considered necessarily relevant to the question at issue.

NGOs do not have to prove any legitimacy. Legitimacy is a concept applying to state authority and the exercise of power by state organs in democratic societies.[89] NGOs do not take any decisions that are legally binding on any citizen. Moreover, this study is limited to the role of NGOs in law enforcement and compliance control and does not address the role of NGOs in international law-making.[90] Potential roles of NGOs in law enforcement and compliance control are also limited to initiators of procedures and amici curiae. They would not function as decision-makers and would not exert any authoritative power. Thus, for the purpose of this study and the above mentioned assumption, it is sufficient to take a closer look at two issues: can NGOs enhance the accountability of international judicial and quasi-judicial bodies and can they enhance the accountability of these bodies towards a global demos?

International judicial and quasi-judicial bodies are established by international treaties mostly between national governments. Even if those states are democratically governed, the legitimacy chain from the national demos to the international negotiator is rather long and the control through national parliaments rather weak. Many states that ratified institution-building treaties are not democratically governed at all. For the same reason, the body of law applied by those judicial and quasi-judicial bodies falls short of democratic legitimacy.[91] Thus, there is a democratic deficit in the power exerted by the international judiciary as far as their decisions are

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[87] For a summary of the critique see Charnovitz, "Nongovernmental Organizations and International Law" (2006) *Am. J. Int'l L.*, 348, 363 et seq. See also Beisheim, "NGOs und die (politische) Frage nach ihrer Legitimation" in Brunnengräber/Klein et al. (eds.), *NGOs im Prozess der Globalisierung* (2005), 242, 242.

[88] Beisheim, "NGOs und die (politische) Frage nach ihrer Legitimation" in Brunnengräber/Klein et al. (eds.), *NGOs im Prozess der Globalisierung* (2005), 242, 242.

[89] See also *ibid.* at 243.

[90] As far as law-making is concerned, representation matters and the democratic legitimacy of NGOs becomes an important factor. For a study on criteria and indicators relevant for the assessment of the democratic legitimacy of transnational civil society organizations and thus as a presupposition for their ability to function as "transmission belts" between transnational citizenry and international organizations, see Steffek/Bendrath et al., "Assessing the Democratic Legitimacy of Transnational CSOs: Five Criteria" in Steffek/Hahn (eds.), *Evaluating Transnational NGOs* (2010), 100, 104 et seq. For a follow-up study applying these criteria to a range of transnational civil society organizations including several NGOs from the environmental sector see Steffek/Hahn et al., *Whose voice? Transnational CSOs and their Relations with Members, Supporters, and Beneficiaries*, TransState Working Papers (2010).

[91] Disputing the decoupling of law and politics and fragmentation see v. Bogdandy/Venzke, "Zur Herrschaft internationaler Gerichte: Eine Untersuchung internationaler öffentlicher Gewalt und ihrer demokratischen Rechtfertigung" (2010) 70 *ZaöRV*, 1, 20 et seq.

legally binding and affect citizens.[92] Deliberative polyarchy, the theoretical concept followed here, argues that the exercise of public power gains democratic legitimacy through responsiveness and the accountability, including transparency, reason giving, and standing of those affected.[93]

This study is limited to the protection of environmental interests as safeguarded in environmental laws. Many decisions of international judicial and quasi-judicial bodies do affect environmental interests protected in national or international environmental law. The case law analyzed in chapters 3 and 4 is a vivid illustration of this. The environment is a public good and cannot speak for itself. Environmental NGOs have been accepted as stakeholders of environmental concerns in many national jurisdictions and on a regional international scale, most notably in the 1998 Aarhus Convention. In this role, ENGOs give a voice to the environmental interests in question. Governments decided to bestow on them certain rights and obligations in order to strengthen the enforcement of environmental law. In order to ensure their commitment, expertise, and capacity to fulfill this function, certain criteria may be formulated and standing in court or other forms of participation may, for example, depend on accreditation. Thus, the standing and participation of ENGOs in international judicial and quasi-judicial procedures ensure that affected environmental interests enter the judicial decision-making machinery. This enhances the accountability of the international judiciary towards the demos who participated in the making of these environmental laws.[94]

ENGOs also contribute to the greater transparency of international judicial and quasi-judicial procedures.[95] They use their knowledge, resources, communication platforms and networks to report on these procedures as far as they are accessible to them.[96] Furthermore, through their standing in court and to a certain degree also as participants in the form of amici curiae they oblige the judicial and quasi-judicial

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[92] Several international judiciaries instituted strong enforcement regimes, especially the WTO and ICSID but also the ECtHR, for example; these are addressed in more detail in the relevant sections in chapters 3 and 4 below. International judiciaries that lack sanctioning and enforcement control mechanisms should also be considered as exercising public power because their decisions are legally binding and failure to comply with them at least brings with it high costs in terms of reputation. See v. Bogdandy/Venzke, *ibid.* at 17. See also Shany, "No Longer a Weak Department of Power? Reflections on the Emergence of a New International Judiciary" (2009) 20 *EJIL*, 73.

[93] Cohen/Sabel, "Global Democracy" (2004) 37 *N.Y.U. J. Int'l L. & Pol.*, 763, 771 et seq.

[94] See also Bartholomeusz, "The Amicus Curiae before International Courts and Tribunals" (2005) 5 *Non-St. Actors & Int'l L.*, 209, 283 et seq.

[95] See also v. Bogdandy/Venzke, "Zur Herrschaft internationaler Gerichte: Eine Untersuchung internationaler öffentlicher Gewalt und ihrer demokratischen Rechtfertigung" (2010) 70 *ZaöRV*, 1, 27, 29 et seq. With regard to decision-making processes in general, see Krajewski, *Legitimizing Global Economic Governance through Transnational Parliamentarization*, Transformations of the State, Collaborative Research Center 597, TransState Working Papers No. 136 (2010), 8.

[96] See, for example, the work of the Center for International Environmental Law (CIEL) at http://www.ciel.org/About_Us/CIEL_Work_Highlights.html, Earthjustice international cases at http://earthjustice.org/our_work/cases?office=7&issue=All, Human Rights Watch on international justice at http://www.hrw.org/en/category/topic/international-justice; OECD Watch at http://oecdwatch.org/.

bodies to take into account environmental concerns, transparently weigh them, and balance them against other affected interests within their decision-making process.[97] The judges need to give reasons for how they deal with affected environmental interests and how they reach a certain decision. Judicial reasoning is a core issue for the legal legitimacy of judgments.[98] The provision of legal certainty and predictability is also a core function of international judicial and quasi-judicial bodies.[99]

All in all, the access of ENGOs to international judicial and quasi-judicial bodies does positively contribute to the voicing of affected interests, transparency, and judicial reasoning and insofar enhances the accountability and responsiveness of those bodies.

The second question is whether the access of ENGOs to international judicial and quasi-judicial bodies enhances the latters' accountability towards a global demos. Critiques argue that the vast majority of NGOs acting on an international scale are based in the United States and Europe and thus mainly represent Northern interests. There is empirical evidence supporting this imbalanced representation.[100] However, it should be noted that, at least with regard to NGOs with a consultative status at ECOSOC, there seems to be a tendency towards a more balanced regional representation of NGOs.[101]

Nevertheless, this aspect has to be taken seriously. As, for example, the *Shrimp/Turtle I* case before the WTO[102] has shown, environmental protection interests advocated by U.S. NGOs in support of the U.S. position, both served the U.S. shrimp-industry and arguably compromised fair trade and the economic interests of developing countries. The question of representativeness is at the heart of the environment/development dichotomy and the developing countries' fear of Northern eco-imperialism. It is thus also at the heart of the concept of sustainable development, the current "solution" to this problem. It is important to ensure equality of

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[97] With regard to the legitimatory potential of amici curiae see v. Bogdandy/Venzke, "Zur Herrschaft internationaler Gerichte: Eine Untersuchung internationaler öffentlicher Gewalt und ihrer demokratischen Rechtfertigung" (2010) 70 *ZaöRV*, 1, 32 et seq. and for more legitimacy through politicization *ibid.* at 35.

[98] See v. Bogdandy/Venzke, "Zur Herrschaft internationaler Gerichte: Eine Untersuchung internationaler öffentlicher Gewalt und ihrer demokratischen Rechtfertigung" (2010) 70 *ZaöRV*, 1, 13, 19. See also Koch/Rüßmann, *Juristische Begründungslehre* (1982), 371 et seq. Their book provides an in-depth analysis of the proper method applied in judicial reasoning.

[99] See v. Bogdandy/Venzke, "Zur Herrschaft internationaler Gerichte: Eine Untersuchung internationaler öffentlicher Gewalt und ihrer demokratischen Rechtfertigung" (2010) 70 *ZaöRV*, 1, 19.

[100] See regional shares of 1996 and 2002 of NGOs with a consultative status at ECOSOC: 47% Europe, 32% U.S.A. as at 1996; 39% Europe, 30% U.S.A. as at 2002, Klein/Walk et al., "Mobile Herausforderer und alternative Eliten" in Brunnengräber/Klein et al. (eds.), *NGOs im Prozess der Globalisierung* (2005), 10, 46. For empirical findings of a remaining geographical imbalance with regard to participation in world conferences as at 1998 see Clark/Friedman et al., "The Sovereign Limits of Global Civil Society" (1998) 51 *World Politics*, 1, 34. See also Lindblom, *Non-Governmental Organisations in International Law* (2005), 525.

[101] See recent absolute numbers at http://esango.un.org/civilsociety/login.do. For the geographical index of UIA see http://www.uia.be/s/or/en/v2.

[102] For a closer examination of the case see chapter 3.I.B.4.e.

access for NGOs to international judicial and quasi-judicial institutions. This could be done through safeguarding accreditation procedures and financial support, for example.[103] A certain balance is already provided for in the substantive law. Interest protection may only be invoked insofar as the substantive law extends. As a rather extreme example, the North-first approach of the obligations under the Kyoto Protocol requires that the enforcement branch oversees compliance with the emission reduction obligations of developed countries only. Thus, formal equal access for NGOs from all geographical regions to judicial and quasi-judicial bodies should be a first crucial step; it should be accompanied, however, by measures that ensure actual equal access. Judicial reasoning and decision-making should be done with a view to enhancing sustainable development and from the perspective of accountability towards the world citizen.[104] Based on these assumptions, it can be concluded that access for ENGOs to international judicial and quasi-judicial bodies does enhance the latter's accountability towards a global demos.

V. Conclusions

This chapter dealt with the question of whether and how environmental NGOs could and should contribute to compliance control and the enforcement of international environmental law. Subchapter I could not provide a comprehensive study of overall NGO contributions to international environmental law but it could, through references to such studies, highlight examples of the commitment and expertise of ENGOs in dealing with environmental problems. There are very different kinds of NGOs with diverse characteristics and focuses, but all in all the ENGOs' main strengths are their contribution to further developing the knowledge base, the provision of information to citizens, transparency, and capacity-building of international environmental regimes. Through their commitment to contribute to solving global environmental problems, they acquire competence and resources and are potentially qualified to act as stakeholders of environmental interests in international judicial and quasi-judicial compliance control and enforcement procedures. The actual qualification can be safeguarded through an accreditation process. The analysis has also shown that the institutional framework of MEAs, set up as such by states, formally and informally acknowledges ENGOs as important partners in handling global environmental concerns.

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[103] See also Lindblom, *Non-Governmental Organisations in International Law* (2005), 523.

[104] Based on *Kant* and in an attempt to relate *Habermas'* "Weltinnenpolitik" to the international judiciary, *von Bogdany* and *Venzke* also argue that ultimately, democratic justification of the exercise of judicial power has to go back to the individual and thus, in the concrete case, to the world citizen; v. Bogdandy/Venzke, "Zur Herrschaft internationaler Gerichte: Eine Untersuchung internationaler öffentlicher Gewalt und ihrer demokratischen Rechtfertigung" (2010) 70 *ZaöRV*, 1, 49.

Subchapter II revealed that there is little political commitment to enhancing the role of NGOs in international judicial and quasi-judicial compliance control and enforcement procedures. The clearest political support can be seen in the Aarhus Convention itself for the UNECE region. With regard to the universal international scope, even the parties to the Aarhus Convention were very cautious in addressing the wider access of NGOs to international review procedures in their Almaty Guidelines. The least common denominator under the Almaty Guidelines between the parties to the Aarhus Convention was that they agreed to "encourage the consideration" of measures to facilitate public access to international review procedures in international fora. Neither the Rio Declaration, nor Agenda 21, nor the UNEP Montevideo Programmes contain a clear political commitment to a stronger role for NGOs before international judicial and quasi-judicial institutions. The Malmö Ministerial Declaration arguably leaves room for a supportive interpretation but the commitment would be very broadly stated. However, in the Rio Declaration and Agenda 21, states recognized the importance of citizen and NGO participation in international decision-making processes and generally agreed to strengthen their role. States also showed that they are aware of shortcomings in compliance with international environmental law. A specific mandate to enhance the role of ENGOs before international judicial and quasi-judicial institutions, however, is still lacking. Therefore, if governments want to ensure better recognition and protection of international environmental law through ENGOs before international judicial and quasi-judicial procedures, they should clearly say so. In the spirit of further developing Principle 10 of the Rio Declaration, such a political statement could be part of the outcome of the Rio+20 United Nations Conference on Sustainable Development in 2012. A blueprint for such a statement could be the language of the draft Almaty Guidelines as proposed by the expert group and cited above.

The search for possible constraints in international law on strengthening the role of ENGOs before international judicial and quasi-judicial bodies conducted in subchapter III did not identify significant barriers. INGOs have a long tradition as actors in international politics and nowadays, according to the UIA, environmental protection is their second most important field of activity. The difficulty of exactly defining "NGO" does not prevent NGOs from being recognized and addressed as actors with rights and duties under international law. The same problem could be successfully dealt with in many national environmental laws and also, for example, in UN Resolution 1996/31. Substantive criteria and an accreditation process can ensure that only those ENGOs, that fulfill certain conditions deemed necessary for being appropriate stakeholders of environmental interests, are endowed with certain rights and duties. It is also not new to international law to confer rights and duties on non-state actors. In numerous BITs, for example, states even vested rights in private investors allowing them to sue states before international arbitral bodies such as ICSID. Through a COP Decision, parties to the Aarhus Convention entitled "members of the public" to bring communications concerning a party's compliance with the Convention before the

Compliance Committee. Thus, there are no legal constraints in international law on granting ENGOs access to international judicial and quasi-judicial bodies; whether participatory rights are vested in ENGOs or not is a question of political will.

Finally, subchapter IV concluded that NGOs do not have to prove any legitimacy before standing to sue or participatory rights are conferred on them. Democracy requires the legitimacy of organs that exercise public authority. Thus, the relevant question is whether the access of ENGOs to international judicial and quasi-judicial institutions renders the latter's decision-making power more democratic. Following broadly the concept of deliberative polyarchy, democratic legitimacy derives from responsiveness and accountability, including transparency, reason giving, and the standing of those affected. It was argued that the access of ENGOs to international judicial and quasi-judicial bodies does positively contribute to these three core aspects – transparency, reason giving, and the standing of those affected – and is therefore apt to enhance those bodies' accountability towards a global demos. In sum, such access for ENGOs would positively contribute to establishing democratic global governance for sustainable development.

Chapter 2

Multilevel Enforcement of International Environmental Law

International environmental law can directly or indirectly be enforced through judicial and quasi-judicial bodies at national, supranational, and international level. Direct enforcement refers to cases in which courts directly apply international environmental law in deciding cases; indirect enforcement comprises cases in which courts refer to international environmental law to interpret national rules in light of international environmental rules.[1] This chapter explores how these three levels of judiciary enforce international environmental law. It identifies gaps in national and European law enforcement and makes suggestions if and how these gaps should be filled, with a special focus on possible support from the international level. The chapter starts with a brief overview of the sources, addressees, and content of international environmental law (I). It then examines how international environmental law is enforced at the national (II) and supranational (III) level and highlights at each level opportunities for and constraints on contribution to the enforcement of international environmental law. Germany and the United States serve as examples for the national level; the European Union is scrutinized as a supranational entity. The fourth part of this chapter serves as a bridge between the analysis in chapters 1 and 2 and the following central parts of this study in chapters 3 and 4. Drawing on the results of the analysis in chapters 1 and 2, it first identifies three categories of cases appropriate for international judicial and quasi-judicial review. Preparing the analysis in chapters 3 and 4, it addresses the characteristics of and differences between dispute settlement, arbitration, and compliance control. Furthermore, some thoughts on multilevel and cross-fragment relations are developed. Conclusions are drawn in subchapter V.

I. International Environmental Law

When it comes to questions of enforcement and compliance control, the special nature of international environmental law is often highlighted. This subchapter examines sources, addressees, and content of international environmental law to get a better understanding of this special nature.

[1] See also Bodansky/Brunnée, "The Role of National Courts in the Field of International Environmental Law" (1998) 7 *RECIEL*, 11, 15.

Cathrin Zengerling, Greening International Jurisprudence, pp. 43–92.
ISBN 978-90-04-25730-6.

A. Sources

Article 38, Section 1, lit a-c of the Statute of the International Court of Justice, annex and integral part of the Charter of the United Nations, lists the three sources of international law: international conventions, international custom, as evidence of a general practice accepted as law, and the general principles of law.[2] In the field of international environmental law so-called soft law also plays an important role, although it is not legally binding.[3]

As regards international environmental law, bi- and multilateral environmental agreements are the main examples of the first source. More than 2,000 agreements of this kind now exist, the vast majority of which being bilateral and regional environmental agreements.[4] Chapter 1.I. already provided a brief overview of several important MEAs dealing with environmental problems that require multilateral state action. Often MEAs do not only contain substantive rules but create institutional structures such as a secretariat, periodic review conferences, and compliance committees.[5] Usually, new environmental treaty regimes start with a framework convention that merely sets a broad basis for further action. Since many environmental problems are accompanied by scientific uncertainties with respect to the sources of pollution, chains of causation, responsible actors, and effective solutions, the framework can only be fleshed out with increasing scientific certainty. This is often reached by scientific bodies set up or mandated through the framework convention to further develop the regime. Protocols and annexes to a treaty then specify emission targets or technical standards. As a new element in law-making and an exception to Article 39 of the 1969 Vienna Convention on the Law of Treaties (VCLT), annexes can be amended through a resolution passed by the Conference of Parties (COP), usually requiring a two-thirds majority, and an opt-out procedure. The amendment comes into effect for all members of the treaty system after a certain period of time, usually between three to six months, except for those countries that filed a formal objection.[6]

Customary international environmental law has its roots in the concept of international neighborhood law. There are at least three environmentally relevant rules

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[2] For an overview of international environmental law see Kiss/Shelton, *Guide to International Environmental Law* (2007), 3 et seq.; Wolfrum, "International Environmental Law: Purposes, Principles and Means of Ensuring Compliance" in Morrison/Wolfrum (eds.), *International, Regional, and National Environmental Law* (2000), 3; Buck/Verheyen, "Umweltvölkerrecht" in Koch (ed.), *Umweltrecht* (2010), 1, 10 et seq.

[3] Kiss/Shelton, *ibid*. at 8 et seq.; Buck/Verheyen, *ibid*. at 11, 14.

[4] As of April 2011, according to ECOLEX there are 2,141 bi- and multilateral environmental treaties, see http://www.ecolex.org/.

[5] Morrison, "The Relationship of International, Regional, and National Environmental Law" in Morrison/Wolfrum (eds.), *International, Regional, and National Environmental Law* (2000), 113, 121.

[6] See, for example, Article XV(1) of CITES, Article 14(4) Aarhus Convention, Article 15 UNFCCC; see Morrison, *ibid*. at 123; Buck/Verheyen, "Umweltvölkerrecht" in Koch (ed.), Umweltrecht (2010), 1, 12.

of customary international law: the principle of limited territorial sovereignty, meaning that no state may use its territory, or allow the use of it, in a way that causes serious damage to the territory of another state; the principle of equitable utilization of resources in the context of shared resources; and the obligation to cooperate, including the duty to warn, notify, inform or consult, at least in cases of serious transboundary damage.[7] In its April 2010 decision in *Pulp Mills on the River Uruguay*, the ICJ stated that "it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource".[8] Not part of customary international environmental law yet are the duty to minimize environmental risks, the precautionary principle, the polluter-pays principle, and the principle of intergenerational equity.[9] In its February 2011 first advisory opinion, the Seabed Disputes Chamber of the ITLOS stated that in view of the Chamber there is a trend towards making the precautionary approach part of customary international law.[10]

Soft law encompasses non-legally binding declarations, codes of conduct, and decisions that entail political rather than legal obligations.[11] The Stockholm and Rio Declarations, Agenda 21, and also declarations, resolutions, and decisions taken by COPs are key examples of international environmental soft law. Soft law may be a prior stage of subsequent actual law; it may also help to interpret environmental law. Furthermore, through its often programmatic character, it provides a road map for required political and eventually legal action.[12] In the field of international

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[7] See also Kiss/Shelton, *Guide to International Environmental Law* (2007), 90 et seq.; Brunnée/Abouchar et al., "Beyond Rio? The Evolution of International Environmental Law" (1993) 20 *Alternatives*, 16 et seq.; Beyerlin, "Different Types of Norms in International Environmental Law" in Bodansky/Brunnée/Hey (eds.), *The Oxford Handbook of International Environmental Law* (2007), 425, 438 et seq.; Buck/Verheyen, Umweltvölkerrecht" in Koch (ed.), Umweltrecht (2010), 1, 15 et seq.; Hobe, Einführung in das Völkerrecht (2008), 513 et seq., 519 et seq. For a critical view of the importance of customary international environmental law see Bodansky, Customary (and not so customary) international environmental law, Ind. J. Global Legal Stud. (1995), 105, 119.

[8] *Pulp Mills on the River Uruguay* (Argentina v. Uruguay), ICJ Judgment of 20 April 2010 at 204. This has been confirmed by the Seabed Disputes Chamber of the ITLOS in its first Advisory Opinion, Case No. 17, *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the International Seabed Area* (*Request for Advisory Opinion submitted to the Seabed Disputes Chamber*), Advisory Opinion of 1 February 2011, at 145. See also Chapter 4.I.A.4.e. (ICJ) and Chapter 4.I.C.4.c.iii. (ITLOS).

[9] See Beyerlin, "Different Types of Norms in International Environmental Law" in Bodansky/Brunnée/Hey (eds.), *The Oxford Handbook of International Environmental Law* (2007), 425, 438 et seq.; Hobe, *Einführung in das Völkerrecht* (2008), 519 et seq.; mentioning sustainable development, the principle of integration, and estoppels as further emerging customary international environmental law Buck/Verheyen, "Umweltvölkerrecht" in Koch (ed.), *Umweltrecht* (2010), 1, 17 et seq.

[10] Case No. 17, *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the International Seabed Area* (*Request for Advisory Opinion submitted to the Seabed Disputes Chamber*), Advisory Opinion of 1 February 2011, at 135.

[11] Kiss/Shelton, *Guide to International Environmental Law* (2007), 8 et seq.; Buck/Verheyen, *ibid.* at 14.

[12] *Ibid.*

environmental law, soft law crucially contributes to the procedural functioning and substantive fleshing out of MEAs.[13] For example, the compliance mechanisms of the Aarhus Convention and the Kyoto Protocol examined in chapters 3 and 4 were mainly set up through COP decisions. Also substantive issues that are addressed rather broadly within a framework convention or in a later protocol are often regulated in greater detail at the soft law level, e.g. through codes of conduct.

International law is binding.[14] The fact that it often lacks sanctions does not mean that it is not binding.[15] The opinion, however, that enforceability is not essential to the concept of (international) law at all, goes too far. This would make the character of such international law too close to a lex imperfecta.[16] The decisive question rather is whether it is essential to a legal order that it is in fact enforceable in every single case. This study is based on the assumption that despite the fact of non-enforceability in some cases, a legal order maintains its character as an order of compulsion ("Sollensordnung"). Its commands and prohibitions still demand compliance ("Rechtsbefolgungsanspruch").[17]

B. *Addressees and Content of MEAs*

The vast majority of rules in multilateral environmental agreements directly address only states and in some cases inter-governmental organizations. If individuals and NGOs are mentioned at all, they are only referred to in an indirect manner. For example, Article 9(2) of the Aarhus Convention states that each party shall, within the framework of its national legislation, ensure that the members of the public concerned have, under certain conditions, access to a review procedure to challenge certain acts or omissions. Article 2(5) of the Aarhus Convention defines "the public concerned" as the affected public, including NGOs. Thus, in such a case, no rights for the public affected or NGOs derive directly from the MEA.[18] Only in a few exceptional cases, rules in MEAs directly confer rights and obligations on non-state

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[13] Kiss/Shelton, *Guide to International Environmental Law* (2007), 8 et seq.; Buck/Verheyen, "Umweltvölkerrecht" in Koch (ed.), *Umweltrecht* (2010), 1, 14.

[14] Hobe, *Einführung in das Völkerrecht* (2008), 3, 5, 243 et seq.; with respect to U.S. law see Grimmett, "Overview of the Treaty Process, Treaties and Other International Agreements: The Role of the United States Senate" (January 2001).

[15] As *Sir Gerald Fitzmaurice* put it: "The law is not binding because it is enforced: it is enforced because it is already binding. Enforcement presupposes the existence of a legal obligation incumbent on those concerned", Fitzmaurice, "The Foundations of the Authority of International Law and the Problem of Enforcement" (1956) 19 *Modern Law Review*, 2.

[16] Kimminich/Hobe, *Einführung in das Völkerrecht* (2000), 18.

[17] *Ibid*. at 18, 22, 23.

[18] This is different in the case of EU law. According to the ECJ, EU directives may under certain circumstances become directly applicable for individuals and groups in the EU (principle of direct effect or immediate applicability); direct effect of a directive presupposes that the provisions are unconditional and sufficiently clear and precise (Case C-41/78 *van Duyn vs. Home Office* [1974] ECR-1337) and that a member state has not transposed the directive by the deadline (Case C-148/78 *Pubblico Ministero v. Ratti* [1979] ECR-1629).

actors.[19] It has been argued above that this silence towards non-state actors is not a legal requirement but is due to a lack of political will.[20]

MEAs contain substantive as well as procedural rules. Substantive rules encompass, for example, fundamental and reduction goals, bans on substances or activities, rules on the use of certain technologies, as well as obligations to set up protection areas and management schemes.[21] For example, Article 2 UNFCCC states that the ultimate objective of the Convention is "to achieve [...] stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system." To reach this fundamental objective, Article 3 of the Kyoto Protocol promulgates a more concrete reduction goal. Accordingly, industrial countries "ensure that their aggregate anthropogenic carbon dioxide equivalent emissions of the greenhouse gases listed in Annex A do not exceed their assigned amounts [...] with a view to reducing their overall emissions of such gases by at least 5 per cent below 1990 levels in the commitment period 2008 to 2012."[22]

Examples of bans on substances can be found in the 2001 Stockholm Convention on Persistent Organic Pollutants, Article 3 and Annex A of the Stockholm Convention; moreover, the gradual phasing out of CFCs under Article 2A of the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer is an example of a substantive obligation to phase out harmful substances. Pursuant to Article 4 of the 1989 Basel Convention, parties shall prohibit the export of hazardous wastes. The moratorium on commercial whaling under the 1946 International Convention for the Regulation of Whaling is an example of the prohibition of a harmful activity through international environmental soft law.[23]

Examples of MEAs that require the use of certain technologies to prevent environmental harm are the 1973 Convention for the Prevention of Pollution from Ships (MARPOL Convention) and the 1992 Convention for the Marine Environment of the North-East Atlantic (OSPAR Convention), Article 2(3)(b). International environmental treaties that require the designation of environmental protection areas are, for example, the 1971 Ramsar Convention on Wetlands (Article 2–4 Ramsar Convention) and the Convention on Biological Diversity (Article 8 CBD).

In addition to such substantive obligations, many MEAs contain procedural obligations. For example, the 1998 Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International

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[19] For example, Article 187(c) of UNCLOS confers access rights to the seabed disputes chamber on certain natural and juridical persons, see chapter 4.I.C.3. In the field of international investment law many bi- and multilateral investment treaties allow private investors to sue host countries before international arbitral tribunals, see chapter 4.III.B.2.a.

[20] See chapter 1.III.

[21] See also Buck/Verheyen, "Umweltvölkerrecht" in Koch (ed.), *Umweltrecht* (2010), 1, 22 et seq.

[22] For a comprehensive analysis of legal duties of states with regard to human induced climate change damage see Verheyen, *Climate Change Damage and International Law* (2005).

[23] The 1982 moratorium is based on a majority vote of the International Whaling Commission (IWC). See also whaling case before the ICJ at chapter 4.I.A.4.f.

Trade promulgates procedural obligations to prevent harm from hazardous chemicals and pesticides. Article 6 of the 1989 Basel Convention stipulates procedural requirements for the transboundary movements of hazardous wastes. The 1991 UNECE Espoo Convention on Environmental Impact Assessment in a Transboundary Context obliges member states to prepare environmental impact assessments on planned activities that are likely to have transboundary environmental effects. The UNECE Aarhus Convention requires parties to ensure access to environmental information, public participation procedures, and access to justice to members of the public or the public concerned.

This brief overview has shown that MEAs include different types of obligations for states. Whereas the objectives of MEAs are described in rather broad language, the framework convention itself, its annexes, or successive protocols contain justiciable legal obligations.[24]

II. National Courts—Germany and the United States

According to *Georges Scelle's* 'dédoublement fonctionnel' theory national courts may fulfill a crucial international judicial function.[25] *Richard Falk* also saw the national court as a potential "agent of an emerging international system of order".[26] In the field of international human rights law empirical studies show that some domestic courts significantly contribute to its enforcement.[27] Empirical research on the role of national courts in the implementation of international environmental law is still limited.[28] Much uncertainty remains in two fields of cross-cutting research,

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[24] With regard to justiciability see also subchapter III below for examples of how the ECJ applied the rules of MEAs in specific cases.

[25] Scelle, "Le phénomène juridique du dédoublement fonctionnel" in Schätzel/Schlochauer et al. (eds.), *Rechtsfragen der internationalen Organisation* (1956), 324, 324. See also Shany, "No Longer a Weak Department of Power? Reflections on the Emergence of a New International Judiciary" (2009) 20 *EJIL*, 73, 74.

[26] Falk, "The Interplay of Westphalia and Charter Conceptions of International Legal Order" in Falk (ed.), *The Future of the International Legal Order* (1969), 32, 69. See also Bodansky/Brunnée, "The Role of National Courts in the Field of International Environmental Law" (1998) 7 *RECIEL*, 11, 11.

[27] Bodansky/Brunnée, "The Role of National Courts in the Field of International Environmental Law" (1998) 7 *RECIEL*, 11, 11 with further references.

[28] The two main studies referred to here are Anderson/Galizzi (eds.), *International Environmental Law in National Courts* (2002) and Palmer/Bethlehem, *International Environmental Law in National Courts* (2004). A part of the study of the American Society of International Law's Interest Group in Environmental Law (ASIL-IELIG), originally undertaken in 1996, is published in a special issue of *RECIEL*; the theoretical foundation of the study and its main findings are discussed in Bodansky/Brunnée, *ibid*. A good database to research, among others, national environmental cases is provided by elaw, the Environmental Law Alliance Worldwide, available at http://www.elaw.org/resources/text.asp?ID=278. In 2004, UNEP published a Compendium of Summaries of Judicial Decisions in Environment Related Cases at the request made by Chief Justices and senior judges of over 100 countries who participated in the UNEP Global Judges Symposium on Sustainable Development and the Role of the Judiciary held at the Johannesburg World Summit on Sustainable

enforcement and compliance control in respect of international environmental law, sometimes also discussed under "effectiveness" of international environmental law, and the role of the national courts in an international legal order.[29] Nevertheless, this subchapter aims to gain some insight into the actual and potential role of domestic courts in international environmental law enforcement.

Two frequently cited examples of a very far-reaching way of implementing international environmental law and soft law through national courts are the *Vellore* case decided by the Supreme Court of India and the *Minors Oposa* case decided by the Supreme Court of the Philippines. In the *Vellore* case the Vellore Citizens Welfare Forum filed a public interest petition under Article 32 of the Constitution of India against soil and water pollution resulting in severe drinking and irrigation water pollution caused by tanneries and other industries in the State of Tamil Nadu.[30] The court ruled, inter alia, that the government should set up an authority under the Indian Environment Protection Act to appropriately administer the polluting industries, based on the precautionary and the polluter pays principle.[31] Giving reasons for its ruling, with respect to sustainable development and other arguably soft law principles of international environmental law, the Supreme Court of India stated:

> We have no hesitation in holding that "Sustainable Development" as a balancing concept between ecology and development has been accepted as a part of the Customary International Law though its salient features have yet to be finalized by the International Law jurists.
>
> Some of the salient principles of "Sustainable Development", as culled-out from the Brundtland Report and other international documents, are Inter-Generational Equity, Use and Conservation of Natural Resources, Environmental Protection, the Precautionary Principle, the Polluter Pays principle, Obligation to assist and cooperate, Eradication of Poverty and Financial Assistance to the developing countries. We are, however, of the view that "The Precautionary Principle" and "The Polluter Pays" principle are essential features of "Sustainable Development".[32]

In the *Minors Oposa* case, a group of children, including those of the environmental activist Antonio Oposa, supported by the NGO Philippine Ecological Network, challenged a timber license issued by the government arguing that it illegally contributes

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Development and several regional and national Judges Symposia; the Compendium is available at http://www.unep.org/delc/Portals/119/UNEPCompendiumSummariesJudgementsEnvironmentrelatedCases.pdf.

[29] See also Bodansky/Brunnée, *ibid*. Chapter 2.IV addresses in more detail questions of the enforcement of and compliance with international environmental law at international level. For an in-depth study on the role of national courts in an international legal order see Shany, *Regulating Jurisdictional Relations Between National and International Courts* (2007).

[30] *Vellore Citizens' Welfare Forum vs. Union of India*, Judgment as of 28 August 1996, 5 SCC 647; the judgment is available at http://www.ielrc.org/content/e9607.pdf.

[31] *Ibid*. at 27.

[32] *Ibid*. at 10 and 11. With regard to the polluter pays principle, see also *Indian Council for Enviro – Legal Action v. Union of India*, Judgment as of 13 February 1996, AIR 1996 SC 1446.

to fast destruction of the rain forest in the Philippines.[33] Referring to the "concept of intergenerational responsibility", the Philippine Supreme Court granted locus standi to the petitioners as representatives of their generation as well as generations unborn.[34] These two cases demonstrate how far national courts have gone to give effect to international environmental (soft) law. They have been criticized for undue judicial activism, but they have at least as often been cited as role models for national implementation of international environmental (soft) law. Empirical findings show that cases like these remain exceptional.

Domestic courts can deal with international environmental issues in three main ways.[35] They may have jurisdiction to solve transboundary environmental disputes. As far as they do so through applying domestic law and private international law, these cases are not at issue here, since the study scrutinizes the enforcement of public international environmental law with a main focus on the protection of the environment as a public good. Moreover, domestic courts, mostly in common law countries, can further develop international environmental law through their law-making function.[36] This function is also not further examined here, since the research deals with enforcement and compliance control in respect of existing international environmental law. Finally, and the focus of this study, domestic courts, in addition to domestic legislature and administration, implement international environmental law. They can do so through the direct or indirect application of international environmental laws (treaty law, customary law, and soft law) in three main types of lawsuits: citizen enforcement actions against the government, private polluter actions against the government, and citizen enforcement actions against private polluters.[37]

There are two ways in which domestic legal orders incorporate international law. Under the monist approach, international law without any further act forms part of the national law and is directly applicable within the jurisdiction of the state. Under the dualist approach, the international and national legal systems are strictly

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[33] *Minors Oposa et al. v. Secretary of the Environment and Natural Resources Fulgencio Factoran*, G.R. No. 101083, 30 July 1993, available at http://www.elaw.org/node/1343.

[34] The court stated: "This case, however, has a special and novel element. Petitioners minors assert that they represent their generation as well as generations yet unborn. We find no difficulty in ruling that they can, for themselves, for others of their generation and for the succeeding generations, file a class suit. Their personality to sue on behalf of the succeeding generations can only be based on the concept of intergenerational responsibility insofar as the right to a balanced and healthful ecology is concerned. Such a right, as hereinafter expounded, considers the "rhythm and harmony of nature." Nature means the created world in its entirety. Such rhythm and harmony indispensably include, inter alia, the judicious disposition, utilization, management, renewal and conservation of the country's forest, mineral, land, waters, fisheries, wildlife, off-shore areas and other natural resources to the end that their exploration, development and utilization be equitably accessible to the present as well as future generations." *Ibid*.

[35] See also Bodansky/Brunnée, "The Role of National Courts in the Field of International Environmental Law" (1998) 7 *RECIEL*, 11, 13.

[36] *Ibid*.

[37] See also *ibid*. at 16.

segregated. International law only becomes part of the domestic legal system if it is formally adopted in a legislative process within the nation.[38] As mentioned above, addressees of international treaty rights and obligations are usually states. Only in some cases do international treaties directly grant rights to and impose duties on non-state actors, such as private investors for example, or international institutions. Thus, the legislation implementing states' obligations at the national level mainly includes rights and duties for individuals or organizations, which they can invoke in the national courts.[39]

The potential role of domestic courts to enforce international environmental law very much depends on their capacities in the national legal order. For example, in countries of precary statehood the judiciary's power will be limited. Furthermore, the function of the judiciary within the national legal order differs in civil law and common law countries; also, international law plays different roles in the domestic legal order in monist and dualist countries. In the following, Germany and the United States, one a civil law country with a dualist approach to international law and one a common law country with a – at least at first sight – monist approach to international law, serve as examples of how national legal orders incorporate international environmental law, with particular reference to the role of the judiciaries. Concluding this subchapter, opportunities for and constraints on the enforcement of international environmental law at national level are highlighted.

A. *Germany*

Two articles of the German Constitution regulate the relationship between international and national law in Germany. According to Article 25 of the Basic Constitutional Law of the Federal Republic of Germany, customary international law is automatically part of German law. It precedes national law and directly creates rights and duties for German citizens without any further legislative act.[40] Thus, Article 25 of the German Constitution obligates all German government bodies to formulate federal law in accordance with customary international law. It also requires government bodies not to apply existing German law in breach of international obligations

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[38] Morrison, "The Relationship of International, Regional, and National Environmental Law" in Morrison/Wolfrum (eds.), *International, Regional, and National Environmental Law* (2000), 113, 128. See also Hobe, *Einführung in das Völkerrecht* (2008), 231 et seq.

[39] See Redgwell, "National Implementation" in in Bodansky/Brunnée/Hey (eds.), *The Oxford Handbook of International Environmental Law* (2007), 923 et seq.

[40] Article 25 of the German Basic Law: "Die allgemeinen Regeln des Völkerrechtes sind Bestandteil des Bundesrechtes. Sie gehen den Gesetzen vor und erzeugen Rechte und Pflichten unmittelbar für die Bewohner des Bundesgebietes." See also Buck/Verheyen, "Umweltvölkerrecht" in Koch (ed.), *Umweltrecht* (2010), 1, 7. The exact ranking of customary international law is disputed. The judiciary and the majority of scholars rank them between the constitution and federal law; Hobe, *Einführung in das Völkerrecht* (2008), 238.

or, alternatively, to interpret and apply it in a way that it complies with international law.[41]

This is different with international treaty law. Article 59(2) of the German Constitution stipulates that this type of international law only becomes national law once the national legislative organs (Lower and Upper Houses of the German Parliament) accept it in the form of a national legislative act (statute requiring assent).[42] The accepted treaty then becomes national law which does not take precedence over other national law but is on an equal level with it.[43] According to Article 59(1) of the German Constitution, the Federal President is responsible for the ratification and the notification to other parties to the international treaty that the treaty has been put into force within the national regime. It is important to note that Article 59 of the German Constitution only applies to the first ratification of an international treaty. Subsequent amendments to the treaty, decisions of an international institution or decisions of the COP often do not require an additional ratification procedure.[44]

As mentioned above, the national legislative act with which international law is ratified and becomes part of German national law, usually only confers rights and duties on the state.[45] To implement its duties, the state in many cases has to change existing national laws or enact new laws. These implementing laws then might create rights and duties for individuals and organizations and can be enforced by them before national courts.

One often cited positive example, in which the German Federal Administrative Court indirectly applied international environmental customary law, is the *Lingen* case.[46] During the public consultation process for the Lingen nuclear power plant, situated about 25 km from the Dutch-German border, the German administrative authorities had refused the submission of a Dutch citizen arguing that only German citizens and residents have a right to participate in the permit procedure. The administrative court held the applicant's claim inadmissible for lack of standing. The German Federal Administrative Court held that Article 7(2) of the German

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[41] Hobe, *ibid*.

[42] In German: *Zustimmungsgesetz/Vertragsgesetz/Ratifikationsgesetz*. Hobe, *ibid*. at 239.

[43] Buck/Verheyen, "Umweltvölkerrecht" in Koch (ed.), *Umweltrecht* (2010), 1, 7.

[44] *Ibid*. *at* 8. This automatic adoption has been criticized because, especially in international environmental law, the first treaty, as described above, often takes the form of a framework convention. Protocols added subsequently and decisions taken by the COP often contain the more definitive rights and obligations. If only the first but not the latter agreements need a ratifying act, there is no direct democratic justification of the actual definitive obligations. However, this mechanism allows for more flexible development of international environmental law that in itself has many advantages. It can also be argued that subsequent protocols or COP decisions only flesh out a framework that has been agreed upon.

[45] See also Morrison, "The Relationship of International, Regional, and National Environmental Law" in Morrison/Wolfrum (eds.), *International, Regional, and National Environmental Law* (2000), 113, 129.

[46] BVerwGE 7 C 29/85, judgment of 17 December 1985.

Nuclear Law (Atomgesetz) has to be interpreted in light of international states' obligation to keep the risk of transboundary environmental harm to a minimum. The findings were backed up by several explicit references in the Nuclear Law to international obligations. According to this interpretation, Article 7(2) of the Nuclear Law granted legal participatory rights not only to German but also to foreign citizens within the limits of Article 42(2) of the German Code of Procedure of the Administrative Court (Verwaltungsgerichtsordnung).[47] The latter requires that the plaintiff is within the scope of protected citizens as envisaged by the national law (so-called 'Schutznormtheorie'). Since this was the case, the Federal Administrative Court concluded that the Dutch plaintiff must have access to the administrative and judicial review procedure and referred the case back to the administrative court for consideration of the merits.

Two other cases, one hypothetical and one real, might serve as examples of difficulties arising within the national enforcement process: The 1987 Montreal Protocol is the core international instrument for the protection of the ozone layer. It came into force in January 1989 and provides for phase out schedules for several ozone relevant substances, which were intensified over the following years. In 1988, Germany ratified the Protocol through a legislative act and the phase out schedules became binding German law. Germany implemented its duties arising from the ratification of the Montreal Protocol through an ordinance ordering the ban on CFCs and halons, which came into force in May 1991.[48] The reduction commitments are binding German law and it is the environmental administration's task to enforce them by issuing the relevant permits for the affected industries. The law does not contain any citizen suit provisions or other rules that gave NGOs a right to enforce these reduction commitments in court. Since the obligation to reduce emissions of ozone depleting substances aims to prevent ozone depletion and thus a problem of the global commons, the emission reduction commitment itself does not create rights for individuals or NGOs. Thus, in the event of legislative or administrative deficits in implementation or enforcement, NGOs cannot take the responsible authorities or a private polluter to court or trigger any other kind of control procedure.

The third pillar of the Aarhus Convention might serve as the second example. Germany ratified the Aarhus Convention through a legislative act in December 2006.[49] At the same time, it passed a law supposedly implementing its obligationsunder the third pillar of the Aarhus Convention and the relevant European directives.[50]

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[47] *Ibid*. juris at 10–12.

[48] "FCKW-Halon-Verbots-Verordnung"; since December 2006 "Chemikalien-Ozonschichtverordnung".

[49] Gesetz zu dem Übereinkommen vom 25. Juni 1998 über den Zugang zu Informationen, die Öffentlichkeitsbeteiligung an Entscheidungsverfahren und den Zugang zu Gerichten in Umweltangelegenheiten (Vertragsgesetz zum Aarhus-Übereinkommen), BGBl. II p. 1252, 15 December 2006.

[50] Gesetz über ergänzende Vorschriften zu Rechtsbehelfen in Umweltangelegenheiten nach der EG-Richtlinie 2003/35/EG (Umwelt-Rechtsbehelfsgesetz), BGBl I p. 2816, 14 December 2006.

This implementing law broadened the access to courts for environmental NGOs but arguably not as much as required by international and European legal obligations.[51] Under national law, there is no way for German environmental NGOs to tackle this arguably unlawful implementation of an international obligation. They can only take a specific case to court in which, according to their legal opinion, the Aarhus Convention grants them standing and the national implementation act does not. In this case, the German (administrative) court does not have the authority to declare that the implementing law violates international environmental law. It is itself bound by the implementing act.

In the specific example case, the fact that European law also requires Germany to broaden access to justice for environmental NGOs comes with an additional opportunity for judicial control. Anyone who considers a measure or practice of an EU member state incompatible with EU law may lodge a complaint with the Commission against this member state.[52] Accordingly, two German NGOs filed a complaint with the Commission arguing that the German "Umwelt-Rechtsbehelfsgesetz" (Environmental Appeals Act) is not compatible with the relevant EU law. The EU Commission could have initiated an infringement procedure against Germany if it had shared the opinion of the NGOs; however, in the concrete case this did not happen. Furthermore, a German judge confronted with the question whether a German law complies with European law can trigger a preliminary ruling procedure according to Article 267 TFEU at the European Court of Justice. This happened in the *Lünen* case which has recently been decided by the ECJ.[53]

B. *United States*

At first sight, the United States seems to follow the monist approach, since Article IV of the U.S. Constitution states that "treaties" are part of the "supreme law of the land" and judges are bound by it.[54] However, this is actually not the case, either with regard to treaty law or with regard to customary international law.[55]

As regards international treaty law, it is important to note that the meaning of "treaty" under U.S. law differs from its meaning under international law. Broadly

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[51] With further references Koch, "Die Verbandsklage im Umweltrecht" (2007) 26 NVwZ, 369, 376 et seq. See also Roller, "Locus Standi for Environmental NGOs in Germany: The (Non)Implementation of the Aarhus Convention by the 'Umweltrechtsbehelfsgesetz' " (2010) *elni Review*, 30.

[52] Details of the complaint procedure are available at http://ec.europa.eu/eu_law/your_rights/your_rights_en.htm.

[53] The *Lünen* decision of the ECJ, C-115/09 (coal-fired power plant in Lünen, standing of an environmental NGO) is discussed in more detail at Chapter 2.III.D.1 below. Arguably, instead of referring the case to the ECJ, the right reaction of the German court would have been to decide the question whether German law is compatible with EU law itself; speech of *Berkemann*, former judge at the German Federal Administrative Court, at the seminar "Neue Herausforderungen im Umweltrechtsschutz", 10 December 2010, Forschungsstelle Umweltrecht of Hamburg University.

[54] Bodansky, "International Environmental Law in United States Courts" (1998) 7 *RECIEL*, 57, 57.

[55] See also Bodansky, *ibid*.

speaking, under international law a "treaty" is any international agreement concluded between states or other entities with international personality, if the agreement is intended to have international legal effect. The Vienna Convention on the Law of Treaties defines a set of international law standards for treaties. The Constitution of the United States requires a different understanding. Article II, Section 2, Clause 2 of the U.S. Constitution states that

> [the President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.

Thus, according to U.S. constitutional law, only an international agreement that received "advice and consent" of two-thirds of the Senate and that has been ratified by the President, qualifies as a "treaty".[56] The President ratifies the treaty by signing an instrument of ratification. The United States House of Representatives does not vote on international treaties at all. Not all international agreements negotiated by the U.S. are submitted to the Senate. There are also so-called "executive agreements" which fulfill the international definition of "treaty", but their legal status under domestic U.S. law is less clear. These are, for example, congressional-executive agreements, and presidential or sole executive agreements.[57]

Due to this special ratification procedure, it is much more likely in the U.S. than in other democratic states that a treaty, which has been signed, is finally not ratified.[58] For example, the President can simply not pass it on to the Senate to ask for its consent. Furthermore, even if the Senate gave its consent, the President has the power to not ratify the treaty and thus prevent it from becoming part of U.S. law.

Once an international treaty has received the Senate's consent and has been ratified by the President, the treaty law becomes part of the "supreme law of the land".[59] Article VI, Clause 2 of the U.S. Constitution (the so-called "supremacy clause") states that

> [t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

If a treaty conflicts with federal law, the one executed later in time prevails.[60] However, courts tend to harmonize domestic and international obligations whenever

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[56] Plater/Abrams et al., *Environmental Law and Policy* (2004), 438 et seq., 449.

[57] For a more detailed explanation see Plater/Abrams et al., *ibid*. at 448 et seq.

[58] For a general analysis of the U.S. reluctance to enter into international obligations see Brunnée, "The United States and International Environmental Law: Living with an Elephant" (2004) 15 *EJIL*, 617.

[59] Plater/Abrams et al., *Environmental Law and Policy* (2004), 440.

[60] Bodansky, "International Environmental Law in United States Courts" (1998) 7 *RECIEL*, 57, 57. citing *Cook v. United States*, 288 U.S. 102 (1933) as an example where a later-in-time treaty was

possible.[61] If state law is inconsistent with treaties, treaties prevail just as other federal law does.[62] Thus, ratified international treaties stand on an equal level with U.S. federal legislative acts. They are enforceable in court by private parties. However, U.S. courts will only directly apply provisions in treaties or other international agreements if they are self-executing.[63] Treaties or parts of treaties which are not self-executing become effective through implementing legislation. This implementing legislation, and not the treaty, then is the law of the land.[64] Whether or not a treaty is self-executing or requires implementing legislation is a matter of interpretation, mostly done by the executive and in some cases by the courts. Usually, international environmental agreements are not self-executing.[65]

The German and U.S. approaches to customary law also differ significantly. According to the prevailing view in the U.S., customary law is part of federal law. In the

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given effect over an earlier statute and *Whitney v. Robertson*, 124 U.S. 190 (1888) as a case in which a later-in-time statute prevailed over a treaty.

[61] Bodansky, "International Environmental Law in United States Courts" (1998) 7 *RECIEL*, 57, 58; *Morrison*, The Relationship of International, Regional, and National Environmental Law" in Morrison/Wolfrum (eds.), *International, Regional, and National Environmental Law* (2000), 113, 130.

[62] Bodansky, "International Environmental Law in United States Courts" (1998) 7 *RECIEL*, 57, 57. *Missouri vs. Holland*, 252 U.S. 416 (1920); but see also 2008 U.S. Supreme Court decision *Medellín vs. Texas*, 552 U.S. 491 (2008) (*Medellin II*) in which the Supreme Court held that, in the absence of implementing legislation or a self-executing treaty, ICJ decisions are not part of federal U.S. law and the U.S. President has no power to enforce international treaties or judgments of the ICJ against U.S. states. Background to the case is the 2004 ICJ ruling in the case *Avena and Other Mexican Nationals* (*Mexico vs. U.S.*), Judgment, I.C.J. Reports 2004, p. 12 (as of 31 March 2004), where the ICJ held that the U.S. had breached Article 36(1)(b) of the Vienna Convention on Consular Relations because they did not inform the petitioner Medellín and 50 other Mexican nationals about their rights under the relevant Vienna Convention (right to have the embassy or consulate notified of arrest). By fourteen votes to one, the ICJ found that, as appropriate reparation, the applicants were entitled to review and reconsideration of the convictions and sentences. President George W. Bush issued a Memorandum to the U.S. Attorney General ordering states to review the convictions and sentences of the foreign nationals accordingly. Based on this Memorandum and the ICJ *Avena* decision, Medellín filed a second case in the state court for habeas corpus (an earlier one had been dismissed). The Texas Court of Criminal Appeals dismissed this second appeal and the Supreme Court issued its *Medellín II* judgment holding that neither the ICJ judgment nor the President's order is binding upon the state. Medellin, a Mexican citizen convicted of the rape and murder of two teenage girls in 1993 (Medellin was then 18 years old), was executed in August 2008 without a review or reconsideration of his conviction or sentence as ordered by the ICJ. In March 2005, after the ICJ *Avena* ruling, the U.S. withdrew from the Optional Protocol concerning the Compulsory Settlement of Disputes to the Vienna Convention, the basis for ICJ jurisdiction in the case in question. The *Medellín II* ruling is available at http://www.supremecourt.gov/opinions/07pdf/06–984.pdf.

[63] Bodansky, "International Environmental Law in United States Courts" (1998) 7 *RECIEL*, 57, 57 et seq.

[64] See Morrison, "The Relationship of International, Regional, and National Environmental Law" in Morrison/Wolfrum (eds.), *International, Regional, and National Environmental Law* (2000), 113, 129.

[65] Bodansky, "International Environmental Law in United States Courts" (1998) 7 *RECIEL*, 57, 58; Morrison, "The Relationship of International, Regional, and National Environmental Law" in Morrison/Wolfrum (eds.), *International, Regional, and National Environmental Law* (2000), 113, 129.

event of a conflict between customary and federal law the newer law overrides the pre-existing norm. Customary law also takes precedence over state law. However, the position of customary law is not entirely settled and much uncertainty remains.[66] Although the rules of customary law are considered to be self-executing, U.S. courts are reluctant to directly apply customary law, especially against the executive.[67]

U.S. courts have rarely applied international environmental law directly or indirectly.[68] One case in which a U.S. court struck down administrative guidelines referring to international environmental law is *Defenders of Wildlife v. Endangered Species Scientific Authority*.[69] The U.S. Court of Appeals for the D.C. Circuit found administrative guidelines for granting permits to export bobcat pelts incompatible with Article IV(2) of CITES. However, in the end, the court held that the guidelines were "arbitrary and capricious" and thus violating the Administrative Procedure Act.[70] The CITES norm had also already been implemented by section 8(e) of the U.S. Endangered Species Act. Thus, arguably, the court did not directly apply international environmental law and even indirect application was not necessary since the Endangered Species Act already gave sufficient interpretative aid. Subsequently, the U.S. Congress enacted legislation 'overruling' the court's decision.[71]

A potentially interesting U.S. instrument for cases with an international scope against private polluters is the Alien Tort Claims Act (ATCA).[72] It gives U.S. federal courts jurisdiction over claims by aliens for "torts committed in violation of the law of nations" and it has successfully been used in the field of human rights violations. However, the ATCA has been invoked to enforce international environmental law in the U.S. courts on only a few occasions and all of these cases were ultimately rejected.[73]

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[66] Bodansky, "International Environmental Law in United States Courts" (1998) 7 *RECIEL*, 57, 58.

[67] *Ibid*. This goes back to the ruling in *Pacquete Habana* where the U.S. Supreme Court held that courts should apply international law "where there is no treaty and no controlling executive or legislative act or judicial decision", 175 U.S. 677, 700 (1900).

[68] For an overview of the case law see Bodansky, "International Environmental Law in United States Courts" (1998) 7 *RECIEL*, 57, 58 et seq. See also Palmer/Bethlehem, *International Environmental Law in National Courts* (2004), 492 et seq.

[69] 659 F.2d 168 (D.C. Cir.), cert. denied, 454 U.S. 963 (1981).

[70] 5 U.S.C. §706(2)(A).

[71] For more information on the case see Bodansky, "International Environmental Law in United States Courts" (1998) 7 *RECIEL*, 57, 58 et seq.

[72] 28 U.S.C. § 1350 (1994).

[73] For an overview of these cases see Bodansky, "International Environmental Law in United States Courts" (1998) 7 *RECIEL*, 57, 60. See also McCallion, "International Environmental Justice: Rights and Remedies" (2002) 26 *Hastings Int'l & Comp. L. Rev.*, 427, 435; Kalas, "International Environmental Dispute Resolution and the Need for Access by Non-State Entities" (2001) 12 *Colo. J. Int'l Envtl. L. & Pol.*, 191, 196 et seq.

C. *Opportunities and Constraints*

The empirical study of the American Society of International Law's Interest Group in International Environmental Law (ASIL-IELIG study) came to the overall conclusion that the role of national courts as agents of an international legal order is rather limited with respect to international environmental law.[74] It draws four further conclusions.[75] First, the findings indicate that the question of civil or common law country, monist or dualist approach does not actually have a strong influence on the way domestic courts apply international environmental law. Judicial attitude seems to be more important.[76] Second, if national courts apply international environmental law at all, they are more likely to do so in an indirect manner, thus using it as an interpretative aid.[77] Third, with respect to the sources, the study concluded that domestic courts mostly refer to treaty law, followed by soft law. They seem to be very reluctant to apply international customary law.[78] Fourth, as regards the type of litigation, the study found that most cases were brought by private litigants against the government. Cases in which international environmental law was invoked by the government's side to justify its action appeared to be more successful than cases in which the plaintiff's case was based on international environmental law.[79] Only very few cases have been brought against private parties based on international environmental law and none of them was successful.[80]

Two conclusions can be drawn from the systematic approach outlined above. First, if the national legislator appropriately transforms international environmental law into national environmental rules and if these rules are appropriately applied by the administration, national administrative courts are the proper forums to deal with any legal dispute arising from this environmental law. Second, there are several obstacles along this ideal track of implementation and national courts are not always in a position to overcome these obstacles. These obstacles within the German and the U.S. legal order are scrutinized more closely below.

1. *Gaps in Judicial Control in Germany*

The hypothetical example case described above (emission reductions of ozone depleting substances) revealed that national courts may not have a role, if the national

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[74] Bodansky/Brunnée, "The Role of National Courts in the Field of International Environmental Law" (1998) 7 *RECIEL*, 11, 14.

[75] *Ibid.* at 14 et seq.

[76] According to the 1996 ASIL-IELIG study, Dutch and Indian courts have been comparably active in applying international environmental law; Dutch courts used international environmental law as an interpretative aid; the Indian Supreme Court actively applied and arguably further developed international environmental (soft) law, Bodansky/Brunnée, *ibid.* at 15.

[77] *Ibid.*

[78] *Ibid.* at 16.

[79] *Ibid.* at 16 et seq.

[80] *Ibid.* at 17.

transformation act properly implements international environmental law but is not properly applied by the administration. Just as in the case of pure national environmental law, environmental NGOs may not take these cases to court unless there are special standing rules. The solution to closing this gap primarily lies in broadening national standing rules for ENGOs. Here, recourse to an international judiciary is not recommended. In a variant of the case, an ENGO might be able to take the case to court, but the court arguably also does not have to apply the national environmental law in a manner required to appropriately implement international environmental law. In this case it is worth considering an additional review procedure before the compliance committee of the affected MEA. In case of the Aarhus Convention such cases have already been considered by the compliance committee.[81]

The third example case (implementation of Aarhus Convention) highlighted another gap. If the national transformation act does not properly implement international environmental law there is no way to take the case to court or, even if this should be possible because individual rights are affected or ENGOs have standing through another source, the national court could not directly apply international environmental law and declare the national implementation act incompatible with it. In such cases the EU judiciary provides for additional judicial control. However, this only applies to EU member states and only to mixed international environmental agreements, where the EU and the member states have ratified the international treaty and the EU properly implemented the international law. In such cases, access to an international review procedure also might be worthy of recommendation. The Aarhus Compliance Committee has, in fact, already dealt with the case at issue.[82]

2. *Gaps in Judicial Control in the United States*

As outlined above, compared with Germany, there are more checks and balances built into the U.S. constitution that can be invoked by either Congress or the President to prevent international law which has already been signed from becoming part of U.S. federal law. These checks and balances strengthen state sovereignty and congressional and thus democratic interests. The judiciary has no influence at this stage of ratification.

Just as in the German case, if a treaty is self-executing or a non-self executing treaty is properly implemented into federal law but not properly applied by the executive, the national courts are responsible for judicial review, just as in the case of any other federal law. Broad standing rules for citizens and/or ENGOs have to ensure that cases with environmental protection interests can be taken to court in the first place. If the national court does not implement federal law deriving from international obligations in a manner consistent with the international environmental law,

[81] See chapter 3.III.D.
[82] See chapter 3.III.D.

recourse to an international review body such as a compliance committee seems a recommendable course of action.

If, in the case of a non-self executing treaty, the national transformation act is not in compliance with international environmental law, there is neither a basis on which any plaintiff could take the case to court nor a way for the court to directly apply the non-self executing treaty. The two additional instruments of judicial control available in the European Union, namely the infringement procedure and the preliminary ruling procedure, are not known to other fora of international environmental compliance control as yet and thus cannot be invoked elsewhere. It might be worth considering if procedures following the rationale of the infringement procedure and the preliminary ruling procedure but tailored to the specifics of the international level could help to close this gap in national judicial control.

Congress may at any time pass legislation to 'overrule' prior legislation or judicial decisions implementing international environmental law. In a future case, the judiciary would be bound by this new legislation although, arguably, in breach of international environmental law. Empirical studies have shown that courts tend to interpret congressional acts or the international agreement in such a way as to harmonize the two. Nevertheless, their influence in implementing international environmental law is limited; the U.S. legal order is set up in a way that ensures that Congress has the last word.

This subchapter elaborated several opportunities but also significant constraints on national judiciaries in serving as agents of the international legal order. International judicial review procedures might help to fill the gaps. In case of the European Union, the European Court of Justice (ECJ) plays an important role in the implementation of international environmental law. Although the EU is an international legal order *sui generis* and not comparable with other regional or universal international legal orders, the ECJ as an international judicial institution ensuring compliance with international environmental law at an above-state level seems a promising institution to consider with regard to the research interest at issue.

III. European Court of Justice

Within the European Union, the ECJ already functions as an above state-level judicial body contributing significantly to the enforcement of EU and international (above EU-level) environmental law.[83] The latter is possible because many MEAs are so-called mixed agreements, meaning that both the EU and its member states ratified the agreement. This subchapter explores how environmental cases reach the ECJ and thereby focuses on the relevance of different types of procedures and the

[83] For a comprehensive analysis of the enforcement of EU environmental law see Hedemann-Robinson, *Enforcement of European Union Environmental Law* (2007).

role of environmental NGOs in triggering such procedures. Next, this subchapter summarizes case law in which the ECJ applied MEAs directly or EU legislation implementing MEAs. It also refers to some case law in which the ECJ ensured compliance with its judgments. Furthermore, some ECJ case law on competing jurisdictions and compliance control is surveyed. In conclusion, opportunities for and constraints on the ECJ's ability to contribute to the enforcement of international environmental law are highlighted. Furthermore, lessons learned from the EU as an international regime coordinating a two-level judiciary are summarized with a view to the further development of regional and universal judicial and quasi-judicial bodies.[84]

Article 19 of the Treaty on European Union (TEU) states that the ECJ shall ensure that in the interpretation and application of the Treaties the law is observed. The Court of Justice of the European Union comprises three courts: the Court of Justice, the General Court and the Civil Service Tribunal. Since their establishment the courts have delivered around 15,000 judgments.[85]

A. *Mixed Multilateral Environmental Agreements*

The European Union[86] is a crucial actor in the field of international environmental law.[87] According to Article 4(2)(e) of the Treaty on the Functioning of the European Union (TFEU) and Title XX of the TFEU, the European Union and its member states share competences in the field of environmental protection. Article 191(1) TFEU explicitly states that the EU shall "promote measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change."

According to Article 191(4) TFEU, the Union and the Member States shall cooperate with third countries and with the competent international organizations "within their respective spheres of competence". In order to do so the European Union can enter into agreements with third parties. Without prejudice thereto, member states have the competence to negotiate in international bodies and to conclude international agreements. However, Article 34(1) TEU states that member states

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[84] For an in depth analysis of the question what the law enforcement mechanisms of the European Union can learn from compliance mechanisms under MEAs, especially under the Kyoto and Montreal Protocol, see Behrens, *Die zentrale Durchsetzung von Gemeinschaftsrecht durch die Europäische Kommission aus der Perspektive ausgewählter Regime des Umweltvölkerrechts* (2006).

[85] See data on the courts' website, available at http://curia.europa.eu/jcms/jcms/Jo2_6999/. For statistics on environmental judgments by the ECJ see Krämer, "Statistics on Environmental Judgments by the EC Court of Justice" (2006) 18 *JEL*, 407.

[86] Since the entry into force of the Treaty of Lisbon on 1 December 2009, the European Union has had legal personality and has acquired the competences previously conferred on the European Community. Community law has therefore become European Union law, which also includes all the provisions previously adopted under the Treaty on European Union as applicable before the Treaty of Lisbon. In the following, the term 'Community law' will nevertheless be used where reference is being made to the case-law of the Court of Justice before the entry into force of the Treaty of Lisbon.

[87] For an overview see http://ec.europa.eu/environment/international_issues/index_en.htm.

shall coordinate their action in international organizations and at international conferences. They shall uphold the Union's positions in such forums. The High Representative of the Union for Foreign Affairs and Security Policy shall organize this coordination.

The European Union is party to a large number of MEAs.[88] According to Article 216(2) TFEU agreements concluded by the Union are binding upon the institutions of the Union and on its member states. In most cases both the European Union and its member states become parties to a MEA. Those agreements are called mixed agreements.[89] In these cases, member states are obliged to implement the international treaty via two channels: as parties to the international agreement and as member states of the European Union.

B. *ECJ and International Environmental Law*

The ECJ has underlined from 1985 onward that environmental protection is "one of the European Community's essential objectives".[90] Article 216(2) TFEU states that agreements concluded by the Union are binding upon the institutions of the Union and on its member states. Consequently with respect to international agreements, the ECJ has held that those to which the EU is a party are an integral part of the Union's legal system.[91] In the *International Dairy Arrangement* (*IDA*) case it stated:

> [T]he primacy of international agreements concluded by the Community over provisions of secondary Community legislation means that such provisions must, so far as possible, be interpreted in a manner that is consistent with those agreements.[92]

Similarly, in the context of the Montreal Protocol on the Ozone Layer the ECJ stated:

> It is settled law that Community legislation must, so far as possible, be interpreted in a manner that is consistent with international law, in particular where its provisions are intended specifically to give effect to an international agreement concluded by the Community.[93]

Furthermore, in several decisions the ECJ took into account international agreements that relate to areas where the EU has exercised competence but to which

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[88] For a complete list of multilateral environmental agreements to which the EU is a party or a signatory see http://ec.europa.eu/environment/international_issues/agreements_en.htm.

[89] For an in depth analysis of the role of the European Community and its member states in mixed MEAs before the entry into force of the Lisbon Treaty see Rodenhoff, *Die EG und ihre Mitgliedstaaten als völkerrechtliche Einheit bei umweltvölkerrechtlichen Übereinkommen* (2008).

[90] Case C-240/83, *ADBHU* case, [1985] ECR 531, para. 13; Case 302/86 *Commission v. Denmark*, [1988] ECR 4607, paras. 9: "[T]he protection of the environment is a mandatory requirement which may limit the application of Article 30 of the Treaty".

[91] Case 181/73 *Haegeman v. Belgium*, [1974] ECR 499, paras. 4–6 (preliminary ruling); Case 12/86 *Demirel v. Stadt Schwäbisch Gmünd*, [1987] ECR 3719, paras. 6–12 (preliminary ruling).

[92] Case C-61/94 *Commission v. Germany* [1996] ECR I-3989, para. 52.

[93] Case C-284/95 *Safety Hi-Tech Srl. v. S. & T. Srl.* [1998] ECR I-4301, para. 22.

it cannot become a party.[94] The ECJ will not interpret international agreements to which the EU is not a party and that relate to a policy area in which it has not exercised its internal competence.[95] On the other hand, a legally binding or non-binding decision taken by an international forum established by an international agreement to which the European Union is a party or which is related to a policy area where the Union has exercised its competence can be relevant to the ECJ's interpretation of law.[96] Thus the factor that determines whether the ECJ will take into account international environmental law is whether the Union has exercised competence in the policy area at issue.[97]

C. *Access to the European Court of Justice*

Section V of the TFEU regulates the functioning and the jurisdiction of the European Court of Justice. ECJ procedures encompass opinion procedures and contentious procedures. Empirical data give some insight into how often and via which procedure environmental cases reach the ECJ. Environmental NGOs have hardly any direct access to the ECJ.

1. *Procedures*

Contentious procedures can reach the ECJ directly or indirectly. The majority of cases the ECJ deals with are indirect cases of references for preliminary rulings as provided for in Article 267 TFEU.[98] In references for preliminary rulings, the national courts may, and sometimes must, refer to the ECJ to clarify a point concerning the interpretation of EU law or seek the review of the validity of an act of EU law. Thus the main aim of the preliminary ruling procedure is to ensure the effective and uniform application of EU legislation.

The second most important contentious procedures before the ECJ are direct actions such as infringement procedures that can be brought under Articles 108, 258–260, and 348 TFEU.[99] In such actions, the ECJ determines whether a member state has fulfilled its obligations under EU law. In actions for failure to fulfill obligations, the Commission first conducts a preliminary procedure before it refers to the

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[94] Opinion 2/91, [1993] ECR I-1061, paras. 5–6; Case C-182/89 *Commission v. France*, [1990] ECR I-4337; See also Hey, "The European Community's Courts and International Environmental Agreements" (1998) 7 *RECIEL*, 4, 5.

[95] Case C-379/92 *Peralta*, [1994] ECR I-3453, para. 16 (preliminary ruling); see also Hey, "The European Community's Courts and International Environmental Agreements" (1998) 7 *RECIEL*, 4, 5.

[96] Hey, "The European Community's Courts and International Environmental Agreements" (1998) 7 *RECIEL*, 4, 5.

[97] *Ibid*.

[98] For statistics on these procedures see Annual Report 2010 provisional version at http://curia.europa.eu/jcms/jcms/Jo2_7000/.

[99] See statistics in provisional Annual Report 2010 at 2, http://curia.europa.eu/jcms/upload/docs/application/pdf/2011-03/ra09_stat_cour_provisoire_en.pdf.

ECJ, Article 258 TFEU. An infringement procedure can also be brought by a member state, Article 259 TFEU. If the Court concludes that a member state has failed to comply with its obligations, the state has to take the necessary measures to come into compliance without delay. If the member state does not act accordingly, the Commission can bring the case again before the ECJ and the ECJ can determine a lump sum or penalty to be paid by the member state according to Article 260 TFEU. References for preliminary rulings as well as infringement procedures can be based on EU law that originates from international environmental law.[100]

With regard to questions of international law, the opinion procedure promulgated in Article 218(11) TFEU is of special interest. Under it, a member state, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties. Where the opinion of the Court is adverse, the agreement envisaged may not come into force unless it is amended or the Treaties are revised.[101]

2. *Statistics*

According to ECJ statistics, in 2010, out of a total of 631 new contentious cases, 385 were references for preliminary rulings, 136 were direct actions and 97 cases of appeals.[102] The opinion procedure is rarely used.[103] In 61 out of the total of 631 new contentious cases in 2010, the subject matter of the action was the environment.[104] This divides into 34 cases of direct action, 26 cases of preliminary rulings,[105] and 1 case of appeal.[106] Thus environmental law is an important field of activity of the ECJ. Unfortunately, the ECJ statistics do not indicate whether the EU environmental law at issue derives from an MEA. They also do not indicate who originally triggered the procedure at state level in cases of preliminary rulings and thus whether the ECJ is asked to protect industry interests or environmental interests.[107]

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[100] With respect to infringement procedures see Shigeta, "The ECJ's 'Hard' Control over Compliance with International Environmental Law: Its Procedural and Substantive Aspects" (2009) 11 *Int'l Comm. L. Rev.*, 251, 265.

[101] An example of such an opinion procedure related to an MEA is the Opinion 2/00 of 6 December 2001 in which the Court found that Article 175(1) EC was the appropriate legal basis for the EC to join the Cartagena Protocol on Biosafety and that the Community and its member states shared competences to conclude the Protocol.

[102] See statistics in provisional Annual Report 2010 at 2, http://curia.europa.eu/jcms/upload/docs/application/pdf/2011-03/ra09_stat_cour_provisoire_en.pdf.

[103] From 2006 until 2010, the ECJ only dealt with two opinion procedures, *ibid*.

[104] *Ibid*. at 3. Other environmentally relevant areas counted separately are agriculture (25 cases), energy (7 cases), REACH (1 case), see *ibid*.

[105] For statistics on preliminary rulings in environmental matters from 1976–2005 see Krämer, "Statistics on Environmental Judgments by the EC Court of Justice" (2006) 18 *JEL*, 407, 420.

[106] See statistics in provisional Annual Report 2010 at 2, http://curia.europa.eu/jcms/upload/docs/application/pdf/2011-03/ra09_stat_cour_provisoire_en.pdf. For statistics on the completed cases see *ibid*. at 9 and 10.

[107] See similar critique of ECJ statistics at Krämer, "Statistics on Environmental Judgments by the EC Court of Justice" (2006) 18 *JEL*, 407, 421.

Data published by the Environment Directorate General of the Commission give some further insight into the use of the infringement procedure.[108] Over the last 5 years the DG Environment handled about 460 infringement procedures each year. With regard to the type of environmental law affected, in 2009 these infringement procedures divided into 92 nature cases (20%), 90 water cases (20%), 86 waste cases (19%), 72 air cases (16%), 61 other cases (14%), and 50 impact cases (11%). As regards the type of infringement at issue, cases divided up as follows: 75 cases of non-communication (member state fails to communicate implementing legislation before a deadline given in a directive), 147 cases of non-conformity (transposition of a directive in a member state shows shortcomings), and 298 cases of bad application (bad application of transposed provisions in a member state).[109]

Almost all environmental infringement procedures were brought under Article 258 TFEU (Commission initiated infringement procedure).[110] From 1976 until at least 2005, for almost 30 years, not a single environmental infringement procedure was brought under Article 259 TFEU (member state institutes infringement procedure against another member state).[111] The follow-up procedure under Article 260 TFEU had been used by the DG Environment in 61 judgments as at the end of 2009.[112] Most of these cases are solved without reference to the ECJ. In three cases that were referred by the DG Environment to the ECJ, the ECJ imposed financial penalties.[113]

3. *Environmental NGOs at the ECJ*

According to Article 263(4) TFEU (ex-Article 230(4) of the EC Treaty),

> [a]ny natural or legal person may [...] institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.

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[108] See statistics at http://ec.europa.eu/environment/legal/law/statistics.htm.

[109] *Ibid*. Further 24 cases were not classified.

[110] *Ibid*.

[111] Krämer, "Statistics on Environmental Judgments by the EC Court of Justice" (2006) 18 *JEL*, 407, 409. The Commission's 2009 statistic cited above does not refer to this number.

[112] See statistics at http://ec.europa.eu/environment/legal/law/statistics.htm. See also Krämer, *EC Environmental Law* (2007), 436 et seq.

[113] Case C-387/97 *Commission v. Greece* [2000] ECR I-5047 (€ 20000/day for toleration of unauthorized landfill), Case C-278/01 *Commission v. Spain* [2003] ECR I-14141 (€ 624150/year for each bathing water that did not comply with the requirements of EC Directive 76/160), and Case C-121/07*Commission v. France*, judgment of 9 December 2008. Greece duly complied with the judgment. From 4 July 2000 to February 2001 it paid the daily penalty of EUR 20,000, amounting to a total sum of EUR 5,400,000. In March 2001, the site was closed and the waste treated in an appropriate installation; see 19th Monitoring Report (2001), COM (2002) 324 final, at 49, para. 2.8.9; more critical Krämer, *EC Environmental Law* (2007), 437. Spain did not pay anything in the end because the Commission found that 95% compliance is sufficient; for a critique of this decision see Krämer, "Statistics on Environmental Judgments by the EC Court of Justice" (2006) 18 *JEL*, 407, 412. The Commission's Monitoring Reports are available at http://ec.europa.eu/eu_law/infringements/infringements_annual_report_en.htm.

In the case *Stichting Greenpeace vs. Commission* Greenpeace International tried to initiate a direct action before the ECJ seeking annulment of a decision by the Commission to financially support the construction of two power stations in the Canary Islands.[114] The CFI denied standing because of lack of direct and individual concern. It held that

> merely [...] the existence of harm suffered or to be suffered, cannot alone suffice to confer locus standi on an applicant, since such harm may affect, generally and in the abstract, a large number of persons who cannot be determined in advance in a way which distinguishes them individually in the same way as the addressee of a decision [...].[115]

The ECJ upheld this decision stating briefly that Greenpeace is not individually concerned by the act of the Commission and only indirectly affected.[116] It also noted that it considers affected rights (in this case regarding environmental impact assessments) fully protected by the national courts, which may refer to the ECJ via a preliminary ruling procedure.[117] This ECJ position has been criticized by many authors and it is arguably not in compliance with the provisions of the Aarhus Convention[118] but it has been upheld to date.[119]

Environmental NGOs may have direct access to the ECJ in cases where their rights under Regulation 1049/2001 (access to documents of EU institutions) or Regulation 1367/2006 (participation in environmental plans and programs elaborated at EU level) are affected.[120]

One indirect way of triggering judicial review is the Commission's complaint procedure. Environmental NGOs can submit complaints informing the Commission about possible infringements of EU law of a member state and the Commission might initiate an infringement procedure under Article 258 TFEU as a result of such

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[114] Case T-585/93 *Stichting Greenpeace* [1995] ECR II-2250 (Court of First Instance) and Case C-321/95P *Stichting Greenpeace* [1998] ECR I-1651 (ECJ upon appeal). For more details on standing of private actors before the ECJ, see Ebbesson, "European Community" in Ebbesson (ed.), *Access to Justice in Environmental Matters in the EU* (2002), 49, 50 et seq., 74 et seq.; Almqvist, "The Accessibility of European Integration Courts from an NGO Perspective" in Treves/Di Rattalma et al. (eds.), *Civil Society, International Courts and Compliance Bodies* (2005), 271, 276 et seq.; Peel, "Giving the Public a Voice in the Protection of the Global Environment (2001) 12 *Colo. J. Int'l Envtl. L. & Pol.*, 47, 50 et seq. For other initiatives of Greenpeace International related to compliance mechanisms of MEAs see Currie, "The Experience of Greenpeace International" in Treves/Di Rattalma et al. (eds.), *Civil Society, International Courts and Compliance Bodies* (2005), 149.

[115] Case T-585/93 *Stichting Greenpeace* [1995] ECR II-2250 at 51.

[116] Case C-321/95P *Stichting Greenpeace* [1998] ECR I-1651 at 27–31.

[117] *Ibid.* at 32 and 33.

[118] See below at Chapter 3.III.D.3. For an early draft proposal of an EU Directive Concerning Access to Justice in Environmental Matters see Thomas Ormond, " 'Access to Justice' for Environmental NGOs in the European Union" in Deimann/Dyssli (eds.), *Environmental Rights* (1995), 71, 77 et seq.

[119] For more details on this debate and further references see Ebbesson, "European Community" in Ebbesson (ed.), *Access to Justice in Environmental Matters in the EU* (2002), 49, 78 et seq. See also Krämer, "Environmental Justice in the European Court of Justice" in Ebbesson/Okowa (eds.), *Environmental Law and Justice in Context* (2009), 195, 209 et seq.

[120] Krämer, *EC Environmental Law* (2007), 161.

a complaint.[121] Another indirect route to the ECJ is the preliminary ruling procedure. Environmental NGOs might initiate judicial proceedings at the national level and the national court may decide to refer the case to the ECJ for a preliminary ruling.[122]

D. *Environmental Case Law*

This subchapter highlights some environmental case law of the ECJ that deals with enforcement of international environmental law and the ECJ's view on competing jurisdictions and compliance control in the international and multilevel judiciary.[123]

1. *Application of MEAs and Legislation Implementing MEAs*

On several occasions, the ECJ directly applied MEAs to a case before it or contributed to the enforcement of MEAs by applying EU implementing legislation in cases of mixed MEAs. A study undertaken by *Shigeta* focused on international environmental law in the fields of nature conservation and hazardous waste management and revealed that the ECJ strictly reviewed compliance with the relevant MEAs.[124] According to the study, contentious nature conservation cases mainly related to three areas: (1) the 1979 Birds Directive (Council Directive 79/409/EEC) implementing the 1971 Ramsar Convention, the 1979 Bonn Convention and the Bern Convention; (2) the 1992 Habitats Directive (Council Directive 92/43/EEC) implementing the 1992 Biodiversity Convention; and (3) the 1982 and 1996 CITES Regulations (Council Regulations 3626/82/EEC and 338/97/EEC) implementing the 1973 CITES.[125] Contentious cases regarding hazardous waste management mainly related to: (1) the 1991 Hazardous Waste Directive (Council Directive 91/689/EEC) and (2) the 1993 Waste Shipment Regulation (Council Regulation 259/93/EEC), both implementing the 1989 Basel Convention.

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[121] For more details on such complaints that can be brought by any EU citizen see Krämer, *EC Environmental Law* (2007), 429 et seq. The Commission provides further information including a complaint form at its website at http://ec.europa.eu/eu_law/your_rights/your_rights_en.htm.

[122] This happened, for example, in the recently decided *Lünen* case, Case C-115/09 (coal-fired power plant in Lünen); another example is Case C-263/08 *Djurgården-Lilla Värtans Miljöskyddsförening vs. Stockholms kommun genom dess marknämnd* [2009] ECR I-09967 (referring to Article 10a of the EIA Directive as amended by Directive 2003/35 which intended to implement the Aarhus Convention and holding that members of the 'public concerned' within the meaning of Articles 1(2) and 10a must be able to have access to a review procedure [. . .] regardless of the role they might have played in the examination of that request by taking part in the procedure before that body and by expressing their views; furthermore holding that Article 10a precludes national legislation which reserves the right to bring an appeal solely to environmental NGOs which have at least 2,000 members).

[123] A full list of the general leading environmental case law of the ECJ up to 2005 is available at http://ec.europa.eu/environment/legal/law/cases_judgements.htm.

[124] Shigeta, "The ECJ's 'Hard' Control over Compliance with International Environmental Law: Its Procedural and Substantive Aspects" (2009) 11 *Int'l Comm. L. Rev.*, 251, 268 et seq.

[125] *Ibid*. at 268.

For example, in the *Tridon* case the ECJ stated that it referred to international agreements to interpret EC implementing legislation:

> [S]ince Regulation No 3626/82 and Regulation No 338/97 both apply [...] in compliance with the objectives, principles and (in case of Regulation No 338/97) provisions of CITES, the Court cannot disregard those elements, in so far as they have to be taken into account in order to interpret the provisions of the regulations.[126]

In the *Jan Nilsson* case the ECJ also interpreted the 1996 CITES Regulation in the light of CITES.[127] In the *Poulsen and Diva* case the ECJ interpreted Article 6(1) of Council Regulation (EEC) No 3094/86 prohibiting the sale of salmon and sea trout caught on the high seas in the light of the 1958 Geneva Convention on Fishing and Conservation of the Living Resources on the High Seas.[128] In the *Chrysler* case the ECJ referred to the Basel Convention to support a harmonization argument and interpret Articles 3 to 5 of the Council Regulation No 259/93 as precluding a Member State from applying its own procedure in relation to the offer and allocation of waste.[129]

The ECJ also referred to a legally non-binding international instrument in the *IBA 89* case and noted

> IBA 89, although not legally binding on the Member States concerned, can, by reason of its acknowledged scientific value in the present case, be used by the Court as a basis of reference for assessing the extent to which the Netherlands has complied with its obligation to classify SPAs [special protection areas].[130]

In the *Bluhme* case the ECJ considered legislation that prohibited the keeping of bees, other than those from a special species, on a Danish island a measure with an effect equivalent to a quantitative restriction, but nevertheless justified based on the protection of the health and life of animals. It stated:

> Conservation of biodiversity through the establishment of areas in which a population enjoys special protection, which is a method recognized in the Rio Convention, especially Article 8a thereof, is already put into practice in Community law.[131]

The ECJ referred to the Basel Convention in holding that stricter domestic measures were not discriminatory in the *Wallonia Waste* case:

> [T]he contested measures cannot be regarded as discriminatory, in the light of the principle that environmental damage should as a matter of priority be remedied at source, which is consistent with the principles of self-sufficiency and proximity set out in the Basel Convention.[132]

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126 Case C-510/99 [2001] ECR I-7777 at 25.
127 Case C-154/02 [2003] ECR I-12733 at 39.
128 Case C-286/90 [1992] ECR I-6019 at 11.
129 Case C-324/99 [2001] ECR I-9897at 35, 42, 76.
130 Case C-3/96 *Commission v. Netherlands* [1998] ECR I-3031 at 70.
131 Case C-67/97 [1998] ECR I-8033 at 36.
132 Case C-2/90 *Commission v. Belgium* [1992] ECR I-4431 at 34–36.

In some cases the ECJ even recognized the direct applicability of international environmental treaties.[133] In two cases[134] concerning freshwater discharge by Électricité de France (EDF) into a saltwater marsh communicating directly with the Mediterranean Sea, the ECJ considered the 1980 Athens Protocol for the Protection of the Mediterranean Sea against Pollution from Land-based Sources[135] directly applicable to the case:

> [T]he answer to the first question must be that both Article 6(3) of the Protocol and Article 6(1) of the amended Protocol, following its entry into force, have direct effect, so that any interested party is entitled to rely on those provisions before the national courts.[136]

There are several cases where the ECJ had to decide on the scope of discretion of EC institutions and found it appropriate because it was exercised in compliance with international instruments.[137]

When the EU ratifies an international environmental agreement and implements it by subsequent EU legislation, the ECJ indirectly controls compliance with MEAs by strictly applying and interpreting the implementing EU legislation, even if it does not mention the MEAs behind it. In the *Tridon* case already mentioned above, the ECJ also stated that the interpretation of an MEA's provisions is unnecessary where there is EU legislation implementing that treaty:

> [T]o rule on the interpretation of provisions of CITES, such an interpretation is in any event unnecessary in the present case, since those provisions apply at Community level only via the two regulations cited in the preceding paragraph.[138]

In such cases, the ECJ interprets and applies the implementation legislation, using international agreements only for reference. Implicitly, the ECJ contributed to the enforcement of the above-mentioned Conventions of international environmental law by giving a pro-environmental interpretation to the relevant EU legislation implementing such treaties and thereby furthering the object and purpose of such

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[133] In contrast to compliance control in MEAs, the ECJ adopted a different point of view with respect to GATT/WTO agreements. In this context the ECJ stated that "the WTO agreements are not in principle among the rules in the light of which the Community court is to review the legality of measures adopted by the Community institutions", Case C-149/96 *Portugal v. Council* [1999] ECR I-8395 at 47. Compliance control in WTO/GATT agreements is therefore rather substantively soft in nature, Shigeta, "The ECJ's 'Hard' Control over Compliance with International Environmental Law: Its Procedural and Substantive Aspects" (2009) 11 *Int'l Comm. L. Rev.*, 251, 265 et seq.

[134] Case C-213/03 [2004] ECR I-7357; Case C-239/03 [2004] ECR I-9325.

[135] A Protocol to the 1976 Barcelona Convention for the Protection of the Mediterranean Sea against Pollution acceded by the EEC, Council Decision 77/585/EEC of 25 July 1977.

[136] Case C-213/03 at 47.

[137] Case C-405/92 *Etablissements Armand Mondiet SA v. Armement Islais SARL* [1993] ECR I-6133 at 34–36 (referring to the 1989 UNGA Resolution 44/225 which recommended moratoria and non-expansion of large-scale pelagic driftnet fishing on the high seas); case C-120/99 *Italy v. Council* [2001] ECR I-7997 at 46 (referring to binding recommendations of the International Commission for the Conservation of Atlantic Tunas (ICCAT) established under the 1966 International Convention for the Conservation of Atlantic Tunas acceded by the EC in 1986).

[138] Case C-510/99 [2001] ECR I-7777 at 24.

treaties. According to the study conducted by *Shigeta*, the ECJ dealt with the following issues in a pro-environmental manner:[139] selection and reduction of Special Protection Areas (SPA) and measures in SPAs pursuant to Article 4 of the Birds Directive; scope of discretion in setting thresholds according to Articles 2(1) and 4(2) of the EIA Directive; interpretation of the requirements to issue an import permit under Article 10(1)(b) of the 1982 CITES Regulation; selection of sites proposed to the Commission under Article 4(1) of the Habitats Directive; obligation to dispose of waste without endangering human health and without harming the environment as required by Article 4 of Directive 75/442; obligation to object to misclassification of a shipment under Articles 26 and 30(1) of the 1993 Waste Shipment Regulation; possibility to adopt more stringent protective measures than provided for in the 1991 Hazardous Waste Directive in order to prohibit the abandonment, dumping or uncontrolled disposal of hazardous waste.

In an infringement procedure brought by the Commission against Luxembourg, the ECJ indirectly contributed to the enforcement of the reporting requirements established under the 1997 Kyoto Protocol.[140] The ECJ found that Luxembourg failed to fulfill its obligations under EU legislation concerning the mechanism for monitoring EU greenhouse gas emissions and for implementing the Kyoto Protocol because it failed to submit information to the Kyoto regime within the prescribed time-limit.[141]

Furthermore, the ECJ already indirectly contributed to the enforcement of the 1998 UNECE Aarhus Convention. The *Trianel Kohlekraftwerk Lünen* case reached the ECJ via the preliminary ruling procedure. The German branch of Friends of the Earth, BUND,[142] had filed a lawsuit against the Arnsberg district council before the higher administrative court of Münster, alleging that a partial license issued by the Arnsberg district council on the location of the planned Trianel coal-fired power plant in Lünen violated water and nature protection laws. One core issue of the case was whether the BUND had standing before the German court to bring the case. According to section 2 of the German Environmental Appeals Act (Umweltrechtsbehelfsgesetz), the ENGO arguably lacked standing because the water and nature protection laws at issue do not aim to protect the interests of individuals but simply the interests of the general public. The higher administrative court of Münster referred the case to the ECJ to request a decision on the scope of access

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[139] See Shigeta, "The ECJ's 'Hard' Control over Compliance with International Environmental Law: Its Procedural and Substantive Aspects" (2009) 11 *Int'l Comm. L. Rev.*, 251, 270 et seq. with further references.

[140] Case C-390/08, *Commission v. Luxembourg*, judgment of 18 May 2009, not yet reported.

[141] *Ibid*. For more information on the interaction between the EU and the Kyoto Protocol system with respect to compliance see Tabau/Maljean-Dubois, "Non-Compliance Mechanisms: Interaction Between the Kyoto Protocol System and the European Union" (2010) 21 *EJIL*, 749.

[142] Bund für Umwelt und Naturschutz Deutschland, here in particular the regional association Landesverband Nordrhein-Westfalen eV.

of ENGOs to national courts in environmental matters under Article 10a of the EIA Directive.[143, 144]

In its decision in the *Trianel Kohlekraftwerk Lünen* case,[145] the ECJ found that the legislation enacted by Germany to implement Article 10a of the European EIA Directive and Article 9 of the Aarhus Convention on access to justice in environmental matters (German Environmental Appeals Act/Umweltrechtsbehelfsgesetz) is not compatible with the requirements of European law and thus, indirectly, with the Aarhus Convention. Article 10a of the EIA Directive implements Article 9 of the 1998 UNECE Aarhus Convention.

The ECJ held that Article 10a of the EIA Directive

> precludes legislation [such as section 2 of the German Environmental Appeals Act][146] which does not permit non-governmental organisations promoting environmental protection [...] to rely before the courts, in an action contesting a decision authorising projects 'likely to have significant effects on the environment' [...] on the infringement of a rule flowing from the environment law of the European Union and intended to protect the environment, on the ground that that rule protects only the interests of the general public and not the interests of individuals.[147]

The ECJ also found that an ENGO can in such a case derive standing before the (national) courts directly from the last sentence of the third paragraph of Article 10a of the EIA Directive.[148]

2. *ECJ on Competing Jurisdictions*

Given the proliferation of international courts and tribunals, handling competing jurisdictions is crucial with respect to dispute settlement and compliance control. A coherent set of rules on how to delineate competing jurisdictions is also a key factor in combating forum shopping and preserving the international judiciaries' credibility. This subchapter briefly describes the two main cases in which the ECJ dealt with this issue.

In the 2006 *MOX Plant* case the ECJ for the first time acknowledged its exclusive jurisdiction over an international environmental dispute.[149] The case dealt with the protection of the marine environment. It concerned a UK MOX plant on the Irish Sea coast, which is designed to recycle plutonium from spent nuclear fuel by mixing

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143 Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, as amended by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003.

144 Oberverwaltungsgericht Münster, decision of 5 March 2009, 8 D 58/08.AK.

145 Case C-115/09, judgment of 12 May 2011, not yet reported.

146 Inserted by the author.

147 Case C-115/09, judgment of 12 May 2011, not yet reported, at 60.

148 *Ibid.*

149 Case C-459/03 *Commission v. Ireland* [2006] ECR I-4635. For more details on the cases see Churchill/Scott, The MOX Plant Litigation; The First Half-Life (2004) 53 *Int'l & Comp. L.Q.*, 643.

plutonium dioxide with depleted uranium dioxide and thereby converting it into a new fuel known as MOX (mixed oxide fuel). Ireland submitted the case, with varying legal concerns, to three international judicial fora.

Firstly, in June 2001, Ireland initiated arbitration proceedings at the Permanent Court of Arbitration under the 1992 OSPAR Convention, arguing that the UK had failed to comply with Article 9 of the OSPAR Convention since it refused to provide Ireland with a complete copy of the PA report regarding the economic justification for the MOX plant. In July 2003, the arbitral tribunal of the OSPAR Convention dismissed the case.[150] Secondly, in October 2001, Ireland resorted to arbitration at the Permanent Court of Arbitration under the 1982 UNCLOS claiming that the UK had failed to take the necessary measures to prevent, reduce and control pollution of the marine environment of the Irish Sea and therefore did not comply with Articles 192–194, 207, 211, and 213 of the UNCLOS. Following a request from Ireland, the UNCLOS arbitral tribunal had stayed the proceedings since November 2004 and terminated the proceedings in June 2008, after Ireland withdrew its claim in February 2007.[151] Thirdly, in November 2001, Ireland submitted a request to the ITLOS asking it for provisional measures and, more concretely, to immediately suspend the authorization for the operation of the MOX plant. The ITLOS did not accede to Ireland's request but prescribed provisional measures in December 2001 asking both Parties to enter into consultations.[152]

In October 2003 the Commission brought action against Ireland for failure to fulfill obligations under then Article 226 EC and Article 141 EA.[153] It raised three heads of complaint. Firstly, the Commission argued that Ireland had breached Article 292 EC by starting proceedings under UNCLOS to settle the *MOX plant* dispute with the UK and thereby failed to respect the exclusive jurisdiction of the ECJ with regard to disputes concerning the interpretation and application of Community law. Secondly, the Commission claimed that Ireland had breached Articles 292 EC and 193 EA by referring to the arbitral tribunal a dispute which required for its resolution the interpretation and application of measures of Community law. Thirdly, the Commission claimed that Ireland had failed to comply with its duty of cooperation under Article 10 EC because it brought proceedings under the UNCLOS on the basis of provisions that fall within the competence of the Community and therefore exercised a competence which belongs to the Community. Under the third head of complaint the Commission also argued that Ireland did not comply with its duty of cooperation

[150] See chapter 4 II.A.4 for more details on the case under the Permanent Court of Arbitration.

[151] Order No. 6 of 6 June 2008 available at http://www.pca-cpa.org/showpage.asp?pag_id=1148.

[152] Order of 3 December 2001 (Case 10, 'The Mox Plant Case', *Ireland v. United Kingdom*) available at http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_10/Order.03.12.01.E.pdf.

[153] Case C-459/03 *Commission v. Ireland* [2006] ECR I-4635. The Articles in this subsection refer to those in force at the time of the decision.

under both Article 10 EC and Article 192 EA by bringing those proceedings without having first informed and consulted the competent Community institutions.[154]

The Court followed the Commission's complaint in all three respects. With regard to the first head of complaint it stated that Member States and the Commission shared external competences in the field of environmental protection according to Article 175 175 EC. The UNCLOS is a mixed agreement and its provisions came within the scope of Community competence, since the matters covered by those provisions were largely regulated by Community measures. The Court held that it had exclusive jurisdiction, since it follows from Articles 292 EC and 282 of the UNCLOS that the system for the resolution of disputes set out in the EC Treaty must in principle take precedence over that contained in Part XV of the UNCLOS.[155] With respect to the second head of complaint the ECJ held that

> [i]t follows that Articles 220 EC and 292 EC preclude the initiation of proceedings before an arbitral tribunal established pursuant to Annex VII to the Convention with a view to resolving a dispute concerning the interpretation or application of provisions of the Convention coming within the scope of the competence of the Community which the latter exercised by acceding to that Convention, with the result that the provisions in issue form an integral part of the Community legal order.[156]
>
> The submission by a Member State of instruments of Community law covered by the EC and EAEC Treaties to a judicial forum other than the Court [...] for purposes of their interpretation and application in the context of proceedings seeking a declaration that another Member State had breached the provisions of those instruments is at variance with the obligation imposed on Member States by Articles 292 EC and 193 EA to respect the exclusive nature of the Court's jurisdiction to resolve disputes concerning the interpretation and application of provisions of Community law, in particular by having recourse to the procedures set out respectively in Articles 227 EC and 142 EA for the purpose of obtaining a declaration that another Member State has breached those provisions.[157]

With respect to the third head of complaint the ECJ stated that it is unnecessary to find that there has been a breach of general duty of loyalty resulting from Article 10 when it has already established a failure to comply with the more specific Community obligation pursuant to Article 292 EC.[158] However, it held that in those circumstances

> the obligation of close cooperation within the framework of a mixed agreement involves, on the part of a Member State, a duty to inform and consult the competent Community institutions prior to instituting dispute-settlement proceedings under the Convention.[159]

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154 *Ibid.* at 59.
155 *Ibid.* at 123–126, 128, 133.
156 *Ibid.* (second finding).
157 *Ibid.* (third finding).
158 *Ibid.* at 169, 171.
159 *Ibid.* (fifth finding).

In short, the ECJ seems to claim exclusive jurisdiction over cases arising from mixed agreements if three preconditions are fulfilled: Firstly, the treaty provision at issue is within the scope of the Community's competence and therefore part of the Community legal order. Secondly, the dispute cannot be divided into an EU law aspect and a treaty aspect but has to be considered as one single dispute. Thirdly, the treaty contains a provision that explicitly allows for the precedence of the ECJ over its own dispute settlement procedures.[160]

The last precondition might explain why the Commission did not claim the illegality of Ireland's submission of the case to the OSPAR arbitral tribunal, since the OSPAR Convention does not contain a provision similar to Article 282 of the UNCLOS.

The *Iron Rhine* arbitration is an example of a case in which the international tribunal decided on a dispute between two EU member states in a way which arguably did not infringe provisions of the EC Treaty.[161] In this case, Belgium planned to reactivate the Iron Rhine Railway from Belgium to Germany via the Netherlands, which was built in 1879 and in operation until 1991. The relevant international treaties were the 1839 Treaty of Separation and the 1873 Iron Rhine treaty. Unlike the UNCLOS, they are not mixed agreements and therefore do not form part of the Community legal order. However, the Iron Rhine tribunal was asked to apply European law if necessary.[162] The tribunal referred to the acte clair doctrine and the CILFIT test and finally decided on the case arguably without violation of Article 292 EC. *Shigeta* describes the tribunal's proceedings as "good judicial comity" to avoid frictions with the ECJ.[163]

E. *Opportunities and Constraints*

The analysis above provided some answers to two questions. Firstly, what are the opportunities for and constraints on the ECJ's ability to contribute to the enforcement of international environmental law, in particular MEAs? Secondly, what can be learned from the EU as an international regime coordinating a two-level, and to some extent already a three-level, judiciary with a view to the further development of regional and universal judicial and quasi-judicial bodies?

As regards the first question, it can be concluded that the ECJ significantly contributes to the enforcement of international environmental law. The review of the case law based on the study by *Shigeta* has shown that in the field of nature conservation and hazardous waste management the ECJ strictly reviewed compliance

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[160] See also Shigeta, "The ECJ's 'Hard' Control over Compliance with International Environmental Law: Its Procedural and Substantive Aspects" (2009) 11 *Int'l Comm. L. Rev.*, 251, 294.

[161] Belgium/Netherlands ("Iron Rhine Arbitration"), award of the arbitral tribunal of 24 May 2005, available at http://www.pca-cpa.org/showpage.asp?pag_id=1155.

[162] *Ibid.* at 97.

[163] Shigeta, "The ECJ's 'Hard' Control over Compliance with International Environmental Law: Its Procedural and Substantive Aspects" (2009) 11 *Int'l Comm. L. Rev.*, 251, 296.

with the relevant MEAs. It either interpreted EU legislation in a manner consistent with an MEA or, at least on two occasions, even directly applied international environmental law to a case. In cases involving mixed agreements, and the EU is party to a large number of MEAs, the ECJ implicitly enforces MEAs by reviewing compliance with their implementing legislation. On some occasions, the ECJ also referred to international environmental soft law. A severe constraint on the ECJ's ability to review compliance with environmental law in general is that environmental NGOs, with small exceptions, do not have standing to bring cases in the public interest before the ECJ. They can only initiate cases before national courts, if this is possible under national law, and eventually a court might decide to refer questions to the ECJ to seek a preliminary ruling. Furthermore, environmental NGOs can, like all EU citizens, file a complaint informing the Commission about a possible case of non-compliance by a member state. This might result in the Commission initiating an infringement procedure against a member state. However, both indirect routes are rather weak instruments and do not ensure that environmental concerns are effectively brought before the ECJ. Thus, the ECJ, in the same way as national courts that do not allow for citizen or environmental NGO suits, is used mostly to protect economic interests and not available for cases simply seeking environmental protection.[164]

With respect to the second question, several aspects of the EU's multilevel judiciary regime seem to be instructive with regard to other international judicial and quasi-judicial bodies. Firstly, states do not sue other states in environmental matters. During a period of almost thirty years, no member state initiated an infringement procedure in an environmental case against another member state. The vast majority of environmental cases reached the ECJ via the preliminary ruling or the Commission-initiated infringement procedure. Thus, if an international judicial body wants to contribute to the enforcement of international environmental law, it will not succeed if only states can institute procedures. It will be even less successful if the consent of the defendant is needed for judicial review. Consequently, such an international judicial body needs compulsory jurisdiction and triggers other than states. An administrative review body which is accessible to citizens and NGOs, as the EU Commission is, has proved to be one way to take environmental cases to court. The Commission functions as a filter and provides for non-confrontational communication on a case before submitting it, if necessary, to the ECJ. The infringement procedure, thus, seems to be a good mix of "carrots and sticks".[165] The preliminary

[164] For further critique see Krämer, "Statistics on Environmental Judgments by the EC Court of Justice" (2006) 18 *JEL*, 407, 407 et seq.; Krämer, "Environmental Justice in the European Court of Justice" in Ebbesson/Okowa (eds.), *Environmental Law and Justice in Context* (2009), 195, 209; Ebbesson, "European Community" in Ebbesson (ed.), *Access to Justice in Environmental Matters in the EU* (2002), 49, 94. See also Chapter 3.III.D.3 for a recent decision of the Aarhus Compliance Committee on this issue.

[165] Compliance theory is discussed in more detail in the following subchapter IV.

ruling procedure might also be of special interest for other international judicial and quasi-judicial bodies, especially perhaps within an environmental regime. It connects a two-level judiciary through communication between the judges and thereby ensures, in arguably a softer way than an appeal procedure, effective and uniform application of regime legislation. As regards environmental cases, it should be noted, however, that, since not many EU member states give wide access to environmental NGOs, it is most likely that the majority of the cases reaching the ECJ via the preliminary ruling procedure were initiated at the national level to protect economic and not environmental interests. However, there are no statistics available on this question. Therefore, the preliminary ruling procedure can be more effective in protecting environmental concerns if environmental NGOs and/or citizens have wide access to national courts in respect of environmental matters.

Secondly, it also seems sensible for other international administrative compliance review bodies to follow the Commission's approach and differentiate between several types of infringements such as non-communication, non-conformity, and bad application of regime legislation.[166] A follow-up of reporting obligations is a precondition for any meaningful compliance review. Checking implementing legislation and the application of such legislation is necessary to ensure that full implementation actually takes place.

Thirdly, compliance with the judgments of the ECJ is safeguarded through a special procedure provided for under Article 260 TFEU. In three environmental cases the ECJ imposed substantial daily penalty payments to force member states to come into compliance with EU environmental legislation. Such a procedure is a severe means to exact compliance but it has proved to be necessary and effective in some environmental cases.

Fourthly, the EU's strict law enforcement regime is complemented by its regional policy aimed at the reduction of significant economic, social, and territorial disparities between regions. For example, between 2007 and 2013 €347 billion are being spent to further territorial cohesion.[167] A significant amount of this money helps to improve infrastructures in environmentally relevant areas such as water and waste management, energy production and supply, but also monitoring and capacity building in general. Financial support enables member states to comply with environmental legislation and thus serves as a crucial counterpart to strict law enforcement.

Fifthly, a growing international judiciary has to cope with questions of forum shopping and competing jurisdictions. In the *MOX Plant* case the ECJ for the first time claimed exclusive jurisdiction over an international environmental dispute and set up several criteria for delimiting competences. More research needs to be done

[166] See above at section on statistics, Chapter 2.III.C.2.

[167] For more information on the regional policy of the EU see http://ec.europa.eu/regional_policy/what/index_en.cfm.

to address such jurisdictional questions, especially in fragmented and multi-level international legal regimes.[168]

IV. International Courts, Arbitral Tribunals, and Compliance Committees

This subchapter explores the multilevel as well as the sectoral dimension of international judicial and quasi-judicial law enforcement. Firstly, it discusses the type of cases are appropriate to be dealt with by international judicial and quasi-judicial institutions. Secondly, setting the framework for the structure of the analysis in chapters 3 and 4, the different types of existing international judicial and quasi-judicial institutions are introduced and their relevance for the enforcement of environmental law is highlighted. Thirdly, the relationship between dispute settlement and compliance control is briefly examined. Fourthly, the terms compliance, implementation, enforcement, and effectiveness are defined for the purpose of this study. Finally, some thoughts on multilevel and cross-fragment relations are outlined.

A. *Cases for the International Level*

International enforcement procedures may be useful in three types of cases. Firstly, cases arising from activities of states or non-state actors that cause or contribute to regional or global environmental problems. Secondly, cases arising from activities of states or non-state actors that cause or contribute to local transboundary harm. Thirdly, cases arising from activities of states or non-state actors that have a purely local detrimental effect on the environment but cannot be effectively tackled within national jurisdictions. In all of these cases, such activities must potentially violate international environmental treaty or customary law.

As regards the first category, Chapter 1.I outlined several environmental problems that have either regional or global causes or regional or global effects and thus cannot be tackled effectively by one or a few countries alone. Among these environmental problems are, for example, acid rain, ozone depletion, climate change, transboundary movement and disposal of hazardous wastes, loss of biodiversity, as well as the pollution and exploitation of the world's seas. States have put in place a number of regional and global multilateral environmental agreements to tackle these environmental problems. As seen in subchapter I above, such MEAs contain a variety of justiciable legal obligations. Subchapter II has shown that the primarily implementation of MEAs, including judicial control, occurs at the national level. However, the analysis has also highlighted several areas, in which the incomplete implementation of MEAs is falling through the cracks in national control procedures. Examples

[168] See International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, United Nations (2006); Shany, *The Competing Jurisdictions of International Courts and Tribunals* (2005).

of such cases can be found in the case law of the ECJ outlined above, but also in the cases dealt with by compliance committees under MEAs.[169] Regional and global MEAs are concluded because only joint action enables the environmental problem in question to be tackled effectively. For example, the success of the Kyoto Protocol crucially depends on compliance by all parties with their obligations under the Protocol. It is therefore key to a successful international environmental regime that cases, which are falling through the cracks at the national level, can be brought to the attention of an international law enforcement body.

The second category of environmental law suits appropriate for the international level encompasses cases that deal with the prevention of or compensation for transboundary harm caused primarily by industrial activities.[170] Those cases should also mostly be dealt with at the national level through cross-border public participation and access to administrative and judicial control procedures. However, legal protection in transboundary cases is still deficient in many respects both at the information and participation stage and even more so when it comes to the jurisdiction of national courts and enforcement of judgments.[171] Thus, an international backup procedure is necessary in order to provide effective legal protection for affected interests. Conflicts between states or non-state actors over shared natural resources also fall within this category.

The third category of cases arises from activities of states or non-state actors that have only a local detrimental effect on the environment, but cannot be effectively tackled within national jurisdictions. This category mainly addresses illegal resource exploitation or pollution caused by transnational corporations in which the transnational corporate structure of the company prevents effective legal proceedings against the company in the state of harm and, for example, the home state of the parent company.[172]

Finally, as outlined in chapters 3 and 4, many cases reach international judicial and quasi-judicial bodies, for example the ICJ, WTO, ITLOS, or arbitral tribunals, not as environmental cases but still with a factual background that comprises environmental interests. In these international procedures, it is important that affected

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[169] See Chapter 3.III.D for compliance issues dealt with by the Aarhus compliance committee and Chapter 4.III.D for questions of implementation that arose under the Kyoto compliance committee.

[170] See also Lakshman Guruswamy, "Commentary on Speech of Fitzmaurice" in Peck/Lee (eds.), *Increasing the Effectiveness of the International Court of Justice* (1997), 418, 421; Ebbesson, "Piercing the State Veil in Pursuit of Environmental Justice" in Ebbesson/Okowa (eds.), *Environmental Law and Justice in Context* (2009), 270, 270.

[171] See also Rest, "Enhanced Implementation of International Environmental Treaties by Judiciary" (2004) 1 MqJICEL, 1, 3 et seq.; Ebbesson, "Piercing the State Veil in Pursuit of Environmental Justice" in Ebbesson/Okowa (eds.), *Environmental Law and Justice in Context* (2009), 270, 282 et seq.

[172] Ebbesson, *ibid.* at 270 et seq. For a case study on mining in Sierra Leone see Schwartz, "Corporate Activities and Environmental Justice: Perspectives on Sierra Leone's Mining" in Ebbesson/Okowa (eds.), *Environmental Law and Justice in Context* (2009), 429.

environmental interests are also involved in the judicial and quasi-judicial decision-making process and are appropriately treated, in compliance with applicable environmental law.

B. *Judicial Dispute Settlement, Arbitration, and Compliance Control*

In a study conducted in 2004, the PICT counted more than 80 active international judicial, quasi-judicial, implementation control, and other dispute settlement bodies.[173] Here the main focus is on international judicial and quasi-judicial bodies that are especially relevant for the enforcement of international environmental law. The analysis in chapter 3 covers regional judicial and quasi-judicial bodies, and chapter 4 reviews universal international judicial and quasi-judicial bodies. Each of these chapters differentiates between procedures of judicial dispute settlement, arbitration, and compliance control. In addition, chapter 3 also scrutinizes two other compliance review bodies that do not fit into any of these three categories.

As regards judicial bodies, the study examines the International Court of Justice, the WTO Dispute Settlement System, the International Tribunal for the Law of the Sea, and the three regional human rights courts. The Permanent Court of Arbitration, the International Center for Settlement of Investment Disputes, and, only briefly, the International Court of Environmental Arbitration and Conciliation, as well as arbitration under the NAFTA and CAFTA-DR are the arbitral frameworks that are scrutinized. With respect to compliance review procedures established under MEAs, the compliance mechanisms of the Kyoto Protocol and the Aarhus Convention are explored. Finally, the study also encompasses the compliance review procedure established under the OECD Guidelines for Multinational Enterprises and, only briefly, the Commission for Environmental Cooperation under the North American Agreement on Environmental Cooperation (NAAEC).

This subchapter provides an introduction to the special characteristics of judicial dispute settlement, arbitration, and compliance control that are the basis for the differentiated analysis in the following two chapters.

1. *Judicial Dispute Settlement*

According to the definition of the PICT project, an international judicial body is a permanent institution, composed of independent judges, adjudicating disputes between two or more entities, at least one of which is either a state or an international organization, works on the basis of predetermined rules of procedure, and renders decisions that are binding.[174] While inter-state dispute resolution has its

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[173] See overview on synoptic chart Version 3.0, November 2004 at http://www.pict-pcti.org/publications/synoptic_chart/synop_c4.pdf.

[174] *Ibid*. PICT synoptic chart, p. 2. See also Romano, "Proliferation of International Judicial Bodies: The Pieces of the Puzzle" (1998) 31 *N.Y.U. J. Int'l L. & Pol.*, 709.

origins in international arbitration, over time international judicial settlement before permanent international courts and tribunals has become a separate category of dispute resolution.[175] Some authors argue that on the international level there is no significant difference between judicial settlement and arbitration,[176] however, this view is not shared here. Arbitration is a far more flexible form of dispute resolution than judicial settlement. In arbitration proceedings, for example, parties to a dispute are free to determine the arbitrators, procedure and applicable law. In judicial settlement, these decisions have been taken by all states parties to the international treaty on which the court is based.[177] Therefore international judicial procedures are more responsible to the community of states parties as a whole and consequently more appropriate to influence the further development of international law than arbitral tribunals whose mere focus is the settlement of a dispute within the framework of case-specific rules set by the respective parties to a dispute on a case-by-case basis.

International judicial dispute settlement bodies have several characteristics that make them most appropriate for the development of a coherent international legal order. They are permanent institutions, composed of independent judges, they work according to a predefined procedure, render legally binding judgments, provide for some control of the implementation of their judgments, their hearings are usually open to the public, and their judgments are published. Such characteristics enhance independence, predictability, and transparency and thus crucial elements of judicial control. To this extent, international judicial dispute settlement bodies are also most appropriate for the application and development of international environmental law. However, there are several constraints that prevent them from playing a crucial role in the enforcement of international environmental law. The main constraint is that traditional access rules prevent environmental cases from reaching such bodies in the first place. Usually only states have standing before international judicial dispute settlement bodies and the case law shows that states very rarely bring cases before an international judicial or quasi-judicial body in order to protect environmental interests. Other constraints are the types of remedies available under dispute settlement.[178]

Chapter 3 scrutinizes the three regional human rights courts that have frequently dealt with environmental cases. Those bodies are also of special interest here because they grant access to individuals and NGOs under certain conditions. Chapter 4 examines in detail three universal international judicial bodies. The International Court of

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[175] Karg, *IGH vs ISGH* (2005), 57, 70.

[176] See, for example, Böckstiegel, "Internationale Streiterledigung vor neuen Herausforderungen" in Beyerlin/Bernhardt (eds.), *Recht zwischen Umbruch und Bewahrung* (1995), 671, 672.

[177] Karg, *IGH vs ISGH* (2005), 70.

[178] For an overview of confrontational measures such as countermeasures on the basis of the VCLT, withdrawal of privileges, trade restriction, responsibility, and liability see Wolfrum, "Means of Ensuring Compliance with and Enforcement of International Environmental Law" (1998), 272 *Recueil des Cours – Académie de Droit International*, 9, 56 et seq. See also Chapter 2.IV.B.3 below.

Justice is of special interest here, because it is the only international court of general jurisdiction and thus in the best position to apply all relevant rules of law to a case at issue and come to a balanced solution. The WTO dispute settlement bodies are also analyzed. They are relevant for this study because they have the highest case load among universal international judicial bodies and frequently decide cases with an environmental impact. The third universal international judicial body scrutinized is the International Tribunal for the Law of the Sea. It deals with cases arising under the United Nations Convention on the Law of the Seas, including all provisions on the protection of the marine environment.

2. *Arbitration*

International arbitration is an alternative form of international dispute settlement that produces legally binding decisions.[179] Article 37 of the 1907 Hague Convention for the Pacific Settlement of International Disputes states that international arbitration

> has for its object the settlement of disputes between States by Judges of their own choice and on the basis of respect for law. Recourse to arbitration implies an engagement to submit in good faith to the Award.

Arbitral proceedings are of special interest in this analysis for several reasons. Firstly, inter-state arbitration played a significant role in the development of international environmental law. For example, the *Pacific Fur Seals Arbitration* (1893), the *Trail Smelter* case (1935/1941) and the *Lac Lanoux* case (1957) were inter-state disputes settled via arbitration.[180] Secondly, in many MEAs dispute settlement clauses establish ad hoc or institutional arbitration as the form of dispute settlement chosen by the parties to the agreement in the event of conflict.[181] Some of the cases that arose under such clauses are discussed below. Thirdly, arbitration is a relevant form of dispute settlement in this context because a growing number of bi- and multilateral investment treaties provide for investor-state arbitration and such disputes often involve the public, including environmental interests. Furthermore, investor-state arbitration, especially as provided for by the ICSID Convention, is a notable development with regard to direct access of non-state actors to international dispute settlement procedures.[182] There are also rules of international arbitration for

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[179] Sands, *Principles of International Environmental Law* (2003), 212; Kiss, "Environmental Disputes and the Permanent Court of Arbitration" (2003) 16 *Hague YIL*, 41, 41. For more background information on historical development and differences between international judicial settlement and international arbitration see Karg, *IGH vs ISGH* (2005), 57 et seq.

[180] These cases have often been discussed; for an overview see Sands, *Principles of International Environmental Law* (2003), 213 with further references.

[181] See for example arbitration according to Annex VII under the 1982 United Nations Convention on the Law of the Sea.

[182] See also Orrego Vicuña, *International Dispute Settlement in an Evolving Global Society* (2006), 64.

conflicts between private parties. However, in this context the analysis focuses on inter-state and investor-state international arbitration.

Three bodies of international arbitration are discussed in more detail in chapter 4 below. The Permanent Court of Arbitration is interesting in this context because it is the oldest forum of international arbitration and has been suggested by some authors as a suitable basis for an international environmental court. The ICSID is an international arbitral tribunal located at the World Bank which settles disputes between private investors and states. Some of its cases have dealt with issues of environmental protection. The International Court of Environmental Arbitration and Conciliation is the first and so far only arbitral tribunal established specifically for environmental cases; however, it has not been established by states but through a private initiative. Chapter 3 briefly introduces to two regional frameworks of arbitration under NAFTA and CAFTA-DR that provide for some progressive features regarding participation and transparency compared with traditional arbitral procedures.

3. *Compliance Control*

The concept of compliance control was developed in the late 1980s and 1990s as a means to enhance implementation and compliance control within international law, for example in the fields of arms control, human rights, and international labor law.[183] Compliance theory is based on the assumption that there is a general propensity for states to comply with international law.[184] It further assumes that the main reasons for non-compliance are unclear treaty language, lack of capacity to appropriately implement obligations under a treaty, and the temporal dimensions of treaty obligations.[185] Consequently, given these roots of non-compliance, coercive means of reacting to non-compliance are not appropriate.[186] A "managerial model" based on a cooperative and non-confrontational approach is considered more apt to address such cases of non-compliance.[187] Furthermore, compliance theory assumes that "compliance is not an on-off phenomenon" but that there is a range of acceptable

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[183] Handl, "Compliance Control Mechanisms and International Environmental Obligations" (1997) 5 *Tul. J. Int'l & Comp. L.*, 29, 30.

[184] Chayes/Chayes, *The New Sovereignty* (1998), 3 et seq. with examples and further references. See also Brunnée, "Enforcement Mechanisms in International Law and International Environmental Law" in Beyerlin/Stoll et al. (eds.), *Ensuring Compliance with Multilateral Environmental Agreements* (2006), 1, 10 et seq.; Fitzmaurice, "Compliance with Multilateral Environmental Agreements" (2007) *Hague YIL*, 19, 19 et seq.; Brown Weiss, "Understanding Compliance with International Environmental Agreements: The Baker's Dozen Myths" (1998) 32 *U. Rich. L. Rev.*, 1555, 1560 et seq. For an in depth historical review see Koh, "Why Do Nations Obey International Law?" (1997) 106 *Yale L.J.*, 2599, 2603 et seq.

[185] Chayes/Chayes, *The New Sovereignty* (1998), 10 et seq.

[186] See also Beyerlin/Stoll et al., "Conclusions Drawn from the Conference on Ensuring Compliance with MEAs" in Beyerlin/Stoll et al. (eds.), *Ensuring Compliance with Multilateral Environmental Agreements* (2006), 359, 1.

[187] Chayes/Chayes, *The New Sovereignty* (1998), 3, 22 et seq. See also Handl, "Compliance Control Mechanisms and International Environmental Obligations" (1997) 5 *Tul. J. Int'l & Comp. L.*, 29, 34.

levels of compliance.[188] If, for example, a state commits to a 30% emission reduction and only achieves 29% by the prescribed date, this should not be regarded as a breach of treaty but as a case of low level non-compliance.[189]

Especially in the field of environmental law, compliance control mechanisms have several advantages compared to traditional means of dispute settlement. As already stated in the case of international law in general, non-compliance with obligations under MEAs is often not due to lack of political will but lack of capacity.[190] Traditional means of dispute settlement do not provide for remedies that could enhance the other party's capacity.[191] Non-compliance mechanisms aim to identify the root of a case of non-compliance in a cooperative manner and they may apply supportive measures such as capacity building, financial support, or guidance as to how to best come back into compliance. Furthermore, obligations under MEAs do usually not have a reciprocal character, but compliance is rather owed to the community of states as a whole.[192] Therefore, there is usually no one injured state if a party to an MEA is not complying with its obligations, and traditional sanctions such as suspension of a treaty, as provided for under Article 60 of the Vienna Convention on the Law of Treaties, do not fit as a remedy for such a case of non-compliance. In order to ensure that the goals of an MEA are attained, it is important to ensure that as many parties as possible comply as much as possible with their obligations under the treaty. Thus, the suspension of a treaty as a reaction to a case of non-compliance would even run counter to the goals of an MEA.[193]

Based on these factors, MEAs have, since the early 1990s, provided for internal compliance control procedures to enhance the implementation and compliance with the obligations contained therein.[194] The first compliance control mechanism in an MEA was established under the 1987 Montreal Protocol to the 1985 Vienna Convention on Substances that Deplete the Ozone Layer and, since then, compliance review procedures have become a constant feature of regional and universal international MEAs.[195] Usually, an MEA contains a clause that enables the COP/MOP to set up a compliance procedure. The actual compliance mechanism is then

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[188] Chayes/Chayes, *ibid*. at 17 with further elaboration on the standard of acceptable compliance.

[189] Ehrmann, *Erfüllungskontrolle im Umweltvölkerrecht* (2000), 466.

[190] Handl, "Compliance Control Mechanisms and International Environmental Obligations" (1997) 5 *Tul. J. Int'l & Comp. L.*, 29, 35.

[191] For an overview on confrontational means to enforce international environmental law see Wolfrum, "Means of Ensuring Compliance with and Enforcement of International Environmental Law" (1998), 272 *Recueil des Cours – Académie de Droit International*, 9, 56 et seq., 101 et seq.

[192] Handl, "Compliance Control Mechanisms and International Environmental Obligations" (1997) 5 *Tul. J. Int'l & Comp. L.*, 29, 35; Beyerlin/Stoll et al., "Conclusions Drawn from the Conference on Ensuring Compliance with MEAs" in Beyerlin/Stoll et al. (eds.), *Ensuring Compliance with Multilateral Environmental Agreements* (2006), 359, 2.

[193] Handl, *ibid*. at 35.

[194] *Ibid*. at 32.

[195] For a comprehensive analysis and comparison of all compliance mechanisms established under MEAs so far see Treves/Pineschi et al. (eds.), *Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements* (2009).

established through a COP/MOP decision.[196] Through this decision the COP/MOP sets up a standing compliance committee comprised of state representatives or independent experts. It decides upon certain trigger mechanisms and thus the way in which cases of non-compliance may reach the committee. It also lists various measures that can be taken by the committee and the COP/MOP to address identified cases of non-compliance. As regards the details of such compliance procedures, there is no fixed framework as yet but the exact procedures, composition, and competences are negotiated separately under each MEA.

Two compliance mechanisms are examined in detail in the following chapters. As an example of a regional compliance mechanism, the Compliance Committee established under the Aarhus Convention is scrutinized. It is of special interest for this study because it allows individuals and NGOs to initiate compliance review procedures against parties directly before the Compliance Committee. On the universal international level, the compliance mechanisms under the Kyoto Protocol are analyzed. The Protocol is considered an innovative testing ground for compliance theory and is equipped with a facilitative and an enforcement branch.

Compliance mechanisms are usually defined as cooperative, non-confrontational, and non-judicial. Within the institutional framework of MEAs, they can be seen as bodies subordinated to the COP/MOP, a convention's central political body, with the special task of overseeing compliance with the agreement in question. The majority of compliance committees established under MEAs are composed of state representatives, which underlines the political and non-judicial character of this mechanism. However, it is argued here that the two compliance mechanisms discussed in this study, the Aarhus and the Kyoto Compliance Committees, may be called quasi-judicial institutions because they almost fulfill the PICT definition of an international judicial body. They are permanent institutions, composed of independent members, deciding upon cases of non-compliance of states parties to a MEA, and they work on the basis of predetermined rules of procedure. The main differences are that, arguably, compliance committees do not "adjudicate disputes" and that their decisions are not legally binding. The first difference very much depends on the definition of "dispute". As described above, the nature of obligations under international environmental law often means that there will be no confrontational dispute over the breach of a treaty obligation, and thus enforcement of international environmental law requires either a broader understanding of dispute or waiver of the criterion altogether. Consequently, relying on the PICT definition, the remaining central difference between international judicial bodies and compliance committees, as set up under the Aarhus Convention and the Kyoto Protocol, is that a compliance committee's decisions are not legally binding. Thus, the similarity with the PICT definition

[196] See also Treves, "Introduction" in Treves/Pineschi et al. (eds.), *Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements* (2009), 1, 3.

is sufficient to consider these two specific compliance mechanisms at least as quasi-judicial mechanisms.

C. *Relationship between Dispute Settlement and Compliance Control*

Multilateral environmental agreements usually contain both a clause on dispute settlement and a clause on compliance control. For example, the Aarhus Convention in Article 15 provides that the MOP establishes "optional arrangements of a non-confrontational, non-judicial and consultative nature for reviewing compliance with the provisions of this Convention." Article 16 of the Aarhus Convention contains the dispute settlement clause providing for recourse to the International Court of Justice or arbitration if a party declares that it accepts such means of dispute settlement as compulsory. Similarly, Article 18 of the Kyoto Protocol empowers the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol (CMP) to approve a compliance mechanism and Article 19, referring to the UNFCCC, provides for settlement of disputes at the ICJ or an arbitral tribunal.

Compliance control is thus not meant to replace dispute settlement but to complement it.[197] The historical and arguably still the most important task of international law and international judicial procedures is to secure the peaceful settlement of disputes between states. However, in the recent decades the growing interdependence of states in political, economic, technical, social, and cultural fields also has required international regulations and mutual compliance control in order to maintain the viability of international society.[198] Consequently, international treaty law, which was historically marked by mainly bilateral or regional arrangements with reciprocal obligations, nowadays encompasses a broad range of multilateral or even universal conventions, addressing complex economic, social or environmental issues that require cooperative action and contain erga omnes obligations.[199] Trade, resource management, security, environmental degradation, and human rights are the main areas of multilateral action.[200] Along with this change in treaty law, new mechanisms of compliance control began to complement traditional dispute settlement. Also due to this change and exemplified through the growing number of international judicial bodies, the role of the international judiciary itself is increasingly changing "from war-prevention" to "norm-advancement and regime maintenance".[201]

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[197] Handl, "Compliance Control Mechanisms and International Environmental Obligations" (1997) 5 *Tul. J. Int'l & Comp. L.*, 29, 37, 46.

[198] Chayes/Chayes, *The New Sovereignty* (1998), 1.

[199] *Ibid.*

[200] *Ibid.*

[201] Shany, "No Longer a Weak Department of Power? Reflections on the Emergence of a New International Judiciary" (2009) 20 *EJIL*, 73, 80 et seq.

In MEAs, states do not provide for any relationship between dispute settlement and compliance control.[202] For example, the MOP decision that establishes the Compliance Committee under the Aarhus Conventions states that compliance procedures are without prejudice to dispute settlement procedures.[203] Thus, theoretically such procedures could be applied in parallel.[204] Many authors argue that compliance control procedures should have priority over dispute settlement procedures.[205] Multilevel procedures that start with cooperative negotiations can be found in dispute settlement clauses, in ILO and WTO dispute resolution mechanisms and, for example, also in the above-mentioned EU infringement procedure.[206] In the field of MEAs, however, states have not yet been able to agree on such a multistage procedure.[207] The view of this study is that such a relationship between non-compliance procedures and subsequent dispute settlement would make sense. It prevents parallel proceedings and weakening of the international legal order through the varying application of international law. Also, the expertise of specialized compliance committees is a valuable resource for ensuring compliance in a non-confrontational manner. Decisions of a compliance committee should be respected or even built upon in a subsequent dispute settlement procedure.[208] In practice to date there has been hardly any dispute settlement under MEAs.[209] If enforcement of an MEA takes place at all, it is mostly via the compliance control mechanism.

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[202] See also Fitzmaurice, "Compliance with Multilateral Environmental Agreements" (2007) *Hague YIL*, 19, 47 et seq.

[203] Paragraph 38 of Decision I/7 on review of compliance, ECE/MP.PP/2/Add.8, 2 April 2004. See also Koester, "The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention)" in Ulfstein/Marauhn et al. (eds.), *Making Treaties Work* (2007b), 179, 183 et seq., 213.

[204] See Ehrmann, *Erfüllungskontrolle im Umweltvölkerrecht* (2000), 468; Beyerlin/Stoll et al., "Conclusions Drawn from the Conference on Ensuring Compliance with MEAs" in Beyerlin/Stoll et al. (eds.), *Ensuring Compliance with Multilateral Environmental Agreements* (2006), 359, 368; Fitzmaurice, "Compliance with Multilateral Environmental Agreements (2007) *Hague YIL*, 19, 49. Analyzing the relationship between non-compliance and dispute settlement through a hypothetical scenario and concrete examples Sands, "Non-Compliance and Dispute Settlement" in Beyerlin/Stoll et al. (eds.), *Ensuring Compliance with Multilateral Environmental Agreements* (2006), 353.

[205] Ehrmann, *ibid*. at 469 with further references. See also Beyerlin/Stoll et al., "Conclusions Drawn from the Conference on Ensuring Compliance with MEAs" in Beyerlin/Stoll et al. (eds.), *Ensuring Compliance with Multilateral Environmental Agreements* (2006), 359, 369.

[206] See Ehrmann, *ibid*. at 470.

[207] See *ibid.* at 469.

[208] See also Beyerlin/Stoll et al., "Conclusions Drawn from the Conference on Ensuring Compliance with MEAs" in Beyerlin/Stoll et al. (eds.), *Ensuring Compliance with Multilateral Environmental Agreements* (2006), 359, 369. The authors suggest that findings of a compliance committee may only be overruled by a subsequent dispute settlement decision if they have been "rebutted by clear and convincing evidence", an effect similar to shifting the burden of proof; *ibid*.

[209] Ulfstein, "Dispute Resolution, Compliance Control and Enforcement in International Environmental Law" in Ulfstein/Marauhn et al. (eds.), *Making Treaties Work* (2007), 115, 120. See also Fitzmaurice, "Compliance with Multilateral Environmental Agreements" (2007) *Hague YIL*, 19, 46 et seq.; Brown Weiss, "Understanding Compliance with International Environmental Agreements: The Baker's Dozen Myths" (1998) 32 *U. Rich. L. Rev.*, 1555, 1582.

D. *Compliance, Implementation, Enforcement, and Effectiveness*

There are several terms related to ensuring that law on paper is applied in the real world. Compliance control, implementation, enforcement, dispute settlement, and effectiveness all deal with this issue. Articles on this topic often differ in systematizing these terms. Sometimes "compliance" is the heading for implementation, enforcement and dispute settlement[210] sometimes "enforcement" is deemed to encompass the other terms.[211] There is also no clear use of these terms in environmental treaty law.[212] It is, however, common to refer to "non-compliance" rather than to "breach of treaty" in order to use non-confrontational language.[213] Therefore it is important to clarify the understanding of these terms as used in this analysis. It is important to note that there is no clear cut difference between the terms but considerable overlap.

According to the UNEP Guidelines on Compliance with and Enforcement of Multilateral Environmental Agreements compliance means "the fulfillment by the contracting parties of their obligations under a multilateral environmental agreement and any amendments to the multilateral environmental agreement."[214] Compliance control encompasses reporting, monitoring, and verification.[215] *Mitchell* goes further and defines the 'compliance system' as "that subset of the treaty's rules and procedures that influence the compliance level of a given rule".[216] He distinguishes between the 'primary rule system' which consists of the actors, rules, and processes related to the behavior that is the substantive target of the regime, the 'compliance information system' which consists of the actors, rules, and processes that collect, analyze, and disseminate information regarding the instances of and parties responsible for violations and compliance, and the 'non-compliance response system'

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[210] Sands, *Principles of International Environmental Law* (2003), 171; Brown Weiss, "Understanding Compliance with International Environmental Agreements: The Baker's Dozen Myths" (1998) 32 *U. Rich. L. Rev.*, 1555, 1563 et seq.

[211] Brunnée, "Enforcement Mechanisms in International Law and International Environmental Law" in Beyerlin/Stoll et al. (eds.), *Ensuring Compliance with Multilateral Environmental Agreements* (2006), 1, 23.

[212] Handl, "Compliance Control Mechanisms and International Environmental Obligations" (1997) 5 *Tul. J. Int'l & Comp. L.*, 29, 30.

[213] Ehrmann, *Erfüllungskontrolle im Umweltvölkerrecht* (2000), 394.

[214] UNEP Guidelines on Compliance with and Enforcement of Multilateral Environmental Agreements at 9(a), adopted by the UNEP Governing Council in decision SS.VII/4; available at http://www.unep.org/delc/Portals/119/UNEP.Guidelines.on.Compliance.MEA.pdf. With respect to the second part of the guidelines referring to the enforcement of law implementing MEAs at the national level, "compliance" is defined in different way; it means "the state of conformity with obligations, imposed by a State, its competent authorities and agencies on the regulated community, whether directly or through conditions and requirements in permits, licences and authorizations, in implementing multilateral environmental agreements"; *ibid.* at 38(a).

[215] *Ibid.* at 14(c). See also Ehrmann, "Procedures of Compliance Control in International Environmental Treaties" (2002) 13 *Colo. J. Int'l Envtl. L. & Pol'y*, 377, 431 et seq.

[216] Mitchell, "Compliance Theory: An Overview" in Cameron/Werksman et al. (eds.), *Improving Compliance with International Environmental Law* (1996), 3, 17.

that consists of the actors, rules, and processes governing the formal and informal responses undertaken to induce those identified as in non-compliance to comply.[217] According to *Ehrmann*, the concept of compliance control consists of three core elements: fact finding, factual and legal evaluation, and responses to compliance problems.[218] This study focuses on the concept of compliance control as understood by *Ehrmann*; in terms of the *Mitchell* definition, it is mostly limited to the compliance information system and the non-compliance response system.

Implementation as understood here refers to the first step in transferring international obligations to the national level.[219] It comprises "all relevant laws, regulations, policies, and other measures and initiatives, that contracting parties adopt and/or take to meet their obligations under a multilateral environmental agreement and its amendments".[220] Implementation thus focuses on the link between the national legal system and the international obligation.[221] One difference between compliance and implementation becomes clear with an example: full implementation does not necessarily lead to compliance (e.g. CO2 increase by accidents or miscalculation), while compliance may be reached despite poor implementation (e.g. CO2 decrease by economic recession).[222]

Enforcement as understood in this study refers to all actions to make or to force states or other addressees to implement or come into compliance with obligations.[223] The term is thus not used in its narrow but in its wide sense, as outlined

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[217] *Ibid*. With respect to the primary rule system see also Faure/Lefevere, "Compliance with International Environmental Agreements" in Vig/Axelrod (eds.), *The Global Environment: Institutions, Law and Policy* (1999), 138, 144.

[218] Ehrmann, "Procedures of Compliance Control in International Environmental Treaties" (2002) 13 *Colo. J. Int'l Envtl. L. & Pol'y*, 377, 432.

[219] Handl, "Compliance Control Mechanisms and International Environmental Obligations" (1997) 5 *Tul. J. Int'l & Comp. L.*, 29, 30.

[220] UNEP Guidelines on Compliance with and Enforcement of Multilateral Environmental Agreements at 9(b), adopted by the UNEP Governing Council in decision SS.VII/4. See also Brown Weiss, "Understanding Compliance with International Environmental Agreements: The Baker's Dozen Myths" (1998) 32 *U. Rich. L. Rev.*, 1555, 1562.

[221] Faure/Lefevere, "Compliance with International Environmental Agreements" in Vig/Axelrod (eds.), *The Global Environment: Institutions, Law and Policy* (1999), 138, 139.

[222] Shigeta, "The ECJ's 'Hard' Control over Compliance with International Environmental Law: Its Procedural and Substantive Aspects" (2009) 11 *Int'l Comm. L. Rev.*, 251, 256. See also Ehrmann, *Erfüllungskontrolle im Umweltvölkerrecht* (2000), 396, who similarly differentiates between implementation and compliance.

[223] Faure/Lefevere, "Compliance with International Environmental Agreements" in Vig/Axelrod (eds.), *The Global Environment: Institutions, Law and Policy* (1999), 138, 139; Brunnée, "Enforcement Mechanisms in International Law and International Environmental Law" in Beyerlin/Stoll et al. (eds.), *Ensuring Compliance with Multilateral Environmental Agreements* (2006), 1, 23; Ulfstein, "Dispute Resolution, Compliance Control and Enforcement in International Environmental Law" in Ulfstein/Marauhn et al. (eds.), *Making Treaties Work* (2007), 115, 128. Similar, Wolfrum, "Means of Ensuring Compliance with and Enforcement of International Environmental Law" (1998), 272 *Recueil des Cours – Académie de Droit International*, 9, 30. For a narrow understanding of "enforcement" see Brown Weiss, "Understanding Compliance with International Environmental Agreements: The Baker's Dozen Myths" (1998) 32 *U. Rich. L. Rev.*, 1555, 1564.

in more detail by *Brunnée*.[224] Consequently, judicial dispute settlement, arbitration, and compliance control procedures are all considered enforcement mechanisms. Enforcement as understood here may include "carrots" and "sticks"; enforcement measures do not necessarily have to be of a legally binding or coercive nature. Relating enforcement and compliance it can be said with *Wolfrum* that enforcement is a reaction to non-compliance.[225]

Effectiveness addresses the question of whether the objectives stated in the treaty are actually reached.[226] Thus, compliance and effectiveness have very distinct meanings. Some scholars prefer to focus on the effectiveness of legal regimes rather than on compliance with them. They do not consider compliance as being a significant factor for effectiveness. However, measuring and evaluating the effectiveness of an environmental regime seems to be even more difficult, especially given the scientific uncertainty inherent in this field. Although it is important to have more studies on the effectiveness of international environmental regimes, it is outside the scope of what this analysis by a lawyer can provide. Effectiveness also depends significantly on the quality of the negotiated treaty obligations.[227] From a legal point of view, compliance seems to be a useful indicator of prima facie effectiveness.[228]

E. *Multilevel and Cross-Fragment Relations*

There is no international legal framework yet regulating either multilevel or cross-fragment relations. Multilevel relations here refer to the relationship between judicial and quasi-judicial bodies at the national, supranational, and international level. Cross-fragment relations address the relationship between judicial and quasi-judicial bodies of different international legal regimes such as, for example, world trade law, law of the sea, human rights law, but also the International Court of Justice as the judicial organ of the United Nations.

As regards the connection between international judicial and quasi-judicial bodies and their national and supranational counterparts, each international judicial and quasi-judicial body defines the relationship in its founding convention or rules

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[224] Brunnée, "Enforcement Mechanisms in International Law and International Environmental Law" in Beyerlin/Stoll et al. (eds.), *Ensuring Compliance with Multilateral Environmental Agreements* (2006), 1, 3 et seq., 23.

[225] Wolfrum, "Means of Ensuring Compliance with and Enforcement of International Environmental Law" (1998), 272 *Recueil des Cours – Académie de Droit International*, 9, 30.

[226] Faure/Lefevere, "Compliance with International Environmental Agreements" in Vig/Axelrod (eds.), *The Global Environment: Institutions, Law and Policy* (1999), 138, 139; Brown Weiss, "Understanding Compliance with International Environmental Agreements: The Baker's Dozen Myths" (1998) 32 *U. Rich. L. Rev.*, 1555, 1564. For an article on effectiveness and adjudication see Helfer/Anne-Marie Slaughter, "Toward a Theory of Effective Supranational Adjudication" (1997) 107 *Yale L.J.*, 273.

[227] Ehrmann, *Erfüllungskontrolle im Umweltvölkerrecht* (2000), 397; Faure/Lefevere, *ibid.*

[228] Shigeta, "The ECJ's 'Hard' Control over Compliance with International Environmental Law: Its Procedural and Substantive Aspects" (2009) 11 *Int'l Comm. L. Rev.*, 251, 257; Faure/Lefevere, *ibid.*

of procedures. Most of those international bodies require that local remedies are exhausted before a case is admissible before an international body. However, for example, Article 26 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) contains an exclusive remedy rule and does not require that local remedies are exhausted before a case is referred to arbitration under ICSID. Within the European Union, the preliminary ruling procedure provides for a special form of multilevel judicial communication. Here it has been argued in line with the subsidiarity principle that national courts should be mainly responsible for enforcing international environmental law.[229] Only if cases cannot be or are not appropriately handled by the national judiciary, should international judicial and quasi-judicial bodies come into play. To ensure the development of a coherent legal order, international judicial bodies should take into consideration the judgments of their national counterparts. Communication should take place in a cooperative manner. There is nothing resembling a preliminary ruling procedure as yet in any international judicial or quasi-judicial regime, but it might be a valuable procedural solution to ensuring that local decision-making bodies remain strong or are strengthened and at the same time that international legal obligations are complied with in a coherent manner.

Through the proliferation of international judicial and quasi-judicial bodies, the relationship between the different specialized bodies and also the relationship between those specialized international judicial bodies and the ICJ becomes an issue of scholarly research.[230] Several questions may arise. Each international judicial and quasi-judicial body has a defined scope of jurisdiction and there is a considerable overlap.[231] Thus there is a risk of abusive forum shopping and parallel proceedings with contradictory decisions, which would undermine the coherence and credibility of the international legal order. Jurisdictional provisions of the judicial and quasi-judicial bodies themselves or from other sources may help delineating scopes of jurisdiction.[232] To further improve coping with jurisdictional cross-fragment relations, *Shany* underlines the importance of increased judicial cooperation and proposes structural reforms such as reorganization of scopes of jurisdiction or referring competences to the ICJ to decide on jurisdictional questions or provide for an appellate court.[233]

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[229] See Chapter 2.II.C.

[230] Romano, "Proliferation of International Judicial Bodies: The Pieces of the Puzzle" (1998) *31 N.Y.U. J. Int'l L. & Pol.*, 709; Lavranos, "Regulating Competing Jurisdictions Among International Courts and Tribunals" (2008) *ZaöRV*, 575; Shany, *The Competing Jurisdictions of International Courts and Tribunals* (2005); Shany, *Regulating Jurisdictional Relations between National and International Courts* (2007); Shany, "No Longer a Weak Department of Power? Reflections on the Emergence of a New International Judiciary" (2009) 20 *EJIL*, 73.

[231] For in depth research into this question see Shany, *The Competing Jurisdictions of International Courts and Tribunals* (2005), 19 et seq.

[232] See *ibid.* at 179 et seq.; 229 et seq.

[233] *Ibid.* at 272 et seq.

V. Conclusions

Chapter 2 analyzed different aspects of the multilevel enforcement of international environmental law. It first gave a brief overview of the nature of international environmental law and highlighted its sources, addressees, and content. The central sources of international environmental law are multilateral environmental agreements. Customary international environmental law also plays an important role. Not legally binding but still of special relevance is international environmental soft law. The main addressees of international environmental law are states. MEAs as the main source of international environmental law contain substantive as well as procedural obligations. Usually, a framework convention is fleshed out by subsequent protocols that contain concrete substantive provisions on, for example, emission reduction goals, bans on certain substances or activities, use of certain technologies, or obligations to set up protection areas or management schemes. Examples of procedural obligations encompass duties to conduct environmental impact assessments or certain reporting or notification procedures. Such legal obligations are sufficiently concrete to be justiciable.

Aiming to explore the multilevel character of the enforcement of international environmental law, subchapter II began with a look at national judiciaries. It examined how national courts in Germany and the United States contribute to the enforcement of international environmental law and identified several opportunities and constraints. While the analysis could generally support the thesis that national courts fulfill an international function in enforcing international environmental law, the review of empirical studies indicated that in practice national courts are rather reluctant in this regard. A systematic analysis came to the conclusion that national courts are primarily responsible for adjudicating disputes if international environmental law is appropriately implemented by the legislature and applied by the administration. However, this is not always the case and, in addition, there are several gaps in judicial control which suggest that national judicial control should be complemented by international judicial and quasi-judicial control procedures to safeguard the enforcement of international environmental law.

Subchapter III scrutinized the role of the European Court of Justice in the multilevel enforcement of environmental law. Due to a high number of mixed multilateral environmental agreements, the ECJ has jurisdiction over a significant body of MEA-implementing EU legislation. One significant constraint on the ECJ is that NGOs do not have standing to bring before it cases with an environmental protection interest. In a recent decision the Compliance Committee of the Aarhus Convention found that continued limited standing for NGOs might be incompatible with the obligations of the EU under the Aarhus Convention. It remains to be seen if the ECJ law on standing changes in the future. Despite this constraint, many environmental cases reach the ECJ via the preliminary ruling or the Commission initiated infringement procedure. A review of several decisions of the ECJ in such cases shows that the ECJ

significantly contributes to the enforcement of international environmental law. On a few occasions the ECJ has already decided on issues of competing jurisdictions. Several lessons can be learned from the European level of judicial control. Especially procedures such as the preliminary ruling procedure, Commission-initiated infringement actions, and control of compliance with ECJ judgments are instructive examples of how an above state-level judiciary can effectively fulfill its tasks.

Finally, subchapter IV focused on the international level of environmental law enforcement. It first identified three types of cases that are appropriate to be dealt with at the international level. Firstly, cases arising from activities of states or non-state actors that cause or contribute to regional or global environmental problems. Secondly, cases arising from activities of states or non-state actors that cause or contribute to local transboundary harm. Thirdly, cases arising from activities of states or non-state actors that have a purely local detrimental effect on the environment but cannot be effectively tackled within national jurisdictions. In all of these cases such activities must potentially violate international environmental treaty or customary law. In addition, international judicial and quasi-judicial bodies were categorized according to their functions, such as judicial dispute settlement, arbitration, and compliance control, to lay the basis for the structure of the analysis in chapters 3 and 4. Subchapter IV also highlighted that there is no clearly defined relationship as yet between dispute settlement and compliance control but showed that in MEAs both procedures are provided for in parallel and without prejudice to each other. The meaning of the terms compliance, implementation, enforcement, and effectiveness for the purpose of this study was defined. Lastly, some thoughts on multilevel and cross-fragment relations underlined the importance of judicial cooperation in both directions to safeguard the development of a coherent international legal order.

Chapter 3

Regional International Judicial and Quasi-Judicial Bodies

Chapter 3 examines several regional international courts, arbitral tribunals, compliance committees, and other compliance review bodies relevant for environmental dispute settlement and compliance control. The three regional human rights courts are the judicial dispute settlement bodies most relevant for this research (I). Arbitration fora are discussed in more detail in chapter 4, since the ones chosen for this study have a potentially global scope. However, two specifically regional initiatives, arbitration under NAFTA and CAFTA-DR, are presented below (II). As regards non-compliance procedures, the Compliance Committee established under the Aarhus Convention is scrutinized in part III. The mechanism established under the OECD Guidelines for Multinational Enterprises and the Commission for Environmental Cooperation set up under the NAAEC provide for unique compliance review procedures and are therefore explored separately in part IV. Conclusions are summarized in part V.

I. Judicial Dispute Settlement—Regional Human Rights Courts

There are three regional human rights courts and commissions.[1] All of them have already dealt with environmental cases and a vigorous discussion is on-going among legal scholars regarding the relationship between human rights law and the protection of the environment. The issue is frequently a topic on the agenda of the United Nations or regional organizations.[2]

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[1] The United Nations Commission on Human Rights and the United Nations Human Rights Council, which replaced the United Nations Commission on Human Rights in 2006, are not scrutinized here. For an overview of the communications before the UN Human Rights Committee see Shelton, *Human Rights and the Environment: Jurisprudence of Human Rights Bodies*, Joint UNEP-OHCHR Expert Seminar on Human Rights and the Environment, January 2002, Geneva, Background Paper No. 2 (2002b), 1; Shelton, *Human Rights and Environment: Past, Present and Future Linkages and the Value of a Declaration*, High Level Experts Meeting on the New Future of Human Rights and the Environment: Moving the Global Agenda Forward, Nairobi, 30 Nov–1 Dec 2009, Background Paper – Draft (2009), 6.

[2] Boyle, *Human Rights and the Environment: A Reassessment*, UNEP (ed.) (2010); Shelton, *Human Rights and Environment: Past, Present and Future Linkages and the Value of a Declaration*, High Level Experts Meeting on the New Future of Human Rights and the Environment: Moving the Global Agenda Forward, Nairobi, 30 Nov–1 Dec 2009, Background Paper – Draft (2009), Shelton, *Human Rights and the Environment: Jurisprudence of Human Rights Bodies*, Joint UNEP-OHCHR Expert Seminar on Human Rights and the Environment, January 2002, Geneva, Background Paper

Cathrin Zengerling, Greening International Jurisprudence, pp. 93–169.
ISBN 978-90-04-25730-6.

The European Court of Human Rights (ECtHR) is situated in Strasbourg, France. It was originally established as a part-time court in 1953 with the entry into force of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR),[3] a convention of the Council of Europe (COE). In 1998 with the entry into force of Protocol 11 to the European Human Rights Convention, a full-time court replaced the old one and the Commission on Human Rights. As of October 2010, 47 states had ratified the Convention on Human Rights.[4] An estimated 800 million COE citizens have access to the ECtHR. It has delivered more than 12,000 judgments.[5] Its rulings are binding on the states concerned.

The Inter-American Court of Human Rights (IACtHR) was established in 1979 and is located in San José, Costa Rica. Together with the Inter-American Commission on Human Rights, it oversees the compliance with the 1969 American Convention on Human Rights (ACHR). Court and Commission are organs of the Organization of American States (OAS). As of October 2010, 22 Latin American countries had ratified the American Convention on Human Rights and recognized the jurisdiction of the IACtHR. The United States signed the Convention in 1977 but never ratified it. Since its creation up to 2009 the court had decided 120 cases.[6]

In 2004, the African Court on Human and Peoples' Rights (AfCtHPR) came into being with the entry into force of the Protocol to the African Charter on Human and

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No. 2 (2002b), Shelton, "Human Rights, Environmental Rights, and the Right to Environment" (1991) 28 *Stan. J. Int'l L.*, 103; García San José, *Environmental Protection and the European Convention on Human Rights* (2005); Acevedo, "The Intersection of Human Rights and Environmental Protection in the European Court of Human Rights" (1999) 8 *N.Y.U. Envtl. L.J.*, 437; Loukaides, "Environmental Protection through the Jurisprudence of the European Convention on Human Rights" (2004) 75 *BYIL*, 249; Stephens, *International Courts and Environmental Protection* (2009), 310 et seq. See further Recommendation 1614 adopted by the Parliamentary Assembly of the Council of Europe (2003). See also documents of several joint UNEP and UNHCR expert meetings, all available online, such as 2009 High Level Expert Meeting on the New Future of Human Rights and Environment: Moving the Global Agenda Forward; 2008 Expert Forum on Ecosystem Services and Human Well-being: The Role of Law and Governance; 2002 Expert Seminar on Human Rights and the Environment. Also the recent Human Rights Council resolutions 7/23 of 28 March 2008 and 10/4 of 25 March 2009 on human rights and climate change should be highlighted in this context. For a recent bigger research project in this context see policy paper "Recalibrating the Law of Humans with the Laws of Nature: Climate Change, Human Rights, and Intergenerational Justice" by the Climate Legacy Initiative at Vermont Law School, available at http://www.vermontlaw.edu/Academics/Environmental_Law_Center/Institutes_and_Initiatives/Climate_Legacy_Initiative/Publications.htm.

[3] Basis for this analysis is the ECHR as amended by the provisions of Protocol No. 14 as from its entry into force on 1 June 2010.

[4] See current status of ratification at http://conventions.coe.int/treaty/Commun/ChercheSig.asp?NT=005&CM=&DF=&CL=ENG.

[5] For recent statistics see http://www.echr.coe.int/NR/rdonlyres/8699082A-A7B9-47E2-893F-5685A72B78FB/0/Statistics_2010.pdf (growing case load), http://www.echr.coe.int/NR/rdonlyres/E26094FC-46E7-41F4-91D2-32B1EC143721/0/Tableau_de_violations_19592009_ENG.pdf (violations by country), http://www.echr.coe.int/NR/rdonlyres/ACD46A0F-615A-48B9-89D6-8480AFCC29FD/0/FactsAndFiguresENAvril2010.pdf (facts and figures).

[6] Annual Report of the Inter-American Court of Human Rights 2009; available at http://www.corteidh.or.cr/docs/informes/eng_2009.pdf.

Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights.[7] The court is located in Arusha, Tanzania, and had its first meeting in 2006. Currently, 25 African states have recognized the court's jurisdiction. In December 2009, the AfCtHPR issued its first and so far only judgment.[8] The complementing and rather competing organ in monitoring the 1981 African Charter on Human and Peoples' Rights, the African Commission on Human and Peoples' Rights (AfCHPR or African Charter), has been far more active. However, it issues only non-binding decisions.[9] Both institutions are organs of the African Union (AU).[10] The delays in the constitution of the AfCtHPR are partly due to a 2004 decision of the AU Assembly to merge the AfCtHPR and the African Court of Justice, based on resource constraint considerations, to form a new so-called 'African Court of Justice and Human Rights'.[11] This new institution is envisaged to have a general and a human rights section. It has not been established as yet.[12]

A. *Jurisdiction, Applicable Law, and Institutional Arrangements*

All three human rights courts were established through the relevant regional human rights conventions or their protocols and function as their judicial organ.

1. *European Court of Human Rights*

Article 19 of the European Convention on Human Rights established the ECtHR "to ensure the observance of the engagements undertaken by the [...] parties". According to Article 32 of the Convention, the jurisdiction of the court comprises all matters concerning the interpretation and application of the Convention and its protocols. In addition to this jurisdiction over contentious matters, the ECtHR can also issue advisory opinions at the request of the majority of the representatives of

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[7] For background information see Mutua, "The African Human Rights Court: A Two-Legged Stool?" (1999) 21 *Hum. Rts. Q.*, 342.

[8] The judgments of the AfCtHPR are published at http://www.african-court.org/en/index.php/2012-03-04-06-06-00/finalised-cases-closed. The case of *Michelot Yogogombaye v. The Republic of Senegal*, Appl. No. 001/2008, was held to be inadmissible for lack of jurisdiction. It was filed by an individual but Senegal had not accepted the jurisdiction of the court to hear cases instituted directly against the country by individuals or NGOs. The analysis has been completed in May 2011. In the meantime, the caseload of the AfCtHPR increased significantly, see link above.

[9] See also Wachira, *African Court on Human and Peoples' Rights: Ten Years On and Still no Justice*, UNHCR (ed.) Minority Rights Group International (2008).

[10] The Organization of African Unity (OAU) was transformed into the African Union in 2002.

[11] See Protocol on the merged court: Protocol on the Statute of the African Court of Justice and Human Rights, available at http://www.africa-union.org/root/au/documents/treaties/text/Protocol%20on%20the%20Merged%20Court%20-%20EN.pdf.

[12] The ratification procedure seems to have stalled; as of December 2010, only three countries had ratified the Protocol (Libya, Mali, and Burkina Faso). See Conventions and Protocols of the African Union with the status of ratification at http://www.africa-union.org/root/au/Documents/Treaties/treaties.htm.

the Committee of Ministers of the COE on legal questions concerning the interpretation of the Convention and its protocols.[13] The scope of law that can be at issue in advisory opinions is limited. Advisory opinions may not deal with any question relating to the content or scope of the rights or freedoms as defined in Section I of the Convention.[14]

In Article 55 of the Convention, the contracting parties agreed not to submit a dispute arising out of the interpretation or application of the Convention to a dispute settlement body other than those provided for in the Convention in the absence of a special agreement.

The number of judges equals the number of contracting parties, which is 47 as of October 2010. The court can sit in a single-judge formation, in committees of three judges, in Chambers of seven judges and in a Grand Chamber of seventeen judges with varying competences.[15] There are no specialized chambers with respect to certain fields of law.

Rule 39 of the Rules of the Court[16] allows for the indication of interim measures. According to Article 41 of the Convention, available remedies are pecuniary and non-pecuniary damages as well as costs and expenses. According to the Practice Direction on just satisfaction claims,[17] the ECtHR, to date, awards only compensatory damages and does not accept claims for punitive, exemplary or aggravated damages.

The judgments of the court are binding on the parties to the case. The Committee of Ministers of the COE is responsible for the supervision of its execution.[18] It invites the state in question to inform it with respect to payments and other implementation measures. The Committee is assisted by its own secretariat and the Department for the Execution of Judgments of the ECtHR, a special department of the Council of Europe's Secretariat. The state of implementation is documented online.[19]

2. *Inter-American Court of Human Rights*

Unlike the European Convention on Human Rights, the American Convention on Human Rights has two organs to oversee the fulfillment of the commitments made by the states parties to the Convention: the Inter-American Commission on Human

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[13] Article 47(1) and (3) ECHR.

[14] Article 47(2) ECHR.

[15] Article 26 ECHR. For example, the single-judge formation was introduced only recently with the amendments of Protocol No. 14 to the ECHR which entered into force on 1 June 2010.

[16] This analysis refers to the Rules of the Court, which entered into force on 1 April 2011.

[17] As issued by the President of the Court in accordance with Rule 32 of the Rules of Court on 28 March 2007.

[18] Article 46(1) and (2) ECHR.

[19] See http://www.coe.int/t/dghl/monitoring/execution/; for the relationship between new cases at the ECtHR and cases pending for execution see http://www.coe.int/t/dghl/monitoring/execution/Reports/Stats/StatisticsExecutionJudgments_en.asp.

Rights and the Inter-American Court of Human Rights.[20] The functions and powers of the Commission are laid out in Article 41 of the Convention; inter alia, according to paragraph f, it takes action on petitions and other communications.

The IACtHR has jurisdiction over the interpretation and application of the provisions of the Convention and the human rights instruments listed in Article 23 of the Rules of Procedure of the Inter-American Commission on Human Rights.[21] Article 11 of the Protocol of San Salvador provides for a right to a healthy environment:

1. Everyone shall have the right to live in a healthy environment and to have access to basic public services.
2. The States Parties shall promote the protection, preservation, and improvement of the environment.[22]

The IACtHR can also issue advisory opinions regarding the interpretation of the Convention or of other treaties concerning the protection of human rights in the American states but, unlike the ECtHR, at the request of member states of the OAS or, within their spheres of competence, the organs listed in Chapter X of the Charter of the Organization of American States, for example the General Assembly.[23] Likewise the court can provide a state with opinions regarding the compatibility of any of its domestic laws with these international instruments at the request of that state party.[24]

The IACtHR consists of seven judges who are nationals of the OAS member states, and no two judges may be nationals of the same state.[25] There are no special chambers to deal with environmental issues.

According to Article 63 of the Convention, the IACtHR can order the payment of compensatory damages and has also jurisdiction to adopt provisional measures in cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons. Judgments that stipulate compensatory damages may be executed in accordance with the domestic procedure.[26]

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[20] Article 33 ACHR.

[21] These are the American Declaration of the Rights and Duties of Man, the American Convention on Human Rights, the Additional Protocol in the Area of Economic, Social and Cultural Rights, the Protocol to Abolish the Death Penalty, the Inter-American Convention to Prevent and Punish Torture, the Inter-American Convention on Forced Disappearance of Persons, and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women. See Article 62(3) ACHR.

[22] Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador), entry into force in 1999. However, individual petitions against a state cannot be based on a violation of this right, see Schall, "Public Interest Litigation Concerning Environmental Matters before Human Rights Courts: A Promising Future Concept?" (2008) 20 *JEL*, 417, 429.

[23] Article 64(1) ACHR.

[24] Article 64(2) ACHR. For an early analysis of advisory opinions at the IACtHR see Buergenthal, "The Advisory Practice of the Inter-American Human Rights Court" (1985) 79 *Am. J. Int'l L.*, 1.

[25] Article 52 ACHR.

[26] Article 68(2) ACHR.

The judgments of the IACtHR are binding on the parties to the case and they undertake to comply with them.[27] The IACtHR annually issues a report on its work which includes a chapter on compliance.[28]

3. *African Court on Human and Peoples' Rights*

The compliance review body originally established with the African Charter on Human and Peoples' Rights is the African Commission on Human and Peoples' Rights. The African Charter came into force in 1986 and the Commission was inaugurated in 1987. This quasi-judicial body is modeled on the UN Human Rights Committee and its decisions are not binding. The African Commission's secretariat is located in Banjul, Gambia, and has eleven members. It meets twice a year for 15 days per session and can hold extra-ordinary sessions. The African Court on Human and Peoples' Rights came into being about 20 years later and its relationship to the Commission is not yet very clearly organized.[29]

The AfCtHPR scope of jurisdiction and applicable law encompasses not only the African Charter and its Protocol but any other relevant human rights instrument ratified by the states concerned.[30] Thus, for example, the International Covenant on Civil and Political Rights, the Convention on the Rights of the Child or environmental treaties that codify human rights fall under the scope of jurisdiction of the AfCtHPR.[31] The African Charter provides for a "peoples' right to a general satisfactory environment" in its Article 24.[32]

Furthermore, any member state of the AU, the AU, any of its organs, or any African organization recognized by the AU may request advisory opinions on any legal matter relating to the African Charter or any other relevant human rights instruments, provided that the subject matter of the opinion is not related to a matter being examined by the Commission.[33]

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[27] Article 68(1) ACHR.

[28] The reports are available at http://www.cidh.oas.org/publi.eng.htm. For the chapter on compliance in the 2009 report see http://www.cidh.oas.org/annualrep/2009eng/Chap.III.f.eng.htm.

[29] For further details see Wachira, *African Court on Human and Peoples' Rights: Ten Years On and Still No Justice*, UNHCR (ed.) Minority Rights Group International (2008), 15. According to Articles 2 and 8 of the Protocol the AfCtHPR and the Commission complement each other. The Court may request the opinion of the Commission on questions regarding the admissibility of cases and it may even transfer cases to the Commission, Article 6(1) and (3) of the Protocol. See also Rule 29 of the Interim Rules of Court. For a comparison between the African and the Inter-American Human Rights System see Padilla, "An African Human Rights Court: Reflections from the Perspective of the Inter-American System" (2002) 2 *Afr Hum Right Law J*, 185.

[30] Articles 3 and 7 Protocol to the African Charter.

[31] See also Wachira, *African Court on Human and Peoples' Rights: Ten Years On and Still No Justice*, UNHCR (ed.) Minority Rights Group International (2008), 18.

[32] See also Boyle, *Human Rights and the Environment: A Reassessment*, UNEP (ed.) (2010), 3 et seq.

[33] Article 4 Protocol to the African Charter.

The AfCtHPR consists of eleven judges and its hearings shall be generally conducted in public.[34] In order to examine a case brought before it, a quorum of at least seven judges has to agree to do so.[35]

In the case of a human rights violation, the AfCtHPR shall make appropriate orders to remedy the violation, which includes the payment of a fair compensation or reparation.[36] Provisional measures shall be adopted in cases of extreme gravity and urgency, and when necessary to avoid irreparable harm to persons.[37] States Parties undertake to comply with the judgments and guarantee its execution.[38] There is no special procedure to control implementation of the judgments.

B. *Access to the Human Rights Courts*

In contrast to other international courts discussed in this study but inherent in the nature of the human rights laws, not only states but also individuals have standing in the European and African regional human rights courts. The Inter-American human rights system grants individuals direct access only to the Commission. Standing, however, presupposes that the plaintiff has suffered significant disadvantage. This outlaws altruistic lawsuits in the general interest merely for the sake of environmental protection.

1. *European Court of Human Rights*

Any alleged breach of the provisions of the Convention and the protocols can be referred to the ECtHR by a state party against another state party, according to Article 33 of the Convention. In addition, Article 34 of the Convention allows for individual applications.[39] Any person, non-governmental organization or group of individuals claiming to be the victim of a violation by one of the states parties of the rights set forth in the Convention and its protocols may refer a case to the ECtHR. Article 35 of the ECHR defines several criteria for the admissibility of cases; Article 35(3)(b) ECHR might be the most relevant one in an environmental context. It states that a case is inadmissible if the applicant has not suffered significant disadvantage. Consequently, while the ECtHR generally grants standing also to environmental NGOs, it does not provide for altruistic lawsuits. NGOs cannot initiate proceedings in the general interest; they have to claim to be victims of a violation and suffered a significant disadvantage. This is a crucial limitation with respect to the enforcement of international environmental law through human rights courts.

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[34] Articles 11, 10 Protocol to the African Charter.
[35] Article 23 Protocol to the African Charter.
[36] Article 27(1) Protocol to the African Charter.
[37] Article 27(2) Protocol to the African Charter.
[38] Article 30 Protocol to the African Charter.
[39] See also Rule 36 of the Rules of Court.

States and individuals may join the proceedings as third parties according to the conditions laid out in Article 36 of the Convention.[40] A state party may submit written comments and take part in the hearings before the ECtHR, in all cases before a Chamber or the Grand Chamber in which one of its nationals initiated the proceedings.[41] In cases before these chambers, the Council of Europe Commissioner for Human Rights may also submit comments and take part in the hearings.[42] The president of the court may invite other states parties or any person concerned to submit written comments or take part in the hearings in the interests of the proper administration of justice.[43]

There is no explicit regulation for the acceptance of amici curiae statements contained in the Convention or the Rules of Court but the Court does accept amici curiae submissions under Article 36(2) of the Convention.[44]

Hearings at the ECtHR are open to the public unless the court decides otherwise in exceptional circumstances.[45]

2. *Inter-American Court of Human Rights*

With respect to the American Convention on Human Rights, it is important to differentiate between the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights when it comes to access. According to Article 44 of the American Convention on Human Rights

> any person or group of persons, or any nongovernmental entity legally recognized in one or more members state of the Organization, may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party.[46]

States parties can do so when they explicitly declare that they recognize the competence of the Commission to receive and examine communications in which a state party alleges that another state party has committed a violation of a human right.[47]

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[40] See also Rule 44 of the Rules of Court.

[41] Article 36(1) ECHR.

[42] Article 36(3) ECHR.

[43] Article 36(2) ECHR. See also Rule 1(q) of the Rules of Court.

[44] See also Rule 44 (3a) of the Rules of the Court. For more detailed information see Mohamed, "Individual and NGO Participation in Human Rights Litigation before the African Court of Human and Peoples' Rights: Lessons from the European and Inter-American Courts of Human Rights" (1999) 43 *JAL*, 201, 206 et seq.; Ölz, "Non-Governmental Organizations in Regional Human Rights Systems" (1996) 28 *Colum. Hum. Rts. L. Rev.*, 307, 347 et seq.; Shelton, "The Participation of Nongovernmental Organizations in International Judicial Proceedings" (1994) *Am. J. Int'l L.*, 611, 630 et seq. With respect to the environmental cases see analysis of case law below at Chapter 3.I.C.1.

[45] Article 40 ECHR.

[46] For on overview on the protection of indigenous peoples' rights under the Inter-American Human Rights System see Anaya/Williams Jr, "The Protection of Indigenous Peoples' Rights over Lands and Natural Resources under the Inter-American Human Rights System" (2001) 14 *Harv. Hum. Rts. J.*, 33.

[47] Article 45 ACHR.

According to Article 47(b), a petition is inadmissible if it does not state facts that tend to establish a violation of the rights guaranteed by the Convention.

Standing provisions of the Inter-American Court of Human Rights are more limited. According to Article 61, only states parties and the Commission have the right to submit a case to the court. Individuals, groups of individuals and non-governmental organizations may only approach the Commission.[48] As with the access of states parties to the Commission, Article 62 of the Convention requires that a state party must have explicitly recognized as binding the jurisdiction of the court.

According to Article 44 of the Rules of Procedure of the Inter-American Commission on Human Rights, the Commission shall refer a case to the Inter-American Court of Human Rights if the state in question has accepted the jurisdiction of the court and the Commission considers that a state has not complied with the recommendations of an approved report, unless the absolute majority of the members of the Commission decides to the contrary.

In 2009 the IACtHR amended its rules of procedure and now explicitly provides for amicus curiae participation. According to the newly introduced Article 2(3) of the Rules of Procedure of the IACtHR

> the term "amicus curiae" refers to the person who is unrelated to the case and to the proceeding and who submits to the Court a reasoning about the facts contained in the application or legal considerations over the subject-matter of the proceeding, by means of a document or an argument presented in the hearing.

In addition, Article 41 of the Rules of Procedure of the IACtHR now explicitly lays out a procedure for arguments of amicus curiae:

> The brief of one who wishes to act as amicus curiae may be submitted to the Tribunal, together with its annexes, at any point during the contentious proceedings, but within the term of 15 days following the public hearing. If the Court does not hold a public hearing, amicus briefs must be submitted within the term of 15 days following the Resolution setting deadlines for the submission of final arguments and documentary evidence. Following consultation with the President, the amicus curiae brief and its annexes shall be immediately transmitted to the parties, for their information.

Amici curiae submissions were also allowed previously and the IACtHR is in fact known for having the most extensive amicus curiae practice among international courts and tribunals.[49]

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[48] However, NGOs may act as advisors to the Commission during Court sessions if the Commission so allows, see practice guide Taillant, *Environmental Advocacy in the Inter-American Human Rights System*, CEDHA (ed.) (February 2001), 25–27.

[49] Shelton, "The Participation of Nongovernmental Organizations in International Judicial Proceedings" (1994) *Am. J. Int'l L.*, 611, 638 et seq.; Ölz, "Non-Governmental Organizations in Regional Human Rights Systems" (1996) 28 *Colum. Hum. Rts. L. Rev.*, 307, 358 et seq.; Mohamed, "Individual and NGO Participation in Human Rights Litigation before the African Court of Human and Peoples' Rights: Lessons from the European and Inter-American Courts of Human Rights" (1999) 43 *JAL*,

According to Article 15 of the Rules of Procedure of the IACtHR, hearings shall be public, unless the Tribunal deems it appropriate that they be in private.

3. *African Court on Human and Peoples' Rights*

Contentious cases before the AfCtHPR may be initiated by the Commission, states parties, and African intergovernmental organizations.[50] NGOs and individuals may take contentious cases to the court only if they have observer status before the Commission, are entitled by the court, and if a state at the time of the ratification of the Protocol or thereafter made a declaration accepting the competence of the court to receive such cases.[51] To date only two African states, Mali and Burkina-Faso, have made the declaration allowing individuals and NGOs such direct access to the African Court.[52] Direct access of individuals and NGOs is also a highly debated issue with regard to the new African Court of Justice and Human Rights.[53]

Access to the African Commission on Human and Peoples' Rights is much wider. Articles 55 and 56 of the African Charter allow for an actio popularis. Communications other than those of states shall be considered by the Commission if a simple majority of the Commission decides so[54] and if the formal requirements outlined in Article 56 of the African Charter are met. There is no limitation to certain individuals, NGOs or other groups. Since the African Charter explicitly creates and protects peoples' rights, African peoples can bring communications to the Commission, as happened, for example, in the Ogoni people's case.[55]

201, 209 et seq. For practical examples see Taillant, *ibid.* at 27. With respect to amicus curiae participation in environmental cases see also Chapter 3.I.C.2 below.

[50] Article 5(1) Protocol to the African Charter.

[51] Articles 5(3) and 34(6) Protocol to the African Charter. See also Rule 33(1) of the Interim Rules of Court. For a critique of these limiting conditions see Mohamed, "Individual and NGO Participation in Human Rights Litigation before the African Court of Human and Peoples' Rights: Lessons from the European and Inter-American Courts of Human Rights" (1999) 43 *JAL*, 201, 203.

[52] For more details see Wachira, *African Court on Human and Peoples' Rights: Ten Years On and Still No Justice*, UNHCR (ed.) Minority Rights Group International (2008), 20 et seq.

[53] The draft of the merger instrument had dispensed with the requirement of Article 34(6) of the Protocol to the African Charter but in 2008 it was reinstated, see Wachira, *ibid.* at 14.

[54] Article 55(2) African Charter.

[55] *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria* (2001), AfComHPR, case no. 155/96, decision of 27 May 2002 (*Ogoniland* case) at 49; for more information on peoples' rights under the African Charter see Dersso, *Peoples' Rights under the African Charter on Human and Peoples' Rights: Much Ado about Nothing?*, South African Institute for Advanced Constitutional, Public Human Rights &. International Law (ed.) Research Paper Series Programme; regarding second and third generation rights under the African Charter see also Nwobike, "African Commission on Human and Peoples' Rights and the Demystification of Second and Third Generation Rights under the African Charter" (2004) 1 *AJLS*, 129; for a comparable approach to protection of the collective interests of indigenous peoples under the Inter-American Human Rights System see Dann decision, Commission report at 130; Schaaf/Fishel, "Mary and Carrie Dann v. United States at the Inter-American Commission on Human Rights: Victory for Indian Land Rights and the Environment" (2002) 16 *Tul. Envtl. L.J.*, 175, 182 and Anaya/Williams Jr, "The Protection of Indigenous Peoples' Rights over Lands and Natural Resources under the Inter-American Human Rights System" (2001) 14 *Harv. Hum. Rts. J.*, 33.

When a state party has an interest in a case, according to Article 5(2) of the Protocol,[56] it may submit a request to the Court to be permitted to join.[57]

There is no explicit dealing with amicus curiae submissions in the Protocol to the African Charter which establishes the AfCtHPR. However, Articles 55–59 of the African Charter provide for a procedure to receive and consider communications "other than those of states parties" in cases before the African Commission on Humans and Peoples' Rights. Rule 35(2)(e) of the Interim Rules of Court ensures that applications to the AfCtHPR are forwarded to individuals, legal entities, or NGOs that participated in the same case at the African Commission, according to Article 55 of the African Charter. Rule 35(4)(d) of the Interim Rules of Court stipulates that the Registrar

> shall invite [...] the individual or legal entity or the Non-Governmental Organization that has filed an application at the Commission under article 55 of the Charter, to set out, within thirty (30) days, if he/she/it wishes to participate in the proceedings before the Court and in the affirmative, the names and addresses of his/her/its representatives.

Thus, individuals or NGOs that submitted communications in cases before the Commission may also continue participating in the case proceedings before the AfCtHPR.

Furthermore, Article 26(2) of the Protocol to the African Charter on Human and Peoples' Rights may provide for a broader access of amici curiae to the court.[58] It states that the court may receive written and oral evidence including expert testimony and that it shall decide on the basis of such evidence. Rule 46 of the Interim Rules of Court also shows that the Court is free to hear any witness, expert, or other person. According to Rule 43 of the Interim Rules of Court, the court hearings are open to the public and only exceptionally held in camera.

C. *Environmental Case Law*

There is no right to a healthy environment included in the ECHR. Only the Protocol of San Salvador to the Inter-American Convention on Human Rights and the African Charter explicitly provide for a right to a healthy or generally satisfactory environment. Nevertheless jurisprudence of all regional human rights courts and committees safeguarded the procedural as well as substantive rights of citizens or peoples threatened by environmental pollution.[59]

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[56] See also Rule 33(2) of the Interim Rules of Court.

[57] Rule 53 of the Interim Rules of Court lays out in more detail the procedure of intervention of third parties.

[58] Mohamed, "Individual and NGO Participation in Human Rights Litigation before the African Court of Human and Peoples' Rights: Lessons from the European and Inter-American Courts of Human Rights" (1999) 43 *JAL*, 201.

[59] For an overview see Stephens, *International Courts and Environmental Protection* (2009), 310 et seq.

1. *European Court of Human Rights*

The European Court of Human Rights decided about 14 cases directly linked to environmental protection.[60] Seven of these cases[61] dealt with the consequences of industrial accidents and industrial pollution and in all of these cases the court found a violation of Article 8 of the ECHR (right to respect for private and family life)[62] and awarded between 3,000 and 24,000 Euros for non-pecuniary damage under Article 41 of the Convention (just satisfaction).[63] By way of example, three of the industrial pollution cases and three of the other "environmental" cases are described in brief below.

Article 8 of the ECHR stipulates:

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The first and groundbreaking decision at the intersection of human rights and environmental harm issued by the ECtHR is *López-Ostra v. Spain* (1994).[64] The applicant, Mrs. López-Ostra, and her family suffered unbearable living conditions and serious health problems due to fumes, repetitive noise and strong smells from a tannery

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[60] Seven of the cases dealt with industrial pollution, see footnote below. In three cases the plaintiffs complained about noise pollution. In *Powell and Rayner v. United Kingdom*, App. No. 9310/81, judgment of 21 February 1990 and *Hatton v. United Kingdom*, App. No. 36022/97, judgment of 8 July 2003, the plaintiffs argued that noise pollution from London Heathrow airport and insufficient noise abatement measures by government authorities violated their right to respect for private and family life (Article 8) and their right to an effective remedy (Article 13). The ECtHR found a violation of Article 13 only; it did not find a violation of Article 8 of the European Convention on Human Rights. In *Moreno Gomez v. Spain*, App. No. 4143/02, judgment of 16 November 2004 the ECtHR found a breach of Article 8 of the European Convention on Human Rights because of a failure of the authorities to deal with night-time disturbances caused by nightclubs near her home over several years. The other four "environmental" cases dealt with different issues, such as urban development, NGO participation, illegal fishing and nuclear power. They are presented in brief after the industrial pollution cases.

[61] *Lopez Ostra v. Spain*, App. No. 16798/90, judgment of 9 December 1994; *Guerra and Others v. Italy*, App. No. 14967/89, judgment of 19 February 1998; *Taskin and Others v. Turkey*, App. No. 46117/99, judgment of 10 November 2004; *Öneryildiz v. Turkey*, App. No. 48939/99, judgment of 30 November 2004; *Fadeyeva v. Russia*, App. No. 55723/00, judgment of 9 June 2005; *Giacomelli v. Italy*, App. No. 59909/00, judgment of 2 November 2006; *Tatar v. Romania*, App. No. 67021/01, judgment of 27 January 2009.

[62] In *Öneryildiz v. Turkey*, App. No. 48939/99, judgment of 30 November 2004, the ECtHR held that there had been violations of Articles 2 and 13 of the Convention and that no separate issue arose under Article 8 of the Convention.

[63] With the exception of *Tatar v. Romania*, App. No. 67021/01, judgment of 27 January 2009, where, by five votes to two, the ECtHR dismissed the claim for just satisfaction.

[64] See also McCallion, "International Environmental Justice: Rights and Remedies" (2002) 26 *Hastings Int'l & Comp. L. Rev.*, 427, 434.

waste-treatment plant built only 12 meters from her home. The court held that there was an infringement of Article 8 of the European Convention on Human Rights. It stated that

> severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health.[65]

The court awarded 4,000,000 ESP damages to Mrs. López-Ostra. The Spanish government paid the damages within the time limit set by the court.

Similarly, in *Guerra and Others vs. Italy* (1998) the ECtHR found Italy in violation of Article 8 of the Convention. The applicants suffered serious health effects from toxic substances emitted by a chemical factory. Whereas in *López-Ostra* the Spanish authorities actively supported the tannery e.g. via subsidies, in this case the Italian authorities did not and consequently argued that Italy cannot be said to have "interfered" with the applicants' rights. The ECtHR held that

> although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in effective respect for private or family life.[66]

This case is also interesting with respect to the damages: The applicants claimed 20,000,000,000 Italian lire as compensation for "biological" damage. The court awarded 10,000,000 Italian lire to each of the applicants as compensation for non-pecuniary damages but refused to compensate for any biological damages.[67]

In its most recent industrial accident case, *Tatar v. Romania* (2009), the ECtHR found Romania in violation of Article 8 of the European Convention on Human Rights. The applicants lived in the vicinity of the Baia Mare gold mine when in January 2000 an environmental accident occurred at the site; a damn had breached, releasing about 100,000 m^3 of cyanide-contaminated tailings water into the environment. The applicants could not prove a causal link between exposure to sodium cyanide and the asthma suffered by one of the applicants. Nevertheless, the court held that Romania failed in fulfilling its duty to assess the risks of the enterprise both at the time it granted the operating permit and subsequent to the accident, and to take the appropriate measures and that this posed a serious and material risk for the applicants' health and well-being.

The judgment is interesting because of its language and the explicit reference to other sources of international environmental law and soft law. For the first time the ECtHR explicitly states that Romania violated Article 8 of the European Convention

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[65] *Lopez Ostra v. Spain*, App. No. 16798/90, judgment of 9 December 1994 at 51.
[66] *Guerra and Others v. Italy*, App. No. 14967/89, judgment of 19 February 1998 at 58.
[67] *Ibid*. at 64, 67.

on Human Rights because of the failure of Romanian authorities to protect the right of the applicants

> to enjoy a healthy and protected environment.[68]

The court also explicitly mentions the precautionary principle. It should be noted, however, that the ECtHR referred to the right to a healthy and protected environment and to the precautionary principle in the context of consideration of Romanian law where the right to a healthy environment is embedded in the constitution.[69]

Furthermore, the ECtHR explicitly mentioned principle 21 of the Stockholm Declaration and principle 14 of the Rio Declaration, which both stipulate the duty of states to ensure that local industrial activities do not cause any transboundary harm.[70] The environmental accident at Baia Mare also affected Hungary and Serbia and Montenegro. Although this statement is not directly linked to the claims of the case, it shows the court's willingness to remind defendants of crucial language of related international environmental soft law. Finally, the ECtHR referred to the Aarhus Convention and its rules on access to information, participation in decision-making processes, and access to justice which Romania had ratified in May 2000.[71] It pointed out that authorities had to ensure public access to the conclusions of the investigations and studies and public participation in the decision-making processes concerning environmental issues and stressed the failure of Romanian authorities to act accordingly.

As part of the process of implementation in 2010, the Romanian authorities submitted information on individual and general measures. Currently bilateral discussions are taking place aimed at securing the additional information necessary to present an action plan/action report to the Committee.[72]

Apart from these industrial pollution cases there are three other cases worth mentioning. An illustrative example of the limits of Article 8, when it comes to protection of the environment itself, is the ECtHR's decision in *Kyrtatos v. Greece* (2003). The applicants were property owners in the vicinity of a wetland, a habitat

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[68] *Tatar v. Romania*, App. No. 67021/01, judgment of 27 January 2009 at 112; the judgment is issued only in French. The court states as follows: "La Cour conclut que les autorités roumaines ont failli à leur obligation d'évaluer au préalable d'une manière satisfaisante les risques éventuels de l'activité en question et de prendre des mesures adéquates capables de protéger le *droits* de intéressés au respect de leur vie privée et de leur domicile et, plus généralement, *à la jouissance d'un environnement sain et protégé*."

[69] *Ibid.* at 109: "La Cour rappelle *qu'en droit roumain le droit à un environnement sain est un principe ayant valeur constitutionnelle*. Par ailleurs, le principe de précaution recommande aux États de ne pas retarder l'adoption de mesures effectives et proportionnées visant à prévenir un risque de dommages graves et irréversibles à l'environnement en l'absence de certitude scientifique où technique."

[70] *Ibid.* at 111.

[71] *Ibid.* at 118.

[72] See current state of execution at http://www.coe.int/t/dghl/monitoring/execution/Reports/pendingCases_en.asp?CaseTitleOrNumber=Tatar&StateCode=&SectionCode=.

for several protected species, which was destroyed by urban development activities. They alleged a violation of Article 8 of the Convention based on two different arguments. Firstly, they argued that, with the urban development, the area where their home was had lost all of its scenic beauty. Secondly, they complained about the noise and lights at night from the activities of the firms operating in the area.[73] With regard to the latter the ECtHR held that those disturbances had not reached a sufficient degree of seriousness to be taken into account under Article 8.[74] As regards the first argument, the court pointed out that the crucial element of an infringement of Article 8 of the Convention is

> the existence of a harmful effect on a person's private or family sphere and not simply the general deterioration of the environment. Neither Article 8 nor any of the other Articles of the Convention are specifically designed to provide general protection of the environment as such; to that effect, other international instruments and domestic legislation are more pertinent in dealing with this particular aspect.[75]

In *L'Erablière A.S.B.L. v. Belgium* (2009) an environmental NGO lodged a claim before the ECtHR alleging a violation of Article 6(1) of the European Convention on Human Rights (right to a fair hearing).[76] The NGO requested the withdrawal of planning permission for the expansion of a waste collection site. The Conseil d'État denied access to the court on procedural grounds, because the NGO's submission did not include a statement of the facts of the dispute as required by domestic law. The ECtHR observed that the NGO had attached a document including the facts to its statement and that there was no need to reiterate these facts in the statement itself.[77]

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[73] *Kyrtatos v. Greece*, App. No. 41666/98, judgment of 22 May 2003 at 51.

[74] *Ibid.* at 54.

[75] *Ibid.* at 52. In the following paragraph the court elaborates further on this argument and arguably opens a door for Article 8 cases concerned with the destruction of scenic beauty. However, the court highlights the importance of a direct effect on the applicants' well-being: "[E]ven assuming that the environment has been severely damaged by the urban development of the area, the applicants have not brought forward any convincing arguments showing that the alleged damage to the birds and other protected species living in the swamp was of such a nature as to directly affect their own rights under Article 8 § 1 of the Convention. It might have been otherwise if, for instance, the environmental deterioration complained of had consisted in the destruction of a forest area in the vicinity of the applicants' house, a situation which could have affected more directly the applicants' own well-being. To conclude, the Court cannot accept that the interference with the conditions of animal life in the swamp constitutes an attack on the private or family life of the applicants." *Ibid.* at 53.

[76] *L'Erablière A.S.B.L. v. Belgium*, App. No. 49230/07, judgment of 24 February 2009; judgment available only in French.

[77] *Ibid.* at 42: "A cet égard, la Cour note que la requérante avait joint à son recours l'acte administratif attaqué, qui contenait un exposé détaillé des faits ayant conduit à son adoption. Par conséquent, un nouvel exposé des faits établi par les requérants et intégré dans le texte même du recours en annulation n'aurait pas été plus complet que celui figurant dans l'acte attaqué lui-même. En outre, le Conseil d'Etat avait traité d'une première demande de permis d'urbanisme relatif au même objet dans un arrêt de référé du 1er juin 2001 et dans un arrêt au fond du 18 janvier 2005, rendu par une formation identique à celle qui a adopté l'arrêt litigieux. De plus, l'auditeur

It, therefore, held unanimously that there had been a violation of Article 6(1) of the Convention and awarded the applicant NGO 3,000 Euros for non-pecuniary damage and 2,500 Euros for costs and expenses. The case shows that the ECtHR appropriately safeguards NGOs' right to a fair hearing. Nevertheless at the same time it is also an example of the limits of the court's jurisdiction. The NGO had access to the ECtHR because its individual right to a fair hearing had been violated. The mere violation of environmental law would not have given the NGO standing before the ECtHR. To date, the Belgian authorities have paid the damages but have not submitted any information with regard to an action plan.[78]

Finally, *Mangouras v. Spain* (2010) should be mentioned because it corresponds to the case law of the ITLOS discussed below.[79] Mr. Mangouras was the captain of the ship "Prestige" which sank in 2002 off the Galician coast and caused a large oil spill. A criminal investigation was opened and the applicant was detained for 83 days. He was released when his bail of 3,000,000 Euros was paid by the Prestige owner's insurers. The Grand Chamber of the ECtHR held by ten votes to seven that the bail was not excessive and that there had been no violation of Article 5(3) of the ECtHR (right to liberty and security). The bail was not excessive because

> [...] the facts of the present case – concerning marine pollution on a seldom-seen scale causing huge environmental damage – are of an exceptional nature and have very significant implications in terms of both criminal and civil liability. In such circumstances it is hardly surprising that the judicial authorities should adjust the amount required by way of bail in line with the level of liability incurred, so as to ensure that the persons responsible have no incentive to evade justice and forfeit the security. In other words, the question must be asked whether, in the context of the present case, where large sums of money are at stake, a level of bail set solely by reference to the applicant's assets would have been sufficient to ensure his attendance at the hearing, which remains the primary purpose of bail.[80]

The court could not overlook

> the growing and legitimate concern both in Europe and internationally in relation to environmental offences.[81]

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dans ces trois affaires était le même. Enfin, la Cour ne peut souscrire à l'argument du Gouvernement selon lequel la partie adverse de la requérante ne pouvait pas prendre connaissance de l'acte attaqué, envoyé en un seul exemplaire, celle-ci étant l'auteur de cet acte."

[78] For more details on the implementation of the judgment see http://www.coe.int/t/dghl/monitoring/execution/Reports/pendingCases_en.asp?CaseTitleOrNumber=49230%2F07&StateCode=&SectionCode=.

[79] *Mangouras v. Spain*, App. No. 12050/04, judgment of 28 October 2010.

[80] *Ibid.* at 88.

[81] *Ibid.* at 86. The court also refers explicitly to the ITLOS, *ibid.* at 89.

2. *Inter-American Court and Commission of Human Rights*

The Inter-American Human Rights System, court and commission, also decided a number of cases related to the environment.[82] All of these cases were brought by representatives or in the name of indigenous communities, sometimes in collaboration with human rights NGOs. As outlined above, only the commission and states parties can submit cases to the court. Thus, in all of these cases the indigenous peoples filed a petition with the commission which can then decide to refer it to the IACtHR. Four exemplarily cases, one before the IACtHR and three before the Inter-American Commission of Human Rights (IAComHR), are outlined in greater detail below.

In *Mayagna (Sumo) Awas Tingni Community v Nicaragua* (2001)[83] the IACtHR decided for the first time in favor of the rights of an indigenous community to their ancestral land. In October 1995, Jaime Castillo Felipe lodged a petition with the commission on behalf of himself and the Community. He also requested precautionary measures to stop logging activities on communal lands. The allegation claimed that Nicaragua had not demarcated the communal lands of the Awas Tingni Community, that it had not adopted effective measures to ensure the property rights of the Community to its ancestral lands and its natural resources, that it granted a concession on community lands without the assent of the Community, and that it had not ensured effective remedies in response to the Community's protests regarding its property rights. In May 1998, the commission decided to bring the case to the court and in 2001 the IACtHR issued its judgment. As part of the proceedings before the court several NGOs, such as the Organization of Indigenous Syndics of the Nicaraguan Caribbean (OSICAN), the Canadian organization Assembly of First Nations (AFN), and the International Human Rights Law Group, filed amicus curiae briefs.[84]

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[82] See *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, IACtHR, judgment of 31 August 2001; *Yakye Axa Indigenous Community v. Paraguay*, IACtHR, judgment of 17 June 2005; *Kawas-Fernández v. Honduras*, IACtHR, judgment of 3 April 2009 (murder of an environmental activist); *The Kichwa Indigenous People of the Sarayaku and its members v. Ecuador*, IAComHR, Case No. 167/03, Merits Report No. 138/09, of 18 December 2009 (IAComHR has referred the case to the IACtHR where the case is still pending); *Maya indigenous community of the Toledo District v. Belize*, IAComHR, Case No. 12.053, decision of 12 October 2004; *Yanomani Indians v. Brazil*, IAComHR, Case No. 7615, decision of 3 March 1985. Further cases decided by the Inter-American Commission on Human Rights: *Mary and Carrie Dann v. United States*, IAComHR, Case No. 11/140, decision of 27 December 2002 (Western Shohone, indian land rights and the environment; applicants alleged a breach of the 1948 American Declaration of the Rights and Duties of Man; the USA is not party to the ACHR; the IAComHR found several human rights violations and made a number of recommendations, but the USA refused to take any corrective action; the U.S. Supreme Court had decided previously against the plaintiffs; see also Schaaf/Fishel, "Mary and Carrie Dann v. United States at the Inter-American Commission on Human Rights: Victory for Indian Land Rights and the Environment" (2002) 16 *Tul. Envtl. L.J.*, 175.

[83] *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, IACtHR, judgment of 31 August 2001.

[84] *Ibid.* at 38, 41, 42.

The IACtHR decided that Nicaragua violated the right to judicial protection and the right to property (Articles 25 and 21 ACHR). Although the existence of norms recognizing and protecting indigenous communal property in Nicaragua was found to be evident, the court concluded that there was no effective procedure for delimitation, demarcation, and titling of indigenous communal lands.[85] Furthermore, the amparo remedy lodged by members of the Awas Tingni Community was not processed within a reasonable time.[86]

The court unanimously held that

> the State must adopt in its domestic law, pursuant to article 2 of the American Convention on Human Rights, the legislative, administrative, and any other measures necessary to create an effective mechanism for delimitation, demarcation, and titling of the property of indigenous communities, in accordance with their customary law, values, customs and mores.[87]

Furthermore it decided that

> the State must carry out the delimitation, demarcation, and titling of the corresponding lands of the members of the Mayagna (Sumo) Awas Tingni Community and, until that delimitation, demarcation and titling has been done, it must abstain from any acts that might lead the agents of the State itself, or third parties acting with its acquiescence or its tolerance, to affect the existence, value, use or enjoyment of the property located in the geographic area where the members of the Mayagna (Sumo) Awas Tingni Community live and carry out their activities.

With respect to damages, the court found that the state must invest as reparation for immaterial damages US$ 50,000 in works or services of collective interest for the benefit of the Mayagna Awas Tingni Community. It also awarded US$ 30,000 for expenses and costs incurred by the members of the Community and their representatives. To ensure compliance with the judgment, the IACtHR found that Nicaragua must submit a report on measures taken to comply with the judgment every six months and decided to oversee compliance until the provisions of the judgment were fully implemented.[88] In April 2009, the court ordered that monitoring of the case be concluded because the state had complied fully with all aspects.[89]

In 2004, the Inter-American Commission on Human Rights issued a second landmark decision strengthening the human rights of indigenous people and building upon the *Awas Tingni* decision of the IACtHR. In *Maya indigenous community of the Toledo District v. Belize*,[90] the Commission recommended that Belize adopt law to title and protect the territory in which the Maya people have a communal property

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[85] *Ibid.* at 122, 127.
[86] *Ibid.* at 137.
[87] *Ibid.* at 138, 173.
[88] *Ibid.* at 173 No. 8 and 9.
[89] OAS, Annual Report of the Inter-American Court of Human Rights 2009, 61.
[90] *Maya indigenous community of the Toledo District v. Belize*, IAComHR, Case No. 12.053, decision of 12 October 2004.

right and repair the environmental damage resulting from a logging concession granted by the State.[91] Referring to the *Ogoniland* case decided by the AfComHPR, the commission aimed at striking a balance between economic development and environmental protection but explicitly highlighted that

> development activities must be accompanied by appropriate and effective measures to ensure that they do not proceed at the expense of the fundamental rights of persons who may be particularly and negatively affected, including indigenous communities and the environment upon which they depend for their physical, cultural and spiritual well-being.[92]

The implementation of the decision is still pending.[93] In October 2007 in a remarkable statement, the Supreme Court of Belize referred to this recommendation and affirmed the rights of the indigenous Maya communities of Belize to their traditional lands and resources. It declared that those rights were protected by the constitution of Belize in light of international law.[94]

In 2003, the Association of the Kichwa People of Sarayaku, the Center for Economic and Social Rights (CDES), and the Center for Justice and International Law (CEJIL) lodged a petition against Ecuador. They claimed that Ecuador had violated Articles 4 (right to life), 5 (right to humane treatment), 8 (right to a fair trial), 21 (right to property) and 25 (right to judicial protection) ACHR by having allowed a private oil company to operate within the ancestral territory of the Kichwa People of Sarayaku and thereby create a hazardous situation for the Kichwa People. In December 2009, the IAComHR issued its report on *The Kichwa Peoples of the Sarayaku community and its members v. Ecuador* and held in favor of the petitioners.[95] In April 2010, the IAComHR transmitted the case to the IACtHR and requested it to adjudge and declare the international responsibility of Ecuador for violation of the ACHR.[96] Inter alia, the Commission asked the Court to adopt measures to effectively protect the right to property of the Kichwa People, guarantee their right to practice their traditional subsistence activities by removing the explosives planted on their territory, and ensure proper participation of the indigenous community in relevant

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[91] *Ibid.* at 197.

[92] *Ibid.* at 149, 150.

[93] OAS, Annual Report of the Inter-American Commission on Human Rights 2009, 54, available at http://www.cidh.oas.org/annualrep/2009eng/Chap.III.f.eng.htm.

[94] *Cal v. Attorney General*, claim No. 172 of 2007, 18 October 2007, Supreme Court of Belize, available at http://www.elaw.org/node/1620.

[95] *The Kichwa Indigenous People of the Sarayaku and its members v. Ecuador*, Case No. 167/03, Merits Report No. 138/09, of 18 December 2009.

[96] Application filed by the Inter-American Commission on Human Rights with the Inter-American Court of Human Rights against the Republic of Ecuador, Case No. 12.465, *Kichwa People of Sarakayu and its members*, available at http://www.cidh.org/demandas/12.465%20Sarayaku%20Ecuador%2026abr2010%20ENG.pdf. In February 2010, the IACtHR had already upheld an order of provisional measures from 2005 http://www.corteidh.or.cr/docs/medidas/sarayaku_se_04.pdf.

decision-making processes, and to order full individual and communal reparations.[97] The case is still pending.

Finally, with respect to the limits of standing *Metropolitan Nature Reserve v. Panama* should briefly be mentioned.[98] In 1995, Rodrigo Noriega filed a petition with the IAComHR on behalf of the citizens of the Republic of Panama. The petition claimed a violation of the Panamanian people's right to property as vested in the Metropolitan Nature Reserve, following adoption of a law which authorized the construction of a public roadway through the nature reserve. The IAComHR held the case inadmissible under Article 47 of the ACHR since it did not identify individual victims and was overly broad.

3. *African Court and Commission on Human and Peoples' Rights*

Since the African Court on Human and Peoples' Rights has not decided a case on the merits, there is as yet no environmental case law to examine.[99] However, in 2001, the African Commission on Human and Peoples' Rights delivered a landmark decision in human and environmental rights law with the *Ogoniland* case.[100]

In 1995 two human rights NGOs, the Nigerian Social and Economic Rights Action Center (SERAC) and the U.S. American Center for Economic and Social Rights (CESR), filed a communication with the Commission alleging violations by Nigeria of several articles of the African Charter, among others Article 24 which stipulates that

> [a]ll peoples shall have the right to a general satisfactory environment favorable to their development.

The communication alleged that the Nigerian government has been directly involved in oil production operations which have caused the contamination of the environment among the Ogoni People and have led to serious health problems. The oil production operations were undertaken by Nigeria's state oil company, the Nigerian National Petroleum Company (NNCP), which is the majority stakeholder in a consortium with Shell Petroleum Development Corporation (SPDC). Furthermore the

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[97] Application filed by the Inter-American Commission on Human Rights with the Inter-American Court of Human Rights against the Republic of Ecuador, Case No. 12.465, *Kichwa People of Sarakayu and its members*, *ibid.* at 261.

[98] *Metropolitan Nature Reserve v. Panama*, IAComHR, Case No. 11.533, decision of 22 October 2003.

[99] The only case dealt with to date by the AfCtHPR, *Michelot Yogogombaye v. The Republic of Senegal*, Appl. No. 001/2008, was held to be inadmissible for lack of jurisdiction. It was filed by an individual but Senegal had not accepted the jurisdiction of the court to hear cases instituted directly against the country by individuals or NGOs. For a discussion of the judgment see Mujuzi, "Michelot Yogogombaye v The Republic of Senegal: The African Court's First Decision" (2010) 10 *Hum. Rts. L. Rev.*, 372. or Jalloh, "International Decision: Michelot Yogogombaye v. The Republic of Senegal, App. No. 001/2008, Judgment" (2010) 104 *Am. J. Int'l L.*, 620.

[100] *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria* (2001), AfComHPR, case no. 155/96, decision of 27 May 2002 (*Ogoniland* case).

Nigerian government ordered ruthless military operations including destruction of Ogoni villages, homes and food sources.[101]

The Commission found Nigeria in violation of Articles 2 (enjoyment of rights and freedoms, anti discrimination), 4 (respect for life and integrity), 14 (right to property), 16 (right to health), 18(1) (protection of family), 21 (peoples' right to freely dispose of their wealth and natural resources) and 24 (right to a general satisfactory environment) of the African Charter. With respect to the human rights and environmental issues, it appealed to the Nigerian government to ensure protection of the environment, health and livelihood of the people of Ogoniland by

> ensuring adequate compensation to victims of human rights violations, including relief and resettlement assistance to victims of government sponsored raids, and undertaking a comprehensive cleanup of lands and rivers damaged by oil operations;
>
> [e]nsuring that appropriate environmental and social impact assessments are prepared for any further oil development and that the safe operation of any further oil development is guaranteed through effective and independent oversight bodies for the petroleum industry; and
>
> [p]roviding information on health and environmental risks and meaningful access to regulatory and decision-making bodies to communities likely to be affected by oil operations.[102]

The *Ogoniland* decision is a landmark decision and has often been cited. However, in practice, the decision did not seem to have any positive consequences for the Ogoni people.[103]

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[101] *Ibid.* at 1–9.

[102] *Ibid.* at findings.

[103] The AfComHPR does not provide for follow up information on its decisions. The country reports submitted by Nigeria so far do not refer to the *Ogoniland* case. For example, at the 61st session of the UN Commission on Human Rights Mr. Legborsi Saro Pyagbara of the Anti-Racism Information Service stated that the recommendations of the African Commission had been completely ignored and that the Indigenous Ogoni people and the Niger Delta continued to suffer neglect by the present civilian government. For example, he stated, the government had embarked on eviction of at least 5,000 Ogonis and members of ethnic minorities from shanty towns in Port Harcourt to give land to Agip Oil. He requested the UN Commission on Human Rights to ask the Secretary General to report on the progress of the implementation by the Nigerian government of, among others, the decision of the African Commission; transcript of oral submission available at http://www.unpo.org/article/2311. In 1995, nine Ogoni leaders and anti-oil campaigners, including the author Ken Saro-Wiwa, were hanged in Port Harcourt by Nigeria's then military rulers. In 1996, their relatives brought legal action in the U.S. against Shell under the 1789 Alien Tort Claims Act which allows U.S. courts to hear human rights cases brought by foreign citizens for conduct committed outside the U.S. Shell was accused of having collaborated in the executions. On the eve of the trial before a federal court in New York, Shell agreed to settle the case for $15.5m. This is one of the largest payouts agreed by a multinational corporation charged with human rights violations. On its website Shell points out that it "has always regarded the allegations as 'false and without merit' and agreed to settle, in part hoping to aid the process of reconciliation in Ogoni Land", see http://www.shell.com/home/content/environment_society/society/nigeria/ogoni_land/.

D. *Evaluation*

The caseload of the three regional human rights courts differs greatly. The ECtHR, originally established in 1953, has delivered more than 12,000 judgments, the IACtHR, founded in 1979, has decided about 120 cases, and the AfCtHPR, which came into being in 2004, has issued only one judgment so far.

All three regional human rights courts are likely to deal with cases related to environmental protection. However, this is obviously not their main focus of work and rather a by-product of the protection of human rights. Consequently, mere environmental degradation or pollution, with no direct effect on human beings or with effects not sufficiently severe as to qualify as a human rights infringement, is not at issue before human rights courts.

Human rights courts are noteworthy judicial bodies at the international level because they are open to individuals, groups of individuals, NGOs, and even peoples in the case of the AfCtHPR and IACtHR. However, standing always requires that applicants directly suffered a harm or loss which possibly entails a human rights infringement. Neither individuals nor NGOs can bring altruistic lawsuits in the mere public interest, e.g. only for the sake of environmental protection or to mitigate climate change. The only exception here is the African Commission, which allows for an actio popularis under certain circumstances.

1. *Jurisdiction, Applicable Law, and Institutional Arrangements*

The scope of jurisdiction and the applicable law of the ECtHR is limited to the provisions of the ECHR and its protocols. The IACtHR and the AfCtHPR have jurisdiction over several other international and regional human rights treaties such as, in case of the AfCtHPR for example, the Convention on the Rights of the Child, if it has been ratified by the states parties to a dispute. All human rights courts hear contentious cases and may issue advisory opinions.

The Protocol of San Salvador to the ACHR and the African Charter explicitly provide for a right to a healthy or general satisfactory environment. Neither the IACtHR nor the AfCtHPR have so far directly applied these norms in their decisions. Only the African Commission applied Article 24 of the African Charter in the *Ogoniland* case. The IACtHR/IAComHR usually applied the right to property or the right to life in environment related cases. The ECtHR found a violation of Article 8 of the European Convention (right to respect for private and family life) in all industrial pollution cases. In *Tatar vs. Romania*, the ECtHR also explicitly referred to a "right to a healthy environment", but this was due to the fact that such a right is provided for by the Romanian constitution.

There are no special institutional arrangements to deal with environmental issues. The judges are free to draw on expert advice. There was nothing in the case law that showed a need to establish specialized chambers to deal with environmental issues.

One reason for this might be that mere environmental damages are not at stake in human rights cases.

With respect to remedies, the ECtHR, IACtHR, and AfCtHPR may order provisional measures and grant compensatory damages. Judgments of all three regional human rights courts are binding on the parties concerned. The ECtHR and the IACtHR have procedures to monitor implementation of the judgments.

2. *Access*

The ECtHR has the broadest access rules of the three regional human rights courts.[104] Individuals, groups of individuals or NGOs may initiate a lawsuit against a state claiming a human rights violation. At the AfCtHPR individuals and NGOs may take contentious cases to court if certain requirements are met, most importantly, a state has to declare that it accepts the competence of the court to receive cases brought by individuals and NGOs.[105] Since only Mali and Burkina-Faso so far made such declarations, the AfCtHPR is not yet widely open to the public. Another practical problem is the lack of African-based groups.[106] Other than that the Commission, states parties and African intergovernmental organizations may take cases to the AfCtHPR. The fact that the court has received only one case so far and that it was not decided on the merits precisely because it was brought by an individual against a state, which had not made a declaration accepting such action, shows that this access rule or the reluctance of African states to accept cases brought by individuals is a serious hurdle to the effective development and functioning of the AfCtHPR.

Although the IACtHR is known for its openness to non-governmental actors, individuals, groups of individuals and NGOs may only bring cases to the Commission and not directly to the Court. Furthermore, they can only take cases to the Commission if a state party explicitly recognized the jurisdiction of the court in such cases. Thus, access to the IACtHR is even more limited than in the case of the AfCtHPR. Only states parties and the Commission may take cases to the IACtHR.

Bearing in mind the core goal of human rights regimes, which is the protection of individuals against human rights violations, it is crucial that they have direct access to the main institution securing such rights, namely the human rights courts. Thus,

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[104] For a 1996 overview on the different roles of NGOs in regional human rights systems see Ölz, "Non-Governmental Organizations in Regional Human Rights Systems" (1996) 28 *Colum. Hum. Rts. L. Rev.*, 307.

[105] See also Mutua, "The African Human Rights Court: A Two-Legged Stool?" (1999) 21 *Hum. Rts. Q.*, 342, 355, pointing out that although limiting access may have been necessary to get states on board it is perceived by most Africans as a disappointing and serious blow to the standing and reputation of the Court.

[106] See Ölz, "Non-Governmental Organizations in Regional Human Rights Systems" (1996) 28 *Colum. Hum. Rts. L. Rev.*, 307, 374. However, this statement dates from 1996 and the number of African NGOs may have increased since then.

all human rights courts should follow the example of the ECtHR and be directly accessible to individuals, groups of individuals and NGOs.

At the ECtHR and the IACtHR, individuals, groups of individuals or NGOs cannot initiate cases to merely protect the environment. Standing requires that the applicant suffered a significant disadvantage (ECtHR) or states facts that tend to establish a violation of the rights guaranteed by the Convention (IACtHR). The rules of the AfCtHPR do not contain such a victim's requirement, but allow for an actio popularis.[107] Nevertheless, there is as yet no case law from the AfCtHPR to enable an analysis of the consequences of the combination of a substantive right to a satisfactory environment and the procedural right of an actio popularis with respect to protection of the environment. The factual circumstances of the *Ogoniland* case decided by the AfComHPR were so serious that it is highly likely that the other regional human rights courts would also have found a human rights violation. Thus, the regional human rights courts cannot be approached, for example, to protect endangered species or the climate.

All three human rights courts accept amici curiae participation partly subject to certain conditions. The IACtHR has the most extensive practice with regard to amicus curiae participation and in 2009 was the first court to explicitly regulate amicus curiae participation in its rules of procedure. Accordingly, amici curiae may make submissions on factual circumstances and legal consideration, and the rules provide for a certain participation procedure. The ECtHR accepts amicus curiae submissions but as yet there is no rule specifically dealing with this issue. In the case of the AfCtHPR, amicus curiae participation is somewhat more limited, since individuals and NGOs may only participate in the proceedings before the court if they have submitted communications before the Commission at an earlier stage. Given the positive experience with amicus curiae participation at the IACtHR and the ECtHR, all human rights courts should strive for a regulation similar to that applying under the Inter-American human rights regime. Hearings in all human rights courts are open to the public and only in exceptional cases held in camera.

With respect to advisory opinions, the AfCtHPR and the IACtHR provide for comparably broad groups of applicants. Any member state of the AU or OAS, or – in case of the IACtHR most of – its organs may request advisory opinions. At the ECtHR only the majority of the representatives of the Committee of Ministers of the COE may lodge an advisory opinion procedure. Advisory proceedings arguably have less teeth than contentious cases, but on the other hand they are less confrontational and do not stigmatize any party as lawbreaker.[108] In the context of environmental and human rights they appear to be helpful tools in further developing and strengthening the legal regime. Consideration should be given to affording NGOs the right

[107] Mujuzi, "Michelot Yogogombaye v. The Republic of Senegal: The African Court's First Decision" (2010) 10 *Hum. Rts. L. Rev.*, 372, 373.

[108] Buergenthal, "The Advisory Practice of the Inter-American Human Rights Court" (1985) 79 *Am. J. Int'l L.*, 1, 46.

to initiate advisory proceedings, since this might strengthen their role as effective watchdogs at a point in time when further damage can still be prevented or publicity can encourage governmental authorities to handle hazardous activities more cautiously from the outset.

3. *Environmental Case Law*

All human rights courts or commissions have decided cases linked to environmental topics. However, naturally, the human rights perspective does not allow for a holistic treatment of the environmental issues involved. It also has to be noted that, compared to the overall number of cases dealt with by human rights regimes, the number of cases linked to environmental protection is very small.

a. *European Court of Human Rights*

The majority of the environmental cases analyzed above are local cases. *Tatar vs. Romania* (Baia Mare gold mine accident) has a transboundary context but this was not at the center of the judgment. In *Mangouras vs. Spain* (Prestige oil spill), French, Spanish and Portuguese authorities were involved in that none of them allowed the ship to dock in their ports. The oil spill mainly polluted the Spanish EEZ and local territory, namely the sea bed about 250 km off the Galician coast and ecologically important regions of the Galician coast supporting coral reefs and many species of sharks and birds. Thus, the global commons affected in these cases are limited to rare landscapes and species which it is important to protect from a biodiversity perspective. In *Mangouras*, these environmental interests played a crucial role in the judgment, but Mr. Mangouras of course originally approached the ECtHR to hold otherwise. Here human rights and environmental protection did not go hand in hand, as in most of the other cases analyzed above.

In the local industrial pollution cases, for example in *López-Ostra* (tannery waste treatment plant) and *Guerra* (chemical factory), the ECtHR indirectly contributed largely to the enforcement of national and European procedural and substantive environmental laws, which had been completely ignored by the national governments. The health effects on the applicants in these cases were so severe that they constituted a human rights violation. In *Tatar*, applicants could not establish the causal link between the exposure to sodium cyanide and the asthma suffered by one of the applicants. Nevertheless, the ECtHR found a violation of Article 8 of the European Convention on Human Rights because Romania's failure to conduct a proper risk assessment and to take appropriate measures posed a serious and material risk for the applicants' health and well-being. In *Tatar*, the ECtHR showed its willingness to protect citizens from severe environmental pollution even if they were unable to prove causation. Governments are deemed to violate the European Convention on Human Rights if they expose their citizens' health and well-being to a serious and material risk. This is an important step forward and it shows that human rights courts can also strengthen the application of the precautionary

principle, which plays a crucial role in environmental law. However, it has to be noted that the risk was not merely potential in this case but it had materialized before in the devastating Baia Mare accident. In *Balmer-Schafroth and Others vs. Switzerland* (nuclear power plant), the ECtHR could not find a direct link between the operating conditions of the nuclear power plant and the applicants' right to protection of their physical integrity.[109]

With respect to the remedies, the ECtHR granted compensatory damages for the losses suffered by the applicants in all industrial pollution cases, except for *Tatar* where the applicants could not establish causal link between the accident and the effect on health. The ECtHR refused to compensate for biological damages (see *Guerra*). In all cases, the respective governments paid the sum as ordered by the court. The implementation of *Tatar* is still pending.

In *Kyrtatos vs. Greece* the ECtHR clearly pointed out that the European Convention on Human Rights is not designed to provide general protection of the environment as such.[110] However, in *L'Erablière A.S.B.L. v. Belgium*, the ECtHR showed that it is able and willing to safeguard environmental NGOs' right to a fair hearing and insofar supports the position that arguments aimed at the general protection of the environment as such should at least effectively enter decision-making procedures. Belgium paid the damages but the development of an action plan is still pending.

All in all, the ECtHR is a very successful institution. The number of applications is steadily growing and the ECtHR's transparently available record of implementation shows that states largely comply with their obligations arising from the judgments. Compared to its overall workload, the number of cases with an environmental context is very low. Nevertheless, for example with *López-Ostra* and *Tatar*, the ECtHR issued landmark decisions in the field of international environmental law. It strengthened procedural and substantive environmental rights insofar as these relate to the protection of human health and participatory rights of citizens and NGOs (right to respect for private and family life and right to a fair hearing). It held states responsible for human rights violations irrespective of whether they actively supported the environmental pollution (*López*) or not (*Guerra*) and even if a causal link to a concrete health damage could not be proven (*Tatar*). In cases like *Mongouras* and *Tatar*, the ECtHR explicitly referred to other international environmental law and soft law, showing the intention of a balanced reasoning and decision.

On the other hand, the case law also clearly shows the limited potential of the ECtHR to contribute to the enforcement of (international) environmental law. From

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[109] In *Balmer-Schafroth and Others v. Switzerland*, App. No. 22110/93, judgment of 26 August 1997, ten Swiss nationals initiated proceedings against Switzerland. Allegedly, the extension of a nuclear power plant license constituted a breach of Articles 6 (fair hearing) and 13 (effective remedy) of the European Convention on Human Rights. The ECtHR rejected the complaint because applicants failed to establish a direct link between the operating conditions of the power station and their right to protection of their physical integrity, *ibid.* at 40, 42.

[110] See also Boyle, *Human Rights and the Environment: A Reassessment*, UNEP (ed.) (2010), 31.

a procedural point of view, ECtHR orders do not go beyond standards already established by the 1991 UNECE Espoo Convention or the 1998 UNECE Aarhus Convention but rather lag behind.[111] For example, the right to participate in decision-making processes affecting the environment is much narrower according to ECtHR jurisprudence than under the Aarhus Convention.[112] The ECtHR grants it for those who are individually affected, the Aarhus Convention for anyone who has an interest in the decision. However, it should be noted that the ECtHR seems to be willing to apply these standards under the European Convention on Human Rights to countries which have not ratified the UNECE Conventions, as seen in *Taskin v. Turkey*.[113]

b. *Inter-American Court and Commission of Human Rights*

All cases with an environmental protection context discussed above were brought by indigenous communities. They were all of a mainly local nature in the sense that there were no transboundary issues involved. Global commons were involved to the extent that the territories affected by intensive logging or oil extraction were of a global value in terms of biodiversity or as carbon sinks. Most of the cases had an international background in that the local government had given permits for resource exploitation to international companies. For example, in *Awas Tingni* the Nicaraguan government had given a logging concession to a Taiwanese company in the traditional lands of the Awas Tingni community on the Atlantic Coast.[114] Also, several foreign oil companies such as the Argentine company CGC and U.S. based Chevron have been trying for many years to drill for oil on the lands of the Kichwa Peoples of the Sarayaku in Ecuador. Thus the cases also play an important role in the context of indigenous resistance to unsustainable resource extraction and greater accountability for the actions of foreign logging and oil companies.

The cases are noteworthy first of all because the Inter-American Court and Commission decided and thereby established that indigenous communities have a right to demarcation and titling of their ancestral lands.[115] Furthermore, these property rights of indigenous communities need to be effectively protected; in particular, the indigenous communities have control over their natural resources and concessions on community land, for resource exploitation may not be granted without the participation and consent of the affected community.[116] The IACtHR or IAComHR also ordered reparation payments in all cases.

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[111] Boyle, *Human Rights and the Environment: A Reassessment*, UNEP (ed.) (2010), 23 et seq., 26.

[112] See also Boyle, *ibid.* at 23, 31.

[113] *Taskin and Others v. Turkey*, App. No. 46117/99, judgment of 10 November 2004. See also Boyle, *ibid.* at 26.

[114] See also Alvarado, "Prospects and Challenges in the Implementation of Indigenous Peoples' Human Rights in International Law: Lessons From the Case of Awas Tingni v. Nicaragua" (2007) 24 *Ariz. J. Int'l & Comp. L.*, 609, 621 et seq.

[115] *Ibid.* at 609.

[116] *Ibid.*

Environmental protection was at issue in these cases to the extent that the indigenous communities rely on a healthy environment as the basis for their traditional subsistence activities, including their physical, cultural, and spiritual well-being. All cases aim at striking a balance between development and protection of the fundamental rights of the indigenous communities.

There is still a lack of implementation of the recommendations issued by the IAComHR and judgments delivered by the IACtHR. In *Mayagna* (*Sumo*) *Awas Tingni Community v Nicaragua,* decided in 2001, it took the Nicaraguan government eight years to comply fully with the judgment.[117] In *Maya indigenous community of the Toledo District v. Belize,* decision delivered in 2004, compliance is still pending.[118] In *Kichwa Peoples of the Sarayaku community and its members v. Ecuador*, the IAComHR issued its recommendations in December 2009. In April 2010 the Commission decided to refer the case to the IACtHR, after determining that the Ecuadorian state had not complied with the recommendations. The case is now pending at the IACtHR.

c. *African Court and Commission on Human and Peoples' Rights*

With respect to the African Court and African Commission on Human and Peoples' Rights, it is difficult to draw any conclusions due to the fact that the Court so far has only decided one case and the Commission only one with a clear environmental context. Nevertheless, this one decision, the *Ogoniland* case, is a landmark decision in the field of international environmental law.[119] The African human rights regime is also of special interest in this context, since the African Charter is the only regional human rights law that provides for a peoples' right to a satisfactory environment.

As already outlined above, the access rules of the AfCtHPR need to be broadened to give individuals, peoples, and NGOs the chance to actually state their human rights claims. Just as in the *Ogoniland* case or in the Americas cases outlined above, for example, there is likely to be a number of cases where resource exploitation often

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[117] OAS, Annual Report of the Inter-American Court of Human Rights 2009, at 61, available at http://www.cidh.oas.org/annualrep/2009eng/Chap.III.f.eng.htm. For details on the implementation process see Alvarado, "Prospects and Challenges in the Implementation of Indigenous Peoples' Human Rights in International Law: Lessons From the Case of Awas Tingni v. Nicaragua" (2007) 24 *Ariz. J. Int'l & Comp. L.*, 609, 618 et seq.

[118] OAS, Annual Report of the Inter-American Commission on Human Rights 2009, *ibid.* at 54.

[119] According to *Boyle* it is arguably the most important environmental decision of any international tribunal in the same period, Boyle, "The Environmental Jurisprudence of the International Tribunal for the Law of the Sea" (2007a) 22 *IJMCL*, 369, 372; Boyle, *Human Rights and the Environment: A Reassessment*, UNEP (ed.) (2010), 4. See also Wachira, *African Court on Human and Peoples' Rights: Ten Years On and Still No Justice*, UNHCR (ed.) Minority Rights Group International (2008), 9; Oloka-Onyango, "Reinforcing Marginalized Rights in an Age of Globalization: International Mechanisms, Non-State Actors, and the Struggle for Peoples' Rights in Africa" (2003) 18 *Am. U. Int'l L. Rev.*, 851, 871 et seq.; Shelton, "Decision Regarding Communication 155/96 (Social and Economic Rights Action Center/Center for Economic and Social Rights v. Nigeria), Case No. ACHPR/COMM/A044/1" (2002a) 96 *Am. J. Int'l L.*, 937.

by foreign companies is carried out in a manner that causes serious contamination of the environment and health problems for the local inhabitants. The AfCtHPR could play an important role in finding a proper balance between development and environmental protection that contributes to a sustainable use of natural resources and actually improves the living conditions of the local communities.

The *Ogoniland* case was an actio popularis initiated by a Nigerian and a U.S. American human rights NGO, which underlines the importance of giving NGOs direct access to human rights courts.[120] The cooperation between a national and an international NGO can be seen as a good example of combining the knowledge and expertise needed to lodge a successful complaint in an international human rights context.[121]

Referring to, inter alia, Article 16 (individuals' right to health) and Article 24 (peoples' right to a satisfactory environment) of the African Charter on Human and Peoples' Rights, the NGOs invoked individual as well as group rights.[122] In specifying the obligations arising under Article 16 and Article 24 of the African Charter, the AfCHPR did not further differentiate between individuals' and group rights but took both articles together and held that government compliance must include

> independent scientific monitoring of threatened environments, requiring and publicizing environmental and social impact studies prior to any major industrial development, undertaking appropriate monitoring and providing information to those communities exposed to hazardous materials and activities and providing meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities.[123]

The substance behind the human right to health and a satisfactory environment, according to the interpretation of the AfComHPR in the *Ogoniland* case, resembles the obligations of governments under the UNECE Espoo and Aarhus Conventions or the European EIA directive.[124] An important difference might be that under the African Charter not only individuals but also peoples have these rights. The African

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[120] The Commission thanked the two NGOs that brought the matter under its purview, *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria* (2001), AfComHPR, case no. 155/96, decision of 27 May 2002 (*Ogoniland* case) at 49. Shelton, "Decision Regarding Communication 155/96 (Social and Economic Rights Action Center/Center for Economic and Social Rights v. Nigeria), Case No. ACHPR/COMM/A044/1" (2002a) 96 *Am. J. Int'l L.*, 937, 937.

[121] Coomans, "The Ogoni Case before the African Commission on Human and Peoples' Rights" (2003) 52 *Int'l & Comp. L.Q.*, 749, 760.

[122] See also Wachira, *African Court on Human and Peoples' Rights: Ten Years On and Still No Justice*, UNHCR (ed.) Minority Rights Group International (2008), 9.

[123] *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria* (2001), AfComHPR, case no. 155/96, decision of 27 May 2002 (*Ogoniland* case) at 53 and 54. See also Oloka-Onyango, "Reinforcing Marginalized Rights in an Age of Globalization: International Mechanisms, Non-State Actors, and the Struggle for Peoples' Rights in Africa" (2003) 18 *Am. U. Int'l L. Rev.*, 851, 883 et seq.

[124] Council Directive of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (85/337/EEC).

Charter explicitly protects (minority) peoples by giving them environmental rights and rights over natural resources.[125]

Another crucial difference lies in the scope of state obligation. The AfComHPR concluded that the Nigerian state is not only obliged to provide for environmental information and participatory processes but that it is also responsible for ensuring adequate compensation for the victims, including resettlement and a comprehensive cleanup of lands and rivers damaged by oil operations. Especially in this respect, it is the most far-reaching order of any environmental rights case.[126]

Among human rights scholars, the *Ogoniland* decision is welcomed as strengthening economic, social, cultural, and collective rights in Africa.[127] It has to be noted though that the Nigerian government did not participate in the procedure before the Commission, except for a note verbale submitted to a session of the Commission in November 2000, in which the new civil authority admitted that violations were committed.[128] Thus, the uncontested allegations of the complainants became the basis for the decision and were sometimes even literally adopted.[129] The violations, however, where committed by the former Nigerian dictatorship and not by the new government in power at the time of the decision. It also should be highlighted that the decision has not yet been implemented.

Under the human rights focus in the *Ogoniland* case the Commission, naturally, could only deal with the obligations of the Nigerian state and not with the responsibilities of the private oil companies involved.[130]

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[125] Wachira, *African Court on Human and Peoples' Rights: Ten Years On and Still No Justice*, UNHCR (ed.) Minority Rights Group International (2008), 9; Boyle, *Human Rights and the Environment: A Reassessment*, UNEP (ed.) (2010), 4 et seq.

[126] Boyle, *ibid.* at 4.

[127] Coomans, "The Ogoni Case before the African Commission on Human and Peoples' Rights (2003) 52 *Int'l & Comp. L.Q.*, 749, 759; Boyle, *ibid.* at 4; Shelton, "Decision Regarding Communication 155/96 (Social and Economic Rights Action Center/Center for Economic and Social Rights v. Nigeria), Case No. ACHPR/COMM/A044/1" (2002a) 96 *Am. J. Int'l L.*, 937, 942.

[128] *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria* (2001), AfComHPR, case no. 155/96, decision of 27 May 2002 (*Ogoniland* case) at 42; Shelton, "Decision Regarding Communication 155/96 (Social and Economic Rights Action Center/Center for Economic and Social Rights v. Nigeria), Case No. ACHPR/COMM/A044/1" (2002a) 96 *Am. J. Int'l L.*, 937, 938.

[129] *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria* (2001), AfComHPR, case no. 155/96, decision of 27 May 2002 (*Ogoniland* case) at 49; see also Coomans, "The Ogoni Case before the African Commission on Human and Peoples' Rights" (2003) 52 *Int'l & Comp. L.Q.*, 749, 759 pointing out that the Commission could have used other sources of information as provided for under Article 46 of the African Charter.

[130] Shell settled the tort lawsuit in the U.S. shortly before the trial was due to start, see Chapter 3.I.C.3 above. According to *Coomans*, the Ogoniland case shows the potential of a class-action complaint lodged by NGOs, Coomans, "The Ogoni Case before the African Commission on Human and Peoples' Rights (2003) 52 *Int'l & Comp. L.Q.*, 749, 760. For further thoughts on the responsibilities of TNCs for human rights violations see Oloka-Onyango, "Reinforcing Marginalized Rights in an Age of Globalization: International Mechanisms, Non-State Actors, and the Struggle for Peoples' Rights in Africa" (2003) 18 *Am. U. Int'l L. Rev.*, 851, 895 et seq., 903.

E. *Conclusions and Recommendations*

The three regional human rights courts contribute more and more to the enforcement of environmental law. The regime is both powerful and limited in this regard. It is powerful because it is the only international judicial regime in which individuals can sue states. It has three regional, mostly well-functioning, courts that issue legally binding decisions. Furthermore, human rights protection and environmental protection overlap to a certain extent. The IACtHR and the AfCtHPR have also proven very helpful in enforcing collective rights of indigenous peoples to protect and manage their natural resources.

However, the human rights regime also has crucial limitations especially with regard to the enforcement of environmental law that aims to protect public interests. In the European and Inter-American human rights regime, a successful human rights claim requires a violation of individual rights and damage suffered by the plaintiff. Law suits in the public interest are not possible before these human rights courts.[131] Environmental NGOs do not have standing before these human rights courts, unless they were deprived of own participatory rights and this is the basis of their case. Thus, these human rights courts cannot contribute to the protection of biodiversity, wetlands, climate or any other global commons, unless this accidently coincides with an individual interest. This might be different at the AfCtHPR which allows for an actio popularis but there has been no case of this kind as yet. Another weakness of the judiciary of the human rights regimes is that it almost always enters the scene after serious damage has already occurred. Through its mere existence, it also has a deterrent effect but there are no procedures to enforce precautionary measures or to prevent an activity from putting the environment at disproportionate risk.

Another disadvantage is that the three regional human rights courts are not equally strong as yet. Citizens of member states of the Council of Europe have the widest access to their regional human rights court, followed by citizens the Organization of American States and those of the African Union. Furthermore, the lack of implementation of the recommendations and judgments of the last of these human rights judicial and quasi-judicial bodies in particular is a weak point.

To strengthen the role of the three regional human rights courts in contributing to the enforcement of environmental law, the following recommendations may be considered. First of all, the group of potential plaintiffs should be significantly widened at the IACtHR and the AfCtHPR. Individuals and NGOs should have direct access not only to the IAComHR but also to the IACtHR. With respect to the AfCtHPR, it is crucial that more African states ratify the Protocol to the African Charter and

[131] See also Boyle, *Human Rights and the Environment: A Reassessment*, UNEP (ed.) (2010), 31 et seq.; Schall, "Public Interest Litigation Concerning Environmental Matters before Human Rights Courts: A Promising Future Concept?" (2008) 20 *JEL*, 417, 452.

make a declaration accepting the competence of the court to receive cases initiated by NGOs in order that use is actually made of the most advanced procedural and substantive law provided for under the African human rights regime. The foundation of human rights courts in other regions of the world should be considered.

Secondly, all states of the United Nations in and outside the UNECE region which are not already member states should consider ratifying the UNECE Aarhus Convention and the UNECE Espoo Convention, including the respective protocols, or draft similar regional conventions to ensure that all citizens and NGOs throughout the world can participate in decision-making processes that affect the environment and in which they have an interest. This should be accompanied by a right to know about the environmental effects of, for example, certain industrial activities and by appropriate access to judicial control procedures to safeguard the informative and participatory rights. Such procedural human rights ensure that all citizens and NGOs can contribute to finding a proper balance between environmental protection and industrial development and the use of natural resources in their respective region. Such procedural rights are also a very powerful tool, because they come into play at an early stage before any damage has occurred.

Thirdly, monitoring and ensuring of the implementation of the decisions of the three regional human rights courts needs to be improved. The implementation process should be transparent and the public should be able to follow it and function as a watchdog.

Fourthly, although all regional human rights courts accept amici curiae submissions the European and the African human rights courts should consider explicitly regulating amici curiae participation in their rules of procedure, following the 2009 example of the IACtHR and thereby clearly recognizing their status and role in the proceedings.

Fifthly, with respect to damages, the European and the Inter-American human rights court should consider the possibility of ordering a comprehensive cleanup as the AfComHPR did in the Ogoniland decision.

Finally, following the example of many national constitutions and the African human rights regime, the inclusion of a substantive right to a satisfactory environment in combination with an actio popularis should be considered by all regional human rights systems. However, further jurisprudence is needed to enable a better analysis of the consequences of such a human right to a satisfactory environment, especially in combination with an actio popularis as in case of the AfCtHPR. Although it appears worth recommending that the other regional human rights regimes to adopt similar substantive and procedural rules, the human rights courts should not become the future international environmental courts.[132] They should contribute to the enforcement of environmental laws as long as such violations amount to a

[132] See also Schall, "Public Interest Litigation Concerning Environmental Matters before Human Rights Courts: A Promising Future Concept?" (2008) 20 *JEL*, 417, 452.

human rights violation. However, there are many breaches of environmental law that do not entail such serious damages that they qualify as human rights violations. Arguably, a violation of the vast majority of public interest environmental law does not actually infringe human rights. It can and should not be the task of human rights courts to ensure judicial review in these cases.

II. Arbitration

There is a huge variety of fora worldwide offering arbitration.[133] Three arbitration fora with special relevance for environmental interests are dealt with in depth in chapter 4: the Permanent Court of Arbitration (PCA), the International Center for Settlement of Investment Disputes (ICSID), and the International Court of Environmental Arbitration and Conciliation (ICEAC). As regards the regional level, two frameworks for arbitration are presented in brief below.

A. *North American Free Trade Agreement*

The North American Free Trade Agreement (NAFTA) between the United States, Canada, and Mexico came into force in 1994. Under chapter 11 of NAFTA, private investors are entitled to institute arbitral proceedings against the three NAFTA member states in the case of an alleged breach of NAFTA rules. The procedure is not presented in more detail here, mainly because the ICSID already provides a universal international forum offering investor-state arbitration. Some of the environmentally relevant case law is, however, summarized in brief.[134] Investor-state arbitration under NAFTA is also of special interest here because it was the first to acknowledge amicus curiae participation.[135]

A famous case under this regime involving environmental protection interests involved is *Methanex Corporation v. United States*.[136] California banned a gasoline additive called MTBE, and Methanex, the largest producer of methanol, which is

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[133] With regard to permanent arbitral tribunals see PICT synoptic chart at http://www.pict-pcti.org/publications/synoptic_chart/synop_c4.pdf; see also generally on arbitration in environmental matters Sands, *Principles of International Environmental Law* (2003), 212 et seq.

[134] For an in-depth discussion of cases in which environmental interests were at stake see Vinuales/Langer, "Managing Conflicts between Environmental and Investment Norms in International Law" in Kerbrat Y., Maljean-Dubois S. (eds.) *The Transformation of International Environmental Law*, Oxford, Hart Publishing (2011) and Krajewski/Ceyssens, "Internationaler Investitionsschutz und innerstaatliche Regulierung. Eine Untersuchung anhand der bilateralen Investitionsabkommen Deutschlands" (2007) 45 *AVR*, 180.

[135] Following the NAFTA example, U.S. and Canadian Model Bilateral Investment Treaties as well as ICSID Rules incorporated rules on amicus curiae submissions Tienhaara, "Third Party Participation in Investment Environment Disputes: Recent Developments" (2007) 16 *RECIEL*, 230, 231 et seq.

[136] *Methanex Corporation v. The United States of America*, NAFTA Arbitration (UNCITRAL rules), Award of 3 August 2005.

the essential oxygenating element of MTBE, initiated arbitral proceedings under Chapter 11 of NAFTA before an UNCITRAL arbitration tribunal. For the first time an arbitral tribunal in an investor-state dispute accepted written amicus curiae briefs, here submitted by the IISD and the Communities for a Better Environment/Earth Justice Institute. As a result, in 2003, while the *Methanex* case was still pending, the NAFTA Free Trade Commission issued the "Statement of the Free Trade Commission on non-disputing party participation" in which it clarified that the North American Free Trade Agreement does not limit a tribunal's discretion to accept written submissions from persons or entities that are not disputing parties. It also outlined a procedure for these cases. In *Glamis Gold Ltd v. United States* environmental NGOs filed amicus curiae briefs under these new provisions.[137]

In *Chemtura v. Canada*, Canada successfully invoked an international environmental agreement to justify a measure affecting foreign investment.[138] The plaintiff Chemtura manufactures lindane-based products and instituted NAFTA/UNCITRAL arbitral proceedings against Canada arguing that a suspension of the registration of certain lindane-based products violated NAFTA. Canada successfully argued, inter alia, that this measure is justified because of Canada's obligation under the 1998 Protocol on Persistent Organic Pollutants to the 1979 UNECE Convention on Long-Range Transboundary Air Pollution. According to Annex II of the Protocol, member states shall reassess certain uses of lindane and the measures against the plaintiff were a result of this review procedure.

In *S.D. Myers v. Canada*, the investor Myers, a U.S. waste disposal company, initiated arbitral proceedings against Canada claiming a violation of NAFTA Chapter 11 because Canada had taken a number of measures hindering the transboundary movement of waste.[139] Defending these measures, Canada, inter alia, referred to its obligations under the Basel Convention on the Control of Transboundary Movements of Wastes. The Basel Convention prohibits the export of hazardous waste to countries that are not party to the Convention. The tribunal concluded that Canada was not obliged under the Basel Convention to take the measure at issue and stated that

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[137] *Glamis Gold Ltd. v. The United States of America*, NAFTA Arbitration (UNCITRAL rules), Award of 16 May 2009. For more detailed information see Ishikawa, "NGO Participation in Investment Treaty Arbitration" in Vemuri (ed.), *Connected Accountabilities* (2009), 101.

[138] *Chemtura Corp. v. Government of Canada*, NAFTA Arbitration (UNCITRAL rules), Award of 2 August 2010. The tribunal dismissed all claims and ordered Chemtura to pay the entire cost of the arbitration proceedings (USD 688,219) and half of Canada's legal fees and expenses (CAD 2.89 million), see Tienhaara, "International Economy and the Environment" (2010) 21 *YbIEL*, 314 et seq. See also Vinuales/Langer, "Managing Conflicts between Environmental and Investment Norms in International Law" in Kerbrat Y., Maljean-Dubois S. (eds.) *The Transformation of International Environmental Law*, Oxford, Hart Publishing (2011) Nr. C.1.

[139] *S.D. Myers Inc. v. Government of Canada*, NAFTA Arbitration (UNCITRAL rules), Partial Award of 13 November 2000. See also *Vinuales/Langer, ibid.*

> where a party has a choice among equally effective and reasonably available alternatives for complying [...] with a Basel Convention obligation, it is obliged to choose the alternative that is [...] least inconsistent [...] with the NAFTA.[140]

B. *Dominican Republic-Central America Free Trade Agreement*

The Dominican Republic-Central America Free Trade Agreement (CAFTA-DR) is a free trade agreement between the United States, the Dominican Republic and five Central American countries (Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua). It entered into force between 2006 and 2009 for the respective countries and aims to further regional integration through enhanced trade and investment among its member states. Chapter ten of the agreement provides for investor-state dispute settlement under the ICSID Convention and Rules or UNCITRAL Rules.[141]

The investor-state arbitration under CAFTA-DR is worth mentioning here because it is the first regional arbitration procedure that provides explicitly for amicus curiae participation and transparency with respect to documents and hearings. Article 10.20(3) CAFTA-DR stipulates explicitly that an arbitral tribunal established under a CAFTA-DR dispute "shall have the authority to accept and consider amicus curiae submissions from a person or entity that is not a disputing party." Article 10.21(1) CAFTA-DR addresses the transparency of arbitral proceedings and states that documents such as, inter alia, the notice of intent, the notice of arbitration, pleadings, memorials, and briefs submitted to the tribunal, minutes or transcripts of hearings (where available), orders, awards, and decisions of the tribunal shall be made available to the public. Furthermore, hearings shall be conducted in public, Article 10.21(2) CAFTA-DR, with some exceptions for confidentiality reasons.

Under this provision, in *Pac Rim Cayman LLC v. Republic of El Salvador*[142] for the first time in history in an investor-state arbitration, the hearing on the preliminary objections held on 31 May and 1 June 2010 was transmitted live via internet feed.[143] The claimant, a mining company, alleged several breaches of CAFTA-DR because the respondent had failed to issue a mining concession and environmental permits in a manner arguably required under CAFTA-DR investment protection law.[144]

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[140] *S.D. Myers Inc. v. Government of Canada*, *ibid.* at 214, 215, 255, 256.

[141] Article 10.16(3) CAFTA-DR.

[142] ICSID Case No. ARB/09/12.

[143] Tienhaara, "International Economy and the Environment" (2010) 21 *YbIEL*, 319. At the time of writing, from 2 May until 5 May 2011, the hearing was also transmitted live via the internet.

[144] See ICSID Case No. ARB/09/12, Decision on the Respondent's Preliminary Objections under CAFTA Articles 10.20(4) and 10.20(5), 2 August 2010; see also Tienhaara, *ibid*. Another pending CAFTA/ICSID arbitration concerning the revocation of the claimant's environmental permits for mining activities is *Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. Republic of El Salvador*, ICSID Case No. ARB/09/17.

III. Compliance Committee of the Aarhus Convention

The goals envisaged in the 1998 UNECE Aarhus Convention are at the heart of this study. Article 1 of the Convention states its objective:

> In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention.

As underlined in its preamble, the Aarhus Convention was adopted in the spirit of Principle 1 of the Stockholm Declaration on the Human Environment and Principle 10 of the Rio Declaration on Environment and Development. It aims to strengthen accountability for and transparency in decision-making and especially public support for decisions on the environment. It thereby recognizes the stakeholder function of citizens and NGOs in protecting environmental interests. The following excerpts from the preamble to the Aarhus Convention highlight its central role in the context of this study. Parties have agreed to the Aarhus Convention

> recognizing the importance of fully integrating environmental considerations in governmental decision-making and the consequent need for public authorities to be in possession of accurate, comprehensive and up-to date environmental information, [...]
>
> [c]oncerned that effective judicial mechanisms should be accessible to the public, including organizations, so that its legitimate interests are protected and the law is enforced, [...]
>
> [c]onvinced that the implementation of this Convention will contribute to strengthening democracy in the region of the United Nations Economic Commission for Europe (ECE).

As of May 2011, the Aarhus Convention had 44 parties. Although it has been developed under the framework of the UNECE, it is also open for signature by states outside the ECE region.[145] The 2003 Protocol on Pollutant Release and Transfer Registers to the Aarhus Convention (PRTR Protocol) came into force in October 2009.

In Article 15 of the Aarhus Convention, the parties agreed to establish the first compliance review mechanism under an MEA that is directly accessible for members of the public:[146]

> The Meeting of the Parties shall establish, on a consensus basis, optional arrangements of a non-confrontational, non-judicial and consultative nature for reviewing compliance with the provisions of this Convention. These arrangements shall allow for appropriate public

[145] See Articles 17, 19(2) and (3) of the Aarhus Convention.

[146] Under the Alpine Convention, observers, including NGOs, have access to the Compliance Committee, but generally not members of the public. See Pineschi, "The Compliance Mechanism of the 1991 Convention on the Protection of the Alps and its Protocols" in Treves/Pineschi et al. (eds.), *Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements* (2009), 205, 210.

> involvement and may include the option of considering communications from members of the public on matters related to this Convention.

In 2002, the first meeting of parties (MOP) based on the mandate in Article 15 AC, established a Compliance Committee for the review of compliance by the parties with their obligations under the Convention and decided on its structure, function and review procedures.[147] The parties also elected the members of the first Compliance Committee.

As of May 2011, the Compliance Committee had met 32 times and dealt with 59 submissions on non-compliance. This amounts to an average of roughly seven cases per year. The implementation of the decisions of the MOP on compliance is followed up by the secretariat and the MOP itself in its subsequent meetings.[148]

A. *Function and Scope of Review*

Decision I/7 on review of compliance regulates the structure and function of the Compliance Committee as well as the procedures for the review of compliance.[149] According to paragraph 13 of Decision I/7 the Committee shall consider submissions, referrals, and communications brought before it, prepare at request of the MOP a report on compliance with or implementation of the provisions of the Convention, and monitor, assess, and facilitate the implementation of and compliance with reporting requirements under the Convention. Pursuant to paragraph 14 of Decision I/7 the Compliance Committee may examine compliance issues and make recommendations.

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[147] Decision I/7 on review of compliance, ECE/MP.PP/2/Add.8, 2 April 2004, available at http://www.unece.org/env/pp/documents/mop1/ece.mp.pp.2.add.8.e.pdf. For introductions to and discussion of this innovative compliance mechanism see Koester, "The Compliance Committee of the Aarhus Convention" (2007a) 37 *Environ Pol Law*, 83; Wates, "NGOs and the Aarhus Convention" in Treves/Di Rattalma et al. (eds.), *Civil Society, International Courts and Compliance Bodies* (2005), 167, 181 et seq.; Kravchenko, "The Aarhus Convention and Innovations in Compliance with Multilateral Environmental Agreements" (2007) 18 *Colo. J. Int'l Envtl. L. & Pol.*, 10 et seq.; Pitea, "Procedures and Mechanisms for Review of Compliance under the 1998 Aarhus Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters" in Treves/Pineschi et al. (eds.), *Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements* (2009b), 221; Koester, The Compliance Mechanism of the Aarhus Convention and the Cartagena Protocol on Biosafety: A Comparative Analysis of the Negotiation Histories and their Outcomes" in Treves/Pineschi et al. (eds.), *Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements* (2009), 277; Lavrysen, The Aarhus Convention: Between Environmental Protection and Human Rights" in Martens/Bossuyt et al. (eds.), Liège, Strasbourg, Bruxelles: parcours des droits de l'homme (2011), 647.

[148] Detailed information on all implementation procedures is available at http://www.unece.org/env/pp/CCimplementation.htm.

[149] Decision I/7 on review of compliance, ECE/MP.PP/2/Add.8, 2 April 2004, available at http://www.unece.org/env/pp/documents/mop1/ece.mp.pp.2.add.8.e.pdf. The Compliance Committee also published details of its modus operandi in a guidance document available at http://www.unece.org/env/pp/compliance/CC_GuidanceDocument.pdf.

Pending consideration of a compliance issue by the MOP, the Compliance Committee may provide advice and facilitate assistance regarding implementation in consultation with the party concerned.[150] If the party concerned agrees, the Committee may make recommendations and request the submission of a strategy, including a time schedule, regarding the achievement of compliance with the Convention and report on the implementation of such a strategy.[151] Moreover, subject to agreement with the party concerned, the Committee may, in cases of communications from the public, make recommendations to the party concerned on specific measures to address the matter raised in the communication.[152]

It is up to the MOP to decide upon appropriate measures to bring about full compliance with the Convention. Such measures encompass those available to the Compliance Committee and outlined above. Additionally, the MOP may issue declarations of non-compliance, issue cautions, suspend special rights and privileges accorded to the party concerned under the Convention, and, finally, take other non-confrontational, non-judicial, and consultative measures as appropriate.[153] The status of decisions of the MOP can be considered as legally binding upon the parties to the Convention.[154]

The scope of review of the Compliance Committee encompasses the provisions of the Aarhus Convention and, therefore, obligations of the parties under its three pillars regarding collection, dissemination, and access to environmental information (Articles 4 and 5 of the Convention), participation in decision-making processes (Articles 6, 7 and 8 of the Convention), and access to justice (Article 9 of the Convention) in environmental matters. The Compliance Committee stated in one of its decisions that it also

> take[s] into consideration general rules and principles of international law, including international environmental and human rights law.[155]

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[150] Paragraphs 36(a) and 37(a) of Decision I/7, *ibid.* See also Koester, "The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention)" in Ulfstein/Marauhn et al. (eds.), *Making Treaties Work* (2007b), 179, 203 et seq., 208 et seq.

[151] Paragraphs 36(b) and 37(b) and (c) of Decision I/7, *ibid.*

[152] Paragraphs 36(b) and 37(d) of Decision I/7, *ibid.*

[153] Paragraph 37 of Decision I/7, *ibid.*

[154] Koester, "The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention)" in Ulfstein/Marauhn et al. (eds.), *Making Treaties Work* (2007b), 179, 206; Wolfrum, "Means of Ensuring Compliance with and Enforcement of International Environmental Law" (1998), 272 *Recueil des Cours – Académie de Droit International*, 9, 149.

[155] Koester, "The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention)" in Ulfstein/Marauhn et al. (eds.), *Making Treaties Work* (2007b), 179, 207; Communication ACCC/C/2004/04 by Clean Air Action Group (Hungary).

B. *Institutional Arrangements*

The Compliance Committee currently has nine members serving in their personal capacity.[156] Only one national of the same state shall serve on the Committee at any time; diversity of geographical distribution and experience shall be considered in the election of the Committee.[157] Parties, signatories, and NGOs which fulfill the criteria outlined for observer status at an MOP[158] and promote environmental protection may nominate candidates for the Committee.[159] Two persons nominated by NGOs were elected to the first compliance committee.[160] The MOP elects members of the Committee by consensus or, if no consensual decision can be reached, by secret ballot.[161] Prior to taking up duties on the Committee, each member declares that he or she will fulfill his or her tasks impartially and conscientiously.[162] The Committee elects a Chairperson and a Vice-Chairperson.

The Compliance Committee developed a "Modus Operandi" with further details on procedures.[163] According to this Modus Operandi, all documents related to the Committee's work are publicly available on the Convention's website, including meeting agendas and reports, submissions, referrals, and communications from the public, preliminary determinations of admissibility, correspondence between the Committee or the Secretariat and the party concerned, draft and final findings.[164] To better cope with the workload, members of the Committee may take over a curatorship for specific communications.[165]

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[156] Paragraph 1 of Decision I/7 on review of compliance, ECE/MP.PP/2/Add.8, 2 April 2004. See list of members at http://www.unece.org/env/pp/ccMembership.htm. See also Kravchenko, "The Aarhus Convention and Innovations in Compliance with Multilateral Environmental Agreements" (2007) 18 *Colo. J. Int'l Envtl. L. & Pol.*, 12 et seq.

[157] Paragraphs 3 and 8 of Decision I/7, *ibid.*

[158] According to Article 10(5) of the Aarhus Convention, an NGO is entitled to participate as an observer at an MOP if it is qualified in the fields to which the Convention relates, has informed the Executive Secretary of the ECE of its wish to be represented at an MOP and unless at least one third of the Parties present at the meeting raise objections.

[159] For background information on the history of NGO nominations see Kravchenko, "The Aarhus Convention and Innovations in Compliance with Multilateral Environmental Agreements" (2007) 18 *Colo. J. Int'l Envtl. L. & Pol.*, 10 et seq.

[160] *Ibid.* at 12.

[161] Paragraph 7 of Decision I/7 on review of compliance, ECE/MP.PP/2/Add.8, 2 April 2004.

[162] Paragraph 11 of Decision I/7, *ibid.*

[163] Modus Operandi, General principles on the Committee's operation, published in Guidance Document on the Aarhus Convention Compliance Mechanism at 8 et seq., available at http://www.unece.org/env/pp/compliance/CC_GuidanceDocument.pdf. See also Koester, "The Compliance Committee of the Aarhus Convention" (2007a) 37 *Environ Pol Law*, 83, 85 and Marshall, "Two Years in the Life: The Pioneering Aarhus Convention Compliance Committee" (2006) 8 *Int'l Comm. L. Rev.*, 123.

[164] Modus Operandi, *ibid.* at 13. See also Koester, "The Compliance Committee of the Aarhus Convention" (2007a) 37 *Environ Pol Law*, 83, 85 et seq.; Kravchenko, "The Aarhus Convention and Innovations in Compliance with Multilateral Environmental Agreements" (2007) 18 *Colo. J. Int'l Envtl. L. & Pol.*, 24 et seq.

[165] Modus Operandi, *ibid.* at 10. See also Koester, *ibid.* at 86.

At each MOP the Compliance Committee reports on its activities and makes such recommendations as it deems appropriate. Parties make every effort to adopt the report by consensus. Reports of the Compliance Committee are available to the public.[166] Communication between the Aarhus Compliance Committee and compliance review bodies under other agreements is encouraged in order to enhance synergies.[167] Compliance procedures are without prejudice to dispute settlement procedures.[168]

C. *Access*

A compliance procedure under the Aarhus Convention can be triggered by a party to the Convention, the secretariat, or members of the public.[169] A party may make a submission regarding its own compliance (self-trigger) or the compliance by another party (party-to-party trigger). The secretariat may make a referral to the Committee if it becomes aware of a possible case of non-compliance, especially while reviewing the reports submitted by the parties. Before referring the case to the Committee, the secretariat tries to resolve the matter directly with the party. After a grace period of twelve months, or upon request up to a maximum of four years, members of the public may make communications on a party's compliance.[170] Members of the public comprise natural and legal persons, and their associations, organizations or groups.[171]

The Compliance Committee considers communications from members of the public unless they are anonymous, an abuse of right, manifestly unreasonable, or incompatible with Decision I/7 on review of compliance with the Convention.[172] As regards domestic remedies, the Committee should take them into account unless they are unreasonably prolonged or obviously do not provide an effective and sufficient means of redress.[173] The Compliance Committee informs the party concerned as soon as possible about the communication and the party has an obligation to respond as soon as possible but not later than five months after it received the

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[166] Paragraph 35 of Decision I/7 on review of compliance, ECE/MP.PP/2/Add.8, 2 April 2004. So far there were three MOPs and three reports of the Compliance Committee are published at http://www.unece.org/env/pp/ccDocuments.htm. The fourth MOP was held in Chisinau, Moldova from 29 June to 1 July, 2011.

[167] See Paragraph 39 of Decision I/7, *ibid*.

[168] Paragraph 38 of Decision I/7, *ibid*. See also Koester, "The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention)" in Ulfstein/Marauhn et al. (eds.), *Making Treaties Work* (2007b), 179, 183 et seq., 213.

[169] Paragraphs 15–18 of Decision I/7, *ibid.* Kravchenko, "The Aarhus Convention and Innovations in Compliance with Multilateral Environmental Agreements" (2007) 18 *Colo. J. Int'l Envtl. L. & Pol.*, 24 et seq.

[170] Paragraph 18 of Decision I/7, *ibid.*

[171] Article 2(4) of the Aarhus Convention.

[172] Paragraph 20 of Decision I/7 on review of compliance, ECE/MP.PP/2/Add.8, 2 April 2004.

[173] Paragraph 21 of Decision I/7, *ibid*.

information.[174] Since NGOs are directly involved in the compliance procedure there are no special rules for amici curiae participation.[175]

D. *Compliance Issues*

As of May 2011, the Compliance Committee had dealt with a total of 59 submissions and communications.[176] In one case a party filed a submission regarding the compliance of another party.[177] All 58 other cases were brought before the Committee through communications from members of the public. Neither the self-trigger nor the secretariat-trigger has been used to date. 16 of these cases were inadmissible, in 29 cases the Committee has issued findings, and 13 cases are still pending.[178]

In 18 of the 29 cases, in which the Committee has issued its findings, it found the party concerned to be in non-compliance with provisions of the Aarhus Convention and made recommendations.[179] The Compliance Committee found the following

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[174] Paragraphs 22 and 23 of Decision I/7, *ibid*.

[175] Koester, "The Compliance Committee of the Aarhus Convention" (2007a) 37 *Environ Pol Law*, 83, 86.

[176] Documentation on all cases is publicly available online at http://www.unece.org/env/pp/pubcom.htm. For a comprehensive report on the work of the compliance committee with regard to submissions, referrals, and communications concerning non-compliance with the Convention see Report of the Compliance Committee prepared for MOP4 held in Chisinau from 29 June–1 July 2011, advance edited copy, ECE/MP.PP/2011/11, April 2011, at 25–74. For an overview of the first fifteen cases dealt with by the Compliance Committee see Marhsall, "Two Years in the Life: The Pioneering Aarhus Convention Compliance Committee" (2006) 8 *Int'l Comm. L. Rev*., 123, XXX.

[177] Submission ACCC/S/2004/01 by Romania (Ukraine).

[178] See case survey at http://www.unece.org/env/pp/pubcom.htm.

[179] Communication ACCC/C/2004/01 by Green Salvation (Kazakhstan) (Articles 4 and 9 of the Convention); Communication ACCC/C/2004/02 by Green Salvation (Kazakhstan) (Article 6 of the Convention); Submission ACCC/S/2004/01 by Romania and communication ACCC/C/2004/03 by Ecopravo-Lviv (Ukraine) (Articles 3, 4, and 6 of the Convention); Communication ACCC/C/2004/05 by Biotica (Moldova) (Articles 3 and 4 of the Convention); Communication ACCC/C/2004/06 by Ms. Gatina, Mr. Gatin and Ms. Konyushkova (Kazakhstan) (Article 9 of the Convention); Communication ACCC/C/2004/08 by the Center for Regional Development/Transparency International Armenia, the Sakharov Armenian Human Rights Protection Center and the Armenian Botanical Society (Armenia) (Articles 4, 6, 7, and 9 of the Convention); Communication ACCC/C/2005/12 from the Alliance for the Protection of the Vlora Gulf (Albania) (Articles 3, 6, and 7 of the Convention); Communication ACCC/C/2005/15 by the NGO Alburnus Maior (Romania) (Articles 4 and 6 of the Convention); Communication ACCC/C/2006/16 by Association Kazokiskes Community (Lithuania) (Article 6 of the Convention); Communication ACCC/C/2008/23 submitted by Mr. Morgan and Mrs. Baker of Keynsham (UK) (Article 9 of the Convention); Communication ACCC/C/2008/24 submitted by the Association for Environmental Justice (Asociación para la Justicia Ambiental – AJA) (Spain) (Articles 4, 6, 9 of the Convention); Communication ACCC/C/2008/27 by Cultra Residents' Association (UK) (Article 9 of the Convention); Communication ACCC/C/2008/30 submitted by the NGO Eco-TIRAS International Environmental Association of River Keepers (Moldova) (Articles 3, 4, and 9 of the Convention); Communication ACCC/C/2008/33 by ClientEarth, the Marine Conservation Society and Mr. Robert Latimer (UK) (Articles 3 and 9 of the Convention); Communication ACCC/C/2009/36 by Spanish NGO "Plataforma Contra la Contaminación del Almendralejo" (Spain) (Articles 3, 4, and 9 of the Convention); Communication ACCC/C/2009/37 by members of the public (Belarus) (Articles 4 and 6 of the Convention); Communication ACCC/C/2009/41 submitted by Austrian NGO Global 2000/Friends of the Earth Austria, in collaboration with Friends of the Earth Europe (FoEE), Greenpeace

states to be in non-compliance: Kazakhstan and the UK in three cases each, Armenia, Moldova, and Spain in two cases each, and Albania, Belarus, Lithuania, Romania, Slovakia, and Ukraine in one case each. As regards the provisions of the Convention, seven cases of non-compliance have been identified with regard to Article 3 of the Convention (clear framework), nine cases with regard to Article 4 of the Convention (access to information), ten cases regarding Article 6 of the Convention (participation in decision-making procedures), and nine cases concerning Article 9 of the Convention (access to justice).[180] In the other 11 cases, the Compliance Committee found that the party concerned complies with the Convention.[181]

The Compliance Committee addresses its findings and recommendations to the MOP. In endorsing the findings and recommendations of the Compliance Committee, the MOP becomes the body ultimately finding a party concerned to be in non-compliance and formulating recommendations with respect to the party concerned. As of May 2011, all findings and recommendations of the Compliance Committee had been adopted by the MOP, sometimes with amendments. The implementation of measures referred to in decisions on compliance is closely and transparently followed up by the Compliance Committee with support of the Secretariat and also the MOP.[182] Three communications are presented in more detail below.

Slovakia and International, Za Matky Zem and VIA IURIS (Slovakia) (Article 6 of the Convention); Communication ACCC/C/2009/43 by Armenian NGO Transparency International Anti-corruption Centre, in collaboration with the associations Ecodar and Helsinki Citizens' Assembly of Vanadzor (Armenia) (Articles 3 and 6 of the Convention).

[180] For a complete overview differentiating between the specific Articles and paragraphs of the Convention, as well as alleged and established non-compliance see Report of the Compliance Committee prepared for MOP4 held in Chisinau from 29 June–1 July 2011, advance edited copy, ECE/MP.PP/2011/11, April 2011, Annex.

[181] Communication ACCC/C/2004/04 by Clean Air Action Group (Hungary); Communication ACCC/C/2005/11 by Bond Beter Leefmilieu Vlaanderen VZW (Belgium); Communication ACCC/C/2005/13 submitted by Clean Air Action Group (Hungary); Communication ACCC/C/2005/17 submitted by the Lithuanian NGO Association Kazokiskes Community (European Community); Communication ACCC/C/2006/18 submitted by Mr. Søren Wium-Andersen (Denmark); Communication ACCC/C/2007/21 submitted by the Albanian NGO Civic Alliance for the Protection of the Bay of Vlora (European Community); Communication ACCC/C/2007/22 submitted by L'Association de Défense et de Protection du Littoral du Golfe de Fos-sur-Mer, Le Collectif Citoyen Santé Environnement de Port-Saint-Louis-du-Rhône and Fédération d'Action Régionale pour l'Environnement (FARE Sud) (France); Communication ACCC/C/2008/26 submitted by the NGO Nein Ennstal Transit-Trasse Verein für menschen- und umweltgerechte Verkehrspolitik (NETT) (Austria); Communication ACCC/C/2008/29 submitted by Zabianka Housing Cooperative and Ms. Maria Cholewińska, president of the Protest Committee (Poland) (no conclusion could be reached for lack of information); Communication ACCC/C/2008/35 by Caucasus Environmental NGO Network (CENN) (Georgia); Communication ACCC/C/2009/38 by Road Sense (UK).

[182] The implementation process is documented in detail at http://www.unece.org/env/pp/CCimplementation.htm.

1. *Green Salvation—Environmental Information—Kazakhstan*

The first communication considered by the Compliance Committee under the Aarhus Convention was submitted by the Kazakh NGO Green Salvation in February 2004.[183] In 2001, the National Atomic Company Kazatomprom proposed a draft law to the Parliament which would allow the import into and disposal in Kazakhstan of foreign low and medium level radioactive waste and referred to a feasibility study justifying the proposal. Green Salvation requested Kazatomprom to provide access to the documents and calculations on which the proposal was based. Kazatomprom did not respond and the NGO filed lawsuits with several national courts. All but one of the cases was dismissed for lack of jurisdiction. One court decided it has jurisdiction but dismissed the case for lack of standing. The court argued that Green Salvation could only represent interests of its members and not act in its own name. Several appeals were unsuccessful. The communicant therefore claimed before the Aarhus Compliance Committee that its rights to information and access to justice had been violated.[184]

The Committee found Kazakhstan not to be in compliance with Articles 4(1) and (2), 9(1) and 3(1) of the Aarhus Convention.[185] The finding is based on the following reasons. For Kazakhstan, the Convention entered into force on 30 October 2001 and since then, under Kazakhstan's legal system, has been directly applicable by the courts.[186] Green Salvation qualifies as a member of the public according to Article 2(4) of the Convention and the National Atomic Company Kazatromprom, wholly owned by the state and performing administrative functions under national law, is a public authority within the scope of Article 2(2)(b) and (2)(c) of the Convention.[187] The type of information requested, in particular the feasibility study on the import and disposal of radioactive waste, is environmental information under Article 2(3)(b) of the Convention. A request for information does not require reasons to be given; such a requirement is explicitly ruled out by Article 4(1)(a) of the Convention.[188] Consequently, in not responding to the NGO's request, Kazakhstan was not complying with its obligations under Article 4(1) and (2) of the Convention. Furthermore, the Committee found that the NGO as such must have access to a review procedure, that the subsequent court procedure was not expeditious and that, therefore, the

[183] Communication ACCC/C/2004/01 submitted by Green Salvation (Kazakhstan).

[184] For full documentation of the case, including all responses from the party concerned, see http://www.unece.org/env/pp/compliance/Compliancecommittee/01TableKazakhstan.html.

[185] Findings and Recommendations with regard to compliance by Kazakhstan with the obligations under the Aarhus Convention in the case of information requested from Kazatomprom, Communication ACCC/C/2004/01 by Green Salvation (Kazakhstan), ECE/MP.PP/C.1/2005/2/Add.1, 11 March 2005 at 25–27.

[186] *Ibid.* at 13 and 14.

[187] *Ibid.* at 16 and 17.

[188] *Ibid.* at 20. In 2004, the Ministry of the Environment of Kazakhstan and the Organization for Security and Co-operation in Europe (OSCE) had even issued a memo clearly stating that a request for information does not need to be justified; *ibid.*

party concerned was also not in compliance with Article 9(1) of the Convention.[189] Finally, the Committee found Kazakhstan not in compliance with Article 3(1) of the Convention because of lack of clear regulation and guidance and thus a clear, transparent, and consistent framework for implementation of the provisions of the Aarhus Convention.[190]

The Committee recommended to the MOP, inter alia, to request the Government of Kazakhstan to submit a strategy, including a time schedule, for implementing the Convention's provisions, which might include capacity-building activities for the judiciary and public officials.[191] It also recommended to the MOP to

> [r]equest the secretariat or, as appropriate, the Compliance Committee, and invite relevant international and regional organizations and financial institutions, to provide advice and assistance to Kazakhstan as necessary in the implementation of these measures.[192]

In 2005, the second Meeting of the Parties (MOP2) endorsed the findings of the Compliance Committee.[193] In 2008, reviewing the implementation of the findings MOP3 took note of Kazakhstan's introduction of detailed procedures for access to information, provisions on access to justice in a new Environmental Code, as well as initiatives of the Supreme Court of Kazakhstan on capacity-building for the judiciary and other legal professionals.[194]

2. *ClientEarth and Others—Costs of Access to Justice—UK*

In December 2008, ClientEarth, the Marine Conservation Society and Mr. Robert Latimer filed a communication with the Compliance Committee regarding, inter alia, the costs of public interest law suits in environmental matters in England and Wales.[195] The communicants alleged that the UK was not in compliance with Article 9(2)–(5) of the Aarhus Convention. As regards Article 9(4) of the Convention, the communicants argued that in respect of the laws of England and Wales time limits for filing an application for judicial review were uncertain, unfair and overly restrictive and, furthermore, that access to justice was "prohibitively expensive, in particular with regard to the costs awarded against losing claimants and the requirement for claimants to undertake to cover defendants' losses to qualify for injunctive relief."[196]

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[189] *Ibid.* at 21 and 22.
[190] *Ibid.* at 23.
[191] *Ibid.* at 28(a).
[192] *Ibid.* at 28(c).
[193] Decision II/5a at MOP2 (2005), ECE/MP.PP/2005/2/Add.7, 13 June 2005.
[194] Decision III/6c at MOP3 (2008), ECE/MP.PP/2008/2/Add.11, 28 September 2008 at 1 and 2.
[195] Communication ACCC/C/2008/33 by ClientEarth, the Marine Conservation Society and Mr. Robert Latimer (UK).
[196] Findings and recommendations with regard to communication ACCC/C/2008/33 concerning compliance by the United Kingdom of Great Britain and Northern Ireland, ECE/MP.PP/C.1/2010/6/Add.3, 14 February 2011 at 23.

The Compliance Committee partly followed the communicants' allegations and found the UK not to be in compliance with Article 9(4) of the Aarhus Convention because of the prohibitively expensive costs of judicial review and unclear time limits.[197] For lack of a clear, transparent, and consistent framework for implementation of Article 9 of the Convention, the Committee also found the UK not in compliance with Article 3(1) of the Convention.[198] Consequently, the Committee recommended that the UK:

> (a) Review its system for allocating costs in environmental cases within the scope of the Convention and undertake practical and legislative measures to overcome the problems identified in paragraphs 128–136 above to ensure that such procedures:
> (i) Are fair and equitable and not prohibitively expensive; and
> (ii) Provide a clear and transparent framework;
> (b) Review its rules regarding the time frame for the bringing of applications for judicial review identified in paragraph 139 above to ensure that the legislative measures involved are fair and equitable and amount to a clear and transparent framework.[199]

The case is also interesting because in April 2011, the European Commission issued a press release to the effect that it intended to take the UK to the European Court of Justice on basically the same grounds.[200] To implement the Aarhus Convention, the European Union adopted Directive 2003/35/EC which amended the EIA and IPPC Directive and inserted the provision that review procedures "shall be fair, equitable, timely and not prohibitively expensive". During the non-confrontational stage of the infringement procedure, the UK authorities had already agreed to draft new rules but, in view of the fact that, despite many proposals and discussions, no new rules are in place as yet, the Commission decided to refer the case to the ECJ. This case thus serves as another example of the way in which the European Commission and the European Court of Justice indirectly contribute to the enforcement of international environmental law.

3. *ClientEarth—Standing for NGOs at ECJ—EU*

In December 2008, NGOs filed a communication for the third time alleging that the European Union was not in compliance with the provisions of the Aarhus Convention. On the two earlier occasions, the Compliance Committee did not find a case of non-compliance.[201] With regard to this third communication, the recently published

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[197] *Ibid*. at 141 and 143.
[198] *Ibid*. at 144.
[199] *Ibid.* at 145.
[200] Press Release, IP/11/439, Brussels, 6 April 2011, Environment: Commission takes UK to court over excessive cost of challenging decisions.
[201] See Communication ACCC/C/2005/17 submitted by the Lithuanian NGO Association Kazokiskes Community (European Community) and Communication ACCC/C/2007/21 submitted by the Albanian NGO Civic Alliance for the Protection of the Bay of Vlora (European Community).

draft findings of the Compliance Committee are less clear.[202] The communicant, ClientEarth,[203] alleged, inter alia, that the EU was not in compliance with Article 9(2)–(5) of the Aarhus Convention. ClientEarth argued that, due to the standing criterion "individual concern", individuals and NGOs could effectively not challenge decisions of EU institutions before the CFI or ECJ.[204] In its draft findings the Committee focused on this allegation and examined the jurisprudence of the EU Courts on access to justice in environmental matters.[205] It differentiated between criteria for access to review procedures directly before the EU Courts and review procedures that reach the EU Courts through the courts in the member states.[206]

The criteria for standing directly before the EU Courts are referred to as the "Plaumann test" and require that a person is either the addressee of a decision of an EU institution or "individually concerned", meaning that a decision affects a person in an individual manner distinguishable from all other persons.[207] The Committee stated that

> [t]he consequences of applying the Plaumann test to environmental and health issues is that in effect no member of the public is ever able to challenge a decision or a regulation in such case before the ECJ.[208]

It also found that such a narrow interpretation is not required by Article 263(4) TFEU (ex-Article 230 TEC) and that it is within the scope of discretion of the EU Courts to broaden the criteria for standing in a way that they comply with Article 9(3) of the Aarhus Convention.[209] The Committee considered with regret that the entry into force of the Aarhus Convention was not reflected in a change of the EU Courts' interpretation of the standing criteria.[210] As regards access to the EU Courts

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[202] Findings and recommendations of the Compliance Committee with regard to communication ACCC/C/2008/32 (Part I) concerning compliance by the European Union, adopted by the Compliance Committee on 14 April 2011, at 94 (at the time of writing an official UN Document was not yet available). For an NGO report assessing compliance of the EU with Article 9 of the Aarhus Convention see Pallemaerts, *Compliance by the European Community with its Obligations on Access to Justice as a Party to the Aarhus Convention*, Institute for European Environmental Policy, IEEP Report for WWF-UK (June 2009).

[203] The communication was supported by a number of entities, namely Asociación para la Justicia Ambiental (AJA), Bond Beter Leefmilieu (BBL), CEE Bankwatch Network (Bankwatch), Ecologistas en Acción, France Nature Environment (FNE), Friends of the Irish Environment, Greenpeace International, International Fund for Animal Welfare (IFAW), Instituto Internacional de Derecho y Medio Ambiente (IIDMA), Naturschutzbund Deutschland e.V. – NABU, Oceana, Oekobuero and SOS Grand Bleu, and by one private individual, Ludwig Krämer, former DG Environment, European Commission and senior counsel of ClientEarth.

[204] Findings and recommendations of the Compliance Committee with regard to communication ACCC/C/2008/32 (Part I) concerning compliance by the European Union, adopted by the Compliance Committee on 14 April 2011 at 2.

[205] *Ibid*. at 10. For the list of cases that were scrutinized see paragraph 3.

[206] *Ibid*. at 75.

[207] *Ibid*. at 20.

[208] *Ibid*. at 86.

[209] *Ibid.*

[210] *Ibid*. at 87.

via national courts of the member states, the Committee recognized this track as an important element of the system of judicial review in the European Union, but also stated that this cannot compensate for denying direct access to the EU Courts.[211]

In its draft findings the Committee stated as follows:

> With regard to access to justice by members of the public, the Committee is convinced that if the jurisprudence of the EU Courts, as evidenced by the cases examined, were to continue, unless fully compensated for by adequate administrative review procedures, the Party concerned would fail to comply with article 9, paragraphs 3 and 4, of the Convention.[212]

In its recommendations the Committee considered that a new direction of the jurisprudence of the EU Courts should be established to ensure compliance with the Aarhus Convention and recommended that all relevant EU institutions take steps to overcome the shortcomings identified.[213]

E. *Evaluation*

The compliance mechanism established under the Aarhus Convention has several features that are unique in their combination in comparison to other international law enforcement procedures. The most notable ones are that members of the public, including NGOs, can submit communications to the Compliance Committee, that NGOs may nominate members of the Compliance Committee, and that those members serve in their personal capacities and do not represent the interests of states. Furthermore, the degree of transparency of all communications under the compliance mechanism, including the clear, up-to-date, and comprehensive documentation on all compliance issues dealt with by the Committee, on the Convention's website seem unprecedented in international law enforcement procedures.[214] In comparison to other compliance review bodies established under MEAs, the Aarhus Compliance Committee has a significantly higher workload due to the direct access available to members of the public.

1. *Function and Scope of Review*

The Compliance Committee oversees implementation of and compliance with the Convention and reports to the MOP. Its main sources of information for fulfilling its task are the implementation reports submitted by the parties and compliance issues that can be brought to the Committee's attention through parties, the secretariat, or members of the public. Through these varied sources of information, the Committee

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[211] *Ibid*. at 90.
[212] *Ibid*. at 94.
[213] *Ibid*. at 97 and 98.
[214] See also Koester, "The Compliance Committee of the Aarhus Convention" (2007a) 37 *Environ Pol Law*, 83, 85 et seq.

is in a good position to identify shortcomings in the implementation of and compliance with the Convention.

As regards the tools to address such shortcomings, the Committee is merely equipped with cooperative measures.[215] To avoid longer periods of inaction, the Committee can provide advice and assistance even during intersessional periods provided that the party concerned agrees. In a cooperative spirit it may support the party concerned in drawing up a strategy and time schedule to come into compliance, including capacity-building measures. The success of such an undertaking, however, entirely depends on the cooperation of the party concerned. More confrontational measures are in the hands of the MOP. As the case files and the MOP decisions on general issues of compliance show, the vast majority of parties concerned cooperate during the pending compliance review procedure and also at the stage of implementation of decisions.[216]

Concerning the scope of review, in compliance issues the Compliance Committee focuses on the control of compliance with the three pillars and Article 3 (clear framework of implementation) of the Convention. Its case load has been more or less equally distributed between the three pillars. In its decisions, the Committee may also take into consideration other international (environmental) law. While ensuring carefully that the minimum standards set by the Aarhus Convention are met, the Committee leaves broad discretion to the parties as to how they accommodate the Aarhus provisions in their very different respective legal orders.

2. *Institutional Arrangements*

Compared to compliance committees under other MEAs, the members of the Aarhus Compliance Committee are actually independent. None of the members is a civil servant and all expenses are paid through neutral Aarhus funds.[217] This is a crucial characteristic safeguarding objectivity in dealing with compliance issues. The fact that members of the Committee may be also nominated by NGOs is a further unprecedented feature that strengthens the involvement of civil society and the transparency and independence of the compliance review procedure.

Due to the considerable caseload of the Compliance Committee, the number of members has already been increased from eight to nine.[218] The practice of

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[215] Koester, "The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention)" in Ulfstein/Marauhn et al. (eds.), *Making Treaties Work* (2007b), 179, 203 et seq.

[216] See case files at http://www.unece.org/env/pp/pubcom.htm and, for example, the latest Draft decision IV/9 on general issues of compliance prepared for MOP4, ECE/MP.PP/2011/L.11, 13 April 2011, at 7, 8, 11, 12. See also Koester, "The Compliance Committee of the Aarhus Convention" (2007a) 37 *Environ Pol Law*, 83, 92.

[217] Interview with Jeremy Wates, former Secretary to the Aarhus Convention, on 15 May 2011.

[218] Decision II/5, General Issues of Compliance, Addendum to Report of the Second Meeting of the Parties adopted at MOP2 held on 25–27 May 2005, ECE/MP.PP/2005/2/Add.6, 13 June 2005, at 12.

curatorship has proven to be an effective tool for dealing with the compliance issues. Nevertheless there is a growing need for support, especially in preparing the decision through the gathering of all relevant facts and legal aspects. This can be done through more support from the Secretariat but requires sufficient staff and financial resources.[219]

The clear, up-to-date, and comprehensive online documentation on all compliance issues significantly contributes to the transparency of the Aarhus compliance mechanism and therefore its accountability. Also the follow-up on implementation of the decisions on compliance is well documented online and makes the behavior of a party found to be in non-compliance visible. For a system whose success is built largely on cooperation, publicity is a crucial complementary feature to the measures that can be taken by the Compliance Committee and the MOP in ensuring the system's credibility.

The Aarhus compliance mechanism has been the first one set up with a clause that specifically addresses the issue of synergies between compliance procedures under international agreements.[220] The identification and development of synergies are important for several reasons. The exchange of information and experience enables the different compliance mechanisms to learn from each other; good coordination can increase the efficiency of work under the different compliance committees, and close cooperation contributes to developing and maintaining a coherent international legal order. The importance of the topic is particularly evident when the same factual circumstances give rise to compliance issues under different MEAs or other international review mechanisms. For example, two cases dealt with by the Aarhus Compliance Committee were also dealt with by other international compliance review procedures.[221] In such cases it seems advisable to share the workload

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[219] Interview with Jeremy Wates, former Secretary to the Aarhus Convention, on 15 May 2011. See also Draft decision IV/9 on general issues of compliance prepared for MOP4, ECE/MP.PP/2011/L.11, 13 April 2011, at 15.

[220] Decision I/7 on review of compliance, ECE/MP.PP/2/Add.8, 2 April 2004, at 39. It states: "In order to enhance synergies between this compliance procedure and compliance procedures under other agreements, the Meeting of the Parties may request the Compliance Committee to communicate as appropriate with the relevant bodies of those agreements and report back to it, including with recommendations as appropriate. The Compliance Committee may also submit a report to the Meeting of the Parties on relevant developments between the sessions of the Meeting of the Parties." See also Pitea, "Multiplication and Overlap of Non-Compliance Procedures and Mechanisms: Towards Better Coordination?" in Treves/Pineschi et al. (eds.), *Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements* (2009a), 439, 443.

[221] One case concerned the authorization of the construction of a canal connecting the Black Sea and the Bystroe arm of the Danube delta by the Ukrainian government. The Romanian government claimed, inter alia, that Ukraine had not complied with its obligations under the UNECE Espoo Convention to conduct a proper transboundary environmental impact assessment. The case was dealt with by the Implementation Committee of the Espoo Convention and the Compliance Committee of the Aarhus Convention and is an instructive example of overlaps and how to deal with them. For example, the Secretariats of both MEAs took part in a fact-finding mission to Ukraine led by the European Union. For a recent joint initiative of Moldova, Ukraine, and Romania

with respect to fact finding and avoid diverging legal interpretations where the cases overlap. Thus, for several reasons synergetic work between different international compliance review procedures is recommended. As noted by *Pitea*, the clause on synergies in the Aarhus compliance mechanism makes the procedure rather cumbersome, because it requires the MOP to request the Compliance Committee to institute such communication with other bodies. A clause on synergies that allows the Committee to directly contact other compliance review bodies would allow for more effective cooperation and coordination.[222]

Compliance mechanisms established under newer MEAs in the UNECE region follow the valuable example of the Aarhus compliance mechanism in many respects and thus contribute to more accountability in compliance review procedures and effective control of compliance with obligations under MEAs.[223]

3. *Excursion: Compliance Review and Synergies under Global MEAs*

On the global level, an interesting recent development in this context is the joint work on synergies under the three UNEP conventions dealing with hazardous substances.[224] This work on synergies also encompasses the compliance mechanisms

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under the UNECE to reconcile industrial activities and environmental protection in the Danube Delta see UNECE press release from 12 May 2011 at http://www.unece.org/index.php?id=24007. The other case dealt with the construction of an industrial and energy park near the city of Vlore in Albania. An Albanian NGO filed a communication with the Aarhus Compliance Committee alleging that the Albanian authorities had failed to properly inform the public and provide for public participation in the planning procedure. Since the project received funding from, among others, the World Bank and the European Bank for Reconstruction and Development (EBRD), the NGO also submitted the case to the Inspection Panel of the World Bank and the Independent Recourse Mechanism of the EBRD. For more in-depth information on those cases in the context of synergies see Pitea, *ibid.* at 440, 445 et seq. For an overview on UNECE activities in the field of environmental policy see http://www.unece.org/env/welcome.html.

[222] Pitea, *ibid.* at 444. According to *Pitea* the drafts on the compliance mechanisms under the Rotterdam PIC Convention and the Stockholm POPs Convention, two global conventions on chemicals, provide for synergy clauses that would allow for such direct communication, *ibid.*

[223] See compliance mechanism established under the 1999 Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes, in force 4 August 2005, Decision I/2, Review of Compliance, in ECE/MP.WH/2/Add.3, 3 July 2007; and compliance mechanism under the 2003 Protocol on Pollutant Release and Transfer Registers to the 1998 Aarhus Convention, in force 8 October 2009, Decision I/2, Review of Compliance, in ECE/MP.PRTR/2010/2/Add.1, 10 November 2010. For an overview of both mechanisms see Pitea, "Procedures and Mechanisms for Review of Compliance under the 1999 Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes" in Treves/Pineschi et al. (eds.), *Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements* (2009c), 251. and Pitea, "Procedures and Mechanisms for Review of Compliance under the 2003 Protocol on Pollutant Release and Transfer Registers to the 1998 Aarhus Convention" in Treves/Pineschi et al. (eds.), *Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements* (2009d), 263.

[224] Information on this initiative is available at http://archive.basel.int/synergies/index.html. See also Pitea, "Multiplication and Overlap of Non-Compliance Procedures and Mechanisms: Towards Better Coordination?" in Treves/Pineschi et al. (eds.), *Non-Compliance Procedures and*

that are established under the 1998 Basel Convention and in the process of being established under the 1998 Rotterdam and 2001 Stockholm Conventions. In 2008, an ad hoc joint working group on enhancing cooperation and coordination among the three conventions issued draft recommendations.[225] With regard to the compliance mechanisms the joint working group

> [r]ecommends that once compliance/non-compliance mechanisms are established under the Basel, Rotterdam and Stockholm Conventions the Conferences of the Parties to all three conventions explore the possibilities for enhancing coordination among the agreed mechanisms by, for example, convening back-to-back meetings, establishing a single body to administer the three mechanisms and encouraging the appointment of members to the body or bodies to administer the mechanisms of those who have experience with other compliance mechanisms;
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> [r]equests the Secretariats of the Basel, Rotterdam and Stockholm Conventions to exchange information on progress made on the operation or establishment of the compliance/non-compliance mechanisms established or under negotiation under the three conventions.[226]

The identical so-called synergies decisions adopted by the COPs under the respective conventions in 2008 and 2009 incorporated the exact wording of the second paragraph of the recommendation. As regards the first paragraph cited above, however, the COPs deleted the wording on back-to-back meetings and establishment of a single body to administer the three mechanisms. The examples of enhanced coordination to facilitate compliance are now

> provision of joint secretariat support for the committees, the attendance of the chairs of the three committees at each other's meetings or encouraging the appointment of members to the committees who have experience with other compliance mechanisms.[227]

In 2003, COP6 of the Basel Convention established an Implementation and Compliance Committee and, following the synergies decisions, the Secretariat of the Basel Convention shared the outcomes of the Committee's sessions so far held with the Secretariats of the Stockholm and Rotterdam Conventions.[228] The COP5 under the

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Mechanisms and the Effectiveness of International Environmental Agreements (2009a), 439, 449 et seq.

[225] Draft recommendations of the ad hoc joint working group on enhancement of cooperation and coordination amongst the Basel, Rotterdam and Stockholm Conventions, UNEP/FAO/CHW/RC/POPS/JWG.3/2, Annex II, 29 February 2008, available at http://ahjwg.chem.unep.ch/documents/3rdmeeting/ahjwg03_02.pdf.

[226] *Ibid*. at 15 and 16.

[227] See respective COP decisions: Decision IX/10 under Basel Convention, Decision RC-4/11 under Rotterdam Convention, and Decision SC-4/34 under Stockholm Convention, at section II.B, available at http://archive.basel.int/synergies/index.html.

[228] Regarding the compliance mechanism under Basel Convention see Decision VI/12, Establishment of a mechanism for promoting implementation and compliance, UNEP/CHW.6/40, 10 February 2003, Appendix, Mechanisms for Promoting Implementation and Compliance, Terms of Reference, at p. 45 et seq., available at http://archive.basel.int/meetings/cop/cop6/english/Report40e.pdf. On the work that has been done under the three synergies decisions see Report on joint activities carried out by the secretariats of the Basel, Rotterdam and Stockholm conventions

Stockholm Convention in April 2011 did not adopt a compliance mechanism. Under the Rotterdam Convention the adoption of a compliance mechanism is scheduled for the COP5 in June 2011.

Thus, it remains to be seen how the work on synergies related to compliance control under the three UNEP conventions dealing with hazardous substances and wastes develops once compliance mechanisms are established under all three regimes. For the moment it can be concluded that it is very difficult to install compliance review mechanisms under global MEAs at all. The compliance mechanisms established under the Basel Convention and proposed under the Rotterdam Convention also significantly vary from the compliance mechanism agreed to under the Aarhus Convention.[229] They do not provide for actual independence of the members of the compliance committee, NGO nomination of members of the compliance committee, participation of NGOs as amici, NGOs as communicants of compliance issues, or participation of NGOs as observers at the meetings of the compliance committees.[230] Thus, they lack many elements that make the Aarhus Compliance Committee a transparent and accountable compliance review body able to learn of and effectively deal with compliance issues under an MEA.

Bearing in mind the slow progress in developing compliance mechanisms under these three global MEAs, parties' reluctance to equip compliance review bodies under these global conventions with progressive features, and the remaining doubts as to whether the joint administration of different compliance mechanisms actually contributes to better and more efficient compliance control, it seems doubtful that joint compliance review under MEAs will be tested in the near future. In general, the view of *Pitea* is shared here, that the establishment of one compliance mechanism responsible for compliance review of all (or many) MEAs is not only politically

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during 2009 and 2010, UNEP/POPS/COP.5/INF/14, 8 March 2011, available at http://archive.basel.int/synergies/documents/forCOPs/i14e.pdf.

[229] For a short overview on the negotiation of NGO triggers in other MEAs see Kravchenko, "The Aarhus Convention and Innovations in Compliance with Multilateral Environmental Agreements" (2007) 18 *Colo. J. Int'l Envtl. L. & Pol.*, 19 et seq. For a comprehensive discussion of compliance mechanisms under all bigger universal and regional MEAs see Treves/Pineschi et al. (eds.), *Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements* (2009).

[230] With regard to the compliance mechanism established under the Basel Convention see Decision VI/12, available at http://archive.basel.int/meetings/cop/cop6/english/Report40e.pdf. For the draft compliance mechanism proposed for adoption at COP6 in May 2013 under the Rotterdam Convention see Procedures and institutional mechanisms for determining non-compliance with the provisions of the Rotterdam Convention and for the treatment of parties found to be in non-compliance, draft text annexed to decision RC-5/8, in UNEP/FAO/RC/COP.6/13, 25 October 2012, Annex, available at http://www.pic.int/TheConvention/ConferenceoftheParties/Meetingsanddocuments/COP6/tabid/2908/language/en-US/Default.aspx. Despite its eight years of existence, the Implementation and Compliance Committee of the Basel Convention has not yet dealt with a compliance issue. For an overview and critique see Fodella, "Mechanism for Promoting Implementation and Compliance with the 1989 Basel Convention on the Transboundary Movements of Hazardous Wastes and Their Disposal" in Treves/Pineschi et al. (eds.), *Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements* (2009), 33.

unrealistic but also unsuitable.[231] Given the political realities, the plurality rather than the unification of compliance mechanisms makes it possible to test innovative procedures and ensure the further improvement of compliance mechanisms with a view to the effective handling of environmental problems and democratic governance.[232]

4. *Access*

The public trigger established under the Aarhus compliance mechanism is key to the Committee's activity. As of May 2011, 58 out of a total of 59 compliance issues had been initiated through communications from members of the public. Despite this high number of communications from the public, none of the parties has so far made use of the opt-out clause according to which they may declare that they are unable to accept the consideration of such communications by the Committee during a maximum period of four years.[233] Communications have been filed from a range of different types of members of the public, including individuals, project-related NGOs, NGOs with a broader field of activity, and cross-regional "umbrella" organizations of NGOs.

Out of the 58 communications, only 16 have been found inadmissible and the observation by the Chair of the Aarhus Compliance Committee, *Veit Koester*, in 2007 still appears to hold true: the public trigger "has been used, but not misused, and communications have usually been well prepared and well reasoned."[234]

Following the Aarhus example, the compliance mechanisms adopted by parties under two newer MEAs under UNECE auspices, the 1999 Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes and the 2003 Protocol on Pollutant Release and Transfer Registers to the 1998 Aarhus Convention, also include a public trigger.[235]

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[231] Pitea, "Multiplication and Overlap of Non-Compliance Procedures and Mechanisms: Towards Better Coordination?" in Treves/Pineschi et al. (eds.), *Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements* (2009a), 439, 441 et seq. Here it is also important to note that MEAs are currently administered under different umbrellas, such as UNEP or the UNECE, or are acting somewhat independently but under a UN umbrella (UNFCCC and the Kyoto Protocol).

[232] See also *ibid*.

[233] Pitea, "Procedures and Mechanisms for Review of Compliance under the 1998 Aarhus Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters" in Treves/Pineschi et al. (eds.), *Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements* (2009a–b), 221, 228; Kravchenko, "The Aarhus Convention and Innovations in Compliance with Multilateral Environmental Agreements" (2007) 18 *Colo. J. Int'l Envtl. L. & Pol.*, 17.

[234] Koester, "The Compliance Committee of the Aarhus Convention" (2007a) 37 *Environ Pol Law*, 83, 92.

[235] See compliance mechanism established under the 1999 Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes, in force 4 August 2005, Decision I/2, Review of Compliance, in ECE/MP.WH/2/Add.3, 3 July 2007; and compliance mechanism under the 2003 Protocol on Pollutant Release and Transfer

5. *Compliance Issues*

The number of compliance issues dealt with by the Aarhus Compliance Committee is significantly higher than that of any other compliance review body established under an MEA. In about one third of the admissible cases dealt with by the Compliance Committee so far, the MOP, following the recommendations of the Committee, found the party concerned to be in compliance with the Convention; in about two thirds of the cases it found that the party concerned was not in compliance with certain provisions of the Convention. This indicates that the low or close to zero caseload of other compliance committees is not due to the fact that all parties to the respective MEA are in compliance with its provisions but rather highlights again the reluctance of states, and to a certain degree also secretariats, to refer cases to a compliance committee. The case load and the Committee's findings show clearly that environmental law can only be effectively enforced through a court or compliance with it controlled by a committee if representatives of environmental interests may trigger the procedure.

Parties concerned have found to be in non-compliance with all three pillars of the Convention and the framework provision of Article 3 of the Convention with a rather equal share. As of May 2011 the geographical distribution of the parties concerned found to be in non-compliance with the Convention is more balanced than in the beginning where hardly any EU country or the EU itself was subject to a compliance procedure.[236] Out of the 18 instances in which a party concerned was

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Registers to the 1998 Aarhus Convention, in force 8 October 2009, Decision I/2, Review of Compliance, in ECE/MP.PRTR/2010/2/Add.1, 10 November 2010. For an overview of both mechanisms see Pitea, "Procedures and Mechanisms for Review of Compliance under the 1999 Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes" in Treves/Pineschi et al. (eds.), *Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements* (2009c), 251 and Pitea, "Procedures and Mechanisms for Review of Compliance under the 2003 Protocol on Pollutant Release and Transfer Registers to the 1998 Aarhus Convention" in Treves/Pineschi et al. (eds.), *Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements* (2009d), 263. Other than that only the compliance committee established under the Alpine Convention may review submissions by NGOs provided that they qualify as observers under the Convention, see Decision VII/4, Mechanisms for Reviewing Compliance with the Alpine Convention and its Implementation Protocols, at section 2 para 2.3. See also Romanin Jacur, "Triggering Non-Compliance Procedures" in Treves/Pineschi et al. (eds.), *Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements* (2009), 373, 380 et seq. For a general overview on the role of NGOs in compliance procedures see Pitea, "NGOs in Non-Compliance Mechanisms under Multilateral Environmental Agreements: From Tolerance to Recognition?" in Treves/Di Rattalma et al. (eds.), *Civil Society, International Courts and Compliance Bodies* (2005), 205.

[236] See Kravchenko, "The Aarhus Convention and Innovations in Compliance with Multilateral Environmental Agreements" (2007) 18 *Colo. J. Int'l Envtl. L. & Pol.*, 47. *Kravchenko* outlines several plausible reasons for the unequal geographical distribution of compliance issues at the beginning of the Committee's work, such as more Aarhus awareness raising activities in the EECCA countries than in Western countries, the fact that EECCA countries signed and ratified the Convention earlier than Western countries, direct applicability of international law, low GDPs in EECCA countries and therefore lack of resources to comply with MEAs, and the fact that in young democracies

found to be in non-compliance with the Aarhus Convention, in eight cases the party concerned was an EU member state, and in ten cases the party concerned was not an EU member state. The EU itself was subject to three compliance procedures so far and on the third occasion the Committee indicated in its recommendations that the EU is likely to be found in non-compliance with the Convention if it does not alter its rules on access to the European courts in environmental matters.

The three compliance issues outlined above give an insight into the substantive work of the Compliance Committee and show the variety of legal questions before the Committee. In its report prepared for MOP4 in June/July 2011, the Compliance Committee noted that the number as well as the complexity of communications is rising.[237] The first communication concerning Kazakhstan was based on a concrete case in which the public authorities denied the communicant access to environmental information and judicial review and therefore were found to be in non-compliance with the Convention. While Kazakhstan is not yet fully complying with the Convention, it undertook several measures to come into compliance with the Convention implementing the decision of the Compliance Committee in the case in question. The communication regarding cost of judicial review in environmental matters concerning the UK was not based on a single case but generally alleged, drawing on a whole body of case law, that public interest law suits in environmental matters in England and Wales were "prohibitively expensive" and thus not in compliance with the Aarhus Convention. This finding was published only recently and has to be considered by the upcoming MOP4. Nevertheless, it should be noted that the UK is already in the process of drafting new rules on costs and is now, on the same grounds, subject to an infringement procedure before the ECJ. The third communication summarized above concerned the EU and specifically standing for NGOs at the ECJ. It highlights, at the same time, the clear and cautious approach of the Compliance Committee to deal with the substantive matter at hand. It is crucial for the credibility of the Committee's work that it treats all parties concerned equally. It remains to be seen how the MOP and the EU will react to the findings and recommendations of the Committee.

The success of the Aarhus compliance mechanism entirely depends on cooperation of the parties concerned. Each report of an MOP contains a decision on general issues of compliance which includes a section on the cooperation of the parties concerned and a section on the implementation of decisions on compliance. The

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participation and transparency in decision-making and institutional capacities, as well as independence of courts are still developing, *ibid*. For more information on implementation of the Aarhus Convention in non-EU countries see Zaharchenko, *On the Way to Transparency: A Comparative Study on Post-Soviet States and the Aarhus Convention*, Woodrow Wilson International Center for Scholars, Occasional Paper Kennan Institute (2009); Weinthal/Watters, "Transnational Environmental Activism in Central Asia: the Coupling of Domestic Law and International Conventions" (2010) 19 *Environmental Politics*, 782.

[237] Report of the Compliance Committee prepared for MOP4 held in Chisinau from 29 June–1 July 2011, advance edited copy, ECE/MP.PP/2011/11, April 2011, at 61.

record on cooperation of the parties was considered poor at the beginning of the Committee's work. At its second meeting held in Almaty, Kazakhstan in May 2005 the MOP

> [noted] with regret that none of the Parties whose compliance was the subject of a communication or a submission provided comments or feedback to the Committee within the deadlines set out in the relevant provisions of decision I/7 and that some even failed to enter into any substantive engagement with the process at all.[238]

However, cooperation of the parties concerned had already changed significantly before MOP3 in 2008 and the positive trend continued in the intersessional period.[239] In June 2008, MOP3

> [welcomed] the constructive approach and cooperation demonstrated by Albania, Armenia, Belgium, Denmark, Hungary, Kazakhstan, Lithuania, Romania and the European Community whose compliance was the subject of review; [and]
>
> [also welcomed] the acceptance by most of the Parties concerned, including all those found not to be in compliance, of the Committee's recommendations made in accordance with paragraph 36 (b) of the annex to decision I/7, and the progress made by the Parties concerned in the intersessional period.[240]

Thus, now it is fair to conclude that the record on the cooperation of parties concerned is actually positive.

As regards the implementation of decisions on compliance, in 2008 the MOP welcomed the "sustained commitment" of one country to come into compliance with the Convention but noted with concern the "failure" of two countries to "sufficiently engage with the process of implementation" of the decisions on compliance.[241] According to the draft decision on general issues of compliance, MOP4 was expected to welcome the "constructive approach and action" of two countries to come into compliance with the Convention, further welcome the "sustained commitment" of one country to do so, and note with concern the "failure to effectively engage with the process of implementation" of decisions on compliance of three countries that have found to be in non-compliance with provisions of the Convention.[242] Thus, the overall record on implementation of decisions on compliance shows some positive

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[238] Decision II/5, General Issues of Compliance, Addendum to Report of the Second Meeting of the Parties adopted at MOP2 held on 25–27 May 2005, ECE/MP.PP/2005/2/Add.6, 13 June 2005, at 7.

[239] See Draft decision IV/9 on general issues of compliance, prepared for MOP4 in Chisinau from 29 June–1 July 2011, advance edited copy, ECE/MP.PP/2011/L.11, 13 April 2011, at 7, 8.

[240] Decision III/6, General Issues of Compliance, Addendum to Report of the Third Meeting of the Parties adopted at MOP3 held on 11–13 June 2008, ECE/MP.PP/2008/2/Add.8, 26 September 2008, at 11, 12.

[241] *Ibid*. at 8 and 9.

[242] Draft decision IV/9 on general issues of compliance, prepared for MOP4 in Chisinau from 29 June–1 July 2011, advance edited copy, ECE/MP.PP/2011/L.11, 13 April 2011, at 11–13.

examples but just as many negative ones and there is still need for improvement. Due to lack of proper implementation of its decisions on compliance in two cases, the MOP3 decided to issue a caution.[243] MOP4 might decide for the first time to suspend the special rights and privileges accorded to a party under the Aarhus Convention.[244] It remains to be seen how parties concerned react to such measures.

F. *Conclusions and Recommendations*

Compared with all other international judicial and quasi-judicial institutions included in this study, in terms of democratic governance for sustainable development, the Aarhus Convention Compliance Committee is the most advanced international quasi-judicial institution. The independence of its members, transparent and reasoned decision-making, and access of stakeholders in environmental protection interests, render the Aarhus Compliance Committee an accountable and to this extent democratically functioning body. Furthermore, the compliance mechanism's functions, institutional arrangements, and access rules are specifically tailored to the needs of environmental law enforcement.

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[243] Decision III/6e, Compliance by Turkmenistan with its Obligations under the Convention, Addendum to Report of the Third Meeting of the Parties adopted at MOP3 held on 11–13 June 2008, ECE/MP.PP/2008/2/Add.13, 26 September 2008, at 5 and Decision III/6f, Compliance by Ukraine with its Obligations under the Convention, Addendum to Report of the Third Meeting of the Parties adopted at MOP3 held on 11–13 June 2008, ECE/MP.PP/2008/2/Add.14, 26 September 2008, at 5. The MOP issues cautions in a manner that gives parties concerned the chance to prevent the caution from becoming effective when they fulfill certain conditions. After the MOP issued the caution with respect to Ukraine, Ukraine undertook several steps to fulfill these conditions towards coming into compliance with the Convention. After examining the measures undertaken by Ukraine the Compliance Committee found that the conditions were fulfilled and that the caution shall not become effective. See Report of the 23rd Meeting of the Aarhus Convention Compliance Committee, Geneva 31 March to 3 April 2009, Findings with regard to measures undertaken by Ukraine to fulfill the conditions set out in paragraph 5 (a) to (d) of decision III/6f of the Meeting of the Parties (ECE/MP.PP/2008//2/Add.14), adopted on 3 April 2009, at 13. Full record on implementation decisions at the MOPs and subsequent communication is available at http://www.unece.org/env/pp/CCimplementation.htm.

[244] Draft decision IV/9h on compliance by Ukraine with its obligations under the Convention, prepared for MOP4 in Chisinau from 29 June–1 July 2011, advance edited copy, ECE/MP.PP/2011/L.19, 13 April 2011 at 7. The draft decision on compliance by Turkmenistan was not online at the time of writing but there is a chance that it also contains the proposal for a decision to suspend the rights and privileges accorded to Turkmenistan under the Convention. At the request of the bureau the Compliance Committee recently provided its view on the interpretation of "special rights and privileges accorded to a party concerned under the Convention". It stated that such rights do not encompass voting rights since they are accorded to all parties to the Convention. Special rights and privileges might be granted under the Rules of Procedure and thus encompass membership of the bureau of the Convention, chairing Convention bodies and hosting expert or intergovernmental meetings under the Convention. See Report of the Compliance Committee on its thirty-second meeting, advance edited copy, ECE/MP.PP/C.1/2011/4 at 33, 34. See also Koester, "The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention)" in Ulfstein/Marauhn et al. (eds.), *Making Treaties Work* (2007b), 179, 211.

The Aarhus compliance mechanism is a prime example of the need for public interest lawsuits to effectively enforce international environmental law. Despite its high and rising caseload, the compliance mechanism is not an example which supports the floodgates argument. Rather it highlights the enforcement deficit in international environmental law and the fact that only a review mechanism with a public trigger has the opportunity to deal with it. There is also no evidence of misuse of the compliance mechanism by members of the public. The number of communications that lead to a finding of non-compliance, about two thirds of the admissible cases, is very high. It also underlines the importance of this kind of review procedure to ensure that an MEA not only exists on paper but also in real life.

As regards future development, three recommendations are made to further strengthen the compliance mechanism established under the Aarhus Convention. Firstly, the parties to the Aarhus Convention might want to consider altering the catalogues of competences in paragraphs 36 and 37 of Decision I/7 and refer more rights to the Compliance Committee to directly address the party concerned. Although the MOP has so far largely followed the findings and recommendations of the Committee and due to agreement of the parties concerned there was also some progress in compliance issues during the intersessional periods, the compliance mechanism could work more effectively if the MOP shifted some of its powers on to the Committee. For example, it would render the work during the intersessional period more effective if the Committee could order the measures listed in paragraph 37(b)–(d) of Decision I/7 (make recommendations, request strategy including time schedule, make recommendations on specific measures) without agreement of the party concerned.

Secondly, the network supporting proper implementation of the provisions of the Aarhus Convention in cases of non-compliance could be improved. Implementation aid should continue to be based on the strategy proposed by the party concerned but, in addition to inviting international and regional organizations and financial institutions to support implementation with advice and assistance, a more developed implementation aid network seems advisable. For example, parties to the Aarhus Convention together with international organizations and financial institutions could establish an Aarhus fund and an Aarhus network of knowledgeable actors to provide concrete and fast implementation aid to the parties concerned, tailored to their case-specific compliance strategy.

Thirdly, with a view to the rising number and complexity of compliance issues handled by the Compliance Committee, parties to the Aarhus Convention should ensure that the Committee has sufficient resources and especially staff to continue to appropriately deal with the compliance issues. In order to clarify the domestic factual and legal circumstances of a compliance issue, to ensure the quality of tailored solutions, and to establish and maintain a cooperative spirit with the parties concerned, Compliance Committee missions to the party concerned seem to be a helpful tool that should be further strengthened.

As regards the overall strengthening of enforcement of environmental law, three recommendations may be formulated based on the experience of the Aarhus Convention. Firstly, the provisions of the Convention, access to environmental information, participation in decision-making processes, and access to administrative and judicial review procedures in environmental matters, are key to the domestic application and enforcement of environmental law. Here it is argued, in line with the approach followed by the European Union, that the main responsibility for the application and enforcement of international environmental law lies with national actors including administrations, courts, citizens, and NGOs. Accordingly, it is recommended that the Aarhus Convention evolves from a regional to a global MEA. This is technically possible under Articles 17, 19(2) and (3) of the Aarhus Convention, despite some need to further clarify the exact procedure required by these provisions.[245] Alternatively, states in other regions of the world should consider drafting and agreeing a similar Convention.[246]

Secondly, on the international level, parties to all other MEAs should consider adopting a compliance mechanism similar to the one established under the Aarhus Convention. Some authors have argued that the compliance mechanism of the Aarhus Convention only needs to provide for access of members of the public because of the special rights the Convention confers on members of the public at national level. Although the view is shared here that the specific content of the Aarhus Convention makes it a suitable MEA to start developing widely accessible and transparent international compliance committees, this is only considered to be a first step. Here it is argued that the rationale underlying the Aarhus compliance mechanism is applicable to any judicial and quasi-judicial review procedure aiming to contribute to the enforcement of (international) environmental law.[247] In the UNECE region, parties to the 1999 Protocol on Water and Health to the Water Convention and parties to the 2003 Protocol on Pollutant Release and Transfer Registers (PRTR) to the Aarhus Convention have already established compliance mechanisms similar to the one under the Aarhus Convention. This seems to be significantly more difficult in a global context. Parties that oppose such mechanisms should consider that it is not the ratification but the proper implementation of an MEA that makes it effective. They should consider the benefits of compliance committees, especially with a view to their cooperative nature and main aim of supporting parties concerned in coming into compliance with an MEA tailored to the specific needs of the party concerned, provided that the reason for non-compliance is lack of resources and not lack of political will. As the practice of the Aarhus Compliance Committee shows, compliance committees under MEAs do not prevent development but

[245] Interview with Jeremy Wates, former Secretary to the Aarhus Convention, on 15 May 2011.
[246] *Ibid.*
[247] Presenting both rationales Wates, "NGOs and the Aarhus Convention" in Treves/Di Rattalma et al. (eds.), *Civil Society, International Courts and Compliance Bodies* (2005), 167, 184 et seq.

ensure sustainable development. They should not be considered a barrier, but an opportunity.

Thirdly, synergies among MEAs in general and with a view to compliance mechanisms in particular should be further explored and new procedures developed that take account of the findings with a view to the efficient and effective enforcement of international environmental law.

IV. Other Compliance Review Bodies

Because of their international background and focus on the protection of environmental interests, two further compliance review bodies are presented in the following: the so-called National Contact Points under the OECD Guidelines for Multinational Enterprises and the Commission for Environmental Cooperation under the North American Agreement on Environmental Cooperation (NAAEC). Neither of these fits into the category of courts, arbitral tribunals, or compliance committees under MEAs as discussed in Chapter 2.IV and they are therefore addressed in this separate section.

A. *National Contact Points under OECD Guidelines for Multinational Enterprises*

The Organization for Economic Co-operation and Development (OECD) was founded in 1960 by 18 European countries, the United States and Canada as a forum to achieve the highest sustainable economic growth, employment and a rising standard of living in the member countries as well as to contribute to the development of the world economy.[248] As of March 2011, the OECD had 34 member states mainly from Europe but with a growing membership of countries from the Latin American, Asia-Pacific and potentially African regions.[249] Despite its global agenda, it is considered here as a regional international organization because of its mainly European membership.

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[248] Article 1 OECD Convention, 14 December 1960, in force 30 September 1961. The predecessor of the OECD was the Organization for European Economic Cooperation (OEEC) which was established by 18 European countries in 1947 after the Second World War to strengthen peaceful cooperation through economic interdependence. One of the main tasks of the OEEC was to run the U.S.-financed Marshall Plan for reconstruction.

[249] The 34 OECD countries are Australia, Austria, Belgium, Canada, Chile, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Israel, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, the Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, the United Kingdom and the United States. Chile, Slovenia, Israel, and Estonia became members of the OECD in 2010. Russia has already entered into accession talks for membership. In 2007, OECD countries offered enhanced engagement to Brazil, China, India, Indonesia, and South Africa, which might lead to a future membership.

As early as 1976, the OECD established the Guidelines for Multinational Enterprises (OECD Guidelines), a set of voluntary principles and standards for responsible business conduct, as part of a package of procedures contained in the OECD Declaration on International Investment and Multinational Enterprises. Its other parts relate to national treatment, conflicting requirements on enterprises, and international investment incentives and disincentives. The principles and standards addressed in the OECD Guidelines encompass information disclosure, employment and industrial relations, human rights, environment, combating bribery, consumer interests, science and technology, competition, and taxation. As of March 2011, 34 OECD countries and 8 non-OECD countries signed up to the OECD Guidelines.[250]

The OECD Guidelines establish a unique mechanism for implementation of this soft law. They set up national government offices, so called National Contact Points (NCPs), in charge of handling enquiries. Since a reform of the Guidelines in 2000, this control mechanism can be directly triggered by NGOs to enhance, inter alia, environmental protection interests.

A total of 101 cases were filed by NGOs between 2000 and November 2010, an average of roughly 10 cases per year.[251] In 51 of these cases, NGOs claimed a violation of the environmental standards contained in the OECD Guidelines.[252]

1. *Scope of Review and Institutional Arrangements*

The scope of review of National Contact Points is limited to issues regarding the implementation of the OECD Guidelines. International environmental law may play a role only indirectly, as indicated in the case law analysis below. The scope of application of the OECD Guidelines was widened with the 2000 reform. Whereas it originally only encompassed companies operating within the OECD countries, since 2000 it additionally includes companies operating from OECD member states in non-OECD member states.

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[250] The 8 non-OECD members supporting the OECD Guidelines are Argentina, Brazil, Egypt, Latvia, Lithuania, Morocco, Peru, and Romania. For more information on the role of corporate responsibility in the context of global environmental governance see Clapp, "Global Environmental Governance for Corporate Responsibility and Accountability" (2005) 5 *GEP*, 23. For a comparison of the OECD Guidelines with other corporate responsibility instruments see Gordon, *The OECD Guidelines and Other Corporate Responsibility Instruments: A Comparison*, OECD (ed.) Working Papers on International Investment (2001). The OECD Guidelines have been updated on 25 May 2011. This analysis is based on the text of the OECD Guidelines prior to this update. For a summary of the main changes of the 2011 update see OECD Watch statement at http://oecdwatch.org/oecd-guidelines/2010-update-of-the-guidelines.

[251] OECD Watch, *Quarterly Case Update of OECD Guidelines Cases Filed by NGOs*, OECD Watch (ed.) (November 2010), 15. For comparison, 117 cases were initiated by trade unions between 2000 and 2010, Oldenziel/Wilde-Ramsing et al., *10 Years On*, OECD Watch (ed.) (June 2010), 11.

[252] OECD Watch, *Quarterly Case Update of OECD Guidelines Cases Filed by NGOs*, OECD Watch (ed.) (November 2010), 15; more than 40 of the total of 101 NGO complaints addressed issues in the extractive industry (mining, oil, and gas industry), Oldenziel/Wilde-Ramsing et al., *10 Years On*, OECD Watch (ed.) (June 2010), 13.

According to the chapeau of Chapter V of the OECD Guidelines

> [e]nterprises should, within the framework of laws, regulations and administrative practices in the countries in which they operate, and in consideration of relevant international agreements, principles, objectives, and standards, take due account of the need to protect the environment, public health and safety, and generally to conduct their activities in a manner contributing to the wider goal of sustainable development.[253]

Chapter V of the OECD Guidelines goes on to specify environmentally responsible business conduct. For example, enterprises should establish and maintain a system of environmental management (EMS) to collect and evaluate environmental information, set measurable environmental, health, and safety objectives and regularly monitor and verify the progress towards such objectives.[254] Enterprises should share this information with the public and employees and engage in communication with communities directly affected by the environmental, health, and safety policies of the enterprise.[255] Processes, goods, and services should be assessed with regard to foreseeable environmental, health, and safety impacts over their full life cycle; where impacts may be significant, an environmental impact assessment should be conducted.[256]

The main institutional elements set up for the implementation of the Guidelines are the National Contact Points, the OECD Investment Committee, advisory bodies including the Business and Industry Advisory Committee to the OECD (BIAC) and the Trade Union Advisory Committee to the OECD (TUAC), as well as other NGOs as mostly represented by OECD Watch.[257] According to the Procedural Guidance, the National Contact Points

> contribute to the resolution of issues that arise relating to implementation of the Guidelines in specific instances. The NCP will offer a forum for discussion and assist the business community, employee organizations and other parties concerned to deal with the issues raised in an efficient and timely manner and in accordance with applicable law.[258]

The National Contact Point may, for example, be a government office headed by a senior official.[259] "Specific instances" relating to the implementation of the Guidelines may be raised by parties concerned including representatives of the business

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253 OECD Guidelines for Multinational Enterprises, Chapter V, chapeau.

254 *Ibid.* No. 1.

255 *Ibid.* No. 2.

256 *Ibid.* No. 3.

257 OECD Guidelines for Multinational Enterprises, Part II, Implementation Procedures. OECD Watch is a network organization of more than 80 NGOs from 45 different countries contributing to the implementation of the OECD Guidelines since 2000; Oldenziel/Wilde-Ramsing et al., *10 Years On*, OECD Watch (ed.) (June 2010), 6.

258 *Ibid.* Procedural Guidance at I.C.

259 *Ibid.* For a comparative view on NCP structures see Funk, "Limits of Environmental International Voluntary Initiatives with Respect to the OECD Guidelines Chapter on Environmental and Corporate Social Responsibility" (2010) *the diplomat*, 38, 42. Accordingly, only Chile and Finland have an NCP structure that includes representatives of NGOs.

community, labor organizations, other NGOs, and other members of the public.[260] Issues raised are generally dealt with by the NCP in whose country the issue has arisen; they are first discussed on the national level and, where appropriate, at a bilateral level.[261] In assisting the resolution of the issue at hand, the NCP makes an initial assessment of whether the issues raised merit further examination.[262] If the issues merit further examination the NCP helps the parties involved to resolve the dispute via consensual and non-adversarial means, such as conciliation and mediation.[263] If no agreement is reached on the issues raised, the NCP issues a statement and makes recommendations as appropriate on the implementation of the Guidelines.[264] The NCP publishes the results of the procedure after consultation with the parties involved unless "preserving confidentiality would be in the best interest of effective implementation of the Guidelines".[265]

The National Contact Points report to the Investment Committee. After a complaint procedure, NCPs, the Trade Union Advisory Committee and the Business and Industry Advisory Committee can appeal to the Investment Committee and request further clarification on issues raised in the complaint and on how the complaint has been handled by an NCP. NGOs may not institute this review procedure.

2. *Access*

Enquiries about the implementation of the Guidelines before the NCP can be initiated by other National Contact Points, the business community, employee organizations, other NGOs, the public, and governments of non-adhering countries.[266] Thus, environmental NGOs may directly trigger the review procedure before the NCP. However, it is important to note that companies are not required to participate in the NCP complaint procedure.[267] The Guidelines are only soft law among states. Even if the NCP's initial assessment concludes that the issues raised merit further examination there is nothing to compel companies to enter into a dialogue. The whole procedure is voluntary.

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[260] *Ibid*. at I.B.3. See also OECD Guidelines for Multinational Enterprises, Part III, Commentary on the Implementation Procedure, at 8.

[261] OECD Guidelines for Multinational Enterprises, Part III, Commentary on the Implementation Procedure, at 13.

[262] OECD Guidelines for Multinational Enterprises, Part II, Implementation Procedures, Procedural Guidance at I.C.1.

[263] *Ibid*. at I.C.2.(d).

[264] *Ibid*. at I.C.3.

[265] *Ibid*. at I.C.4.(b).

[266] *Ibid.* at I.B.3.

[267] Freeman/Heydenreich et al., *Guide to the OECD Guidelines for Multinational Enterprises' Complaint Procedure*, OECD Watch (ed.) (November 2006), 17.

During the examination procedure it is within the discretion of the NCP to seek advice from NGOs on the case at issue.[268] Once a complaint has been accepted, proceedings are confidential.[269] After conclusion of the procedures, parties are free to openly discuss the issues, but information and views provided by another party during the proceedings has to remain confidential, unless the parties agree otherwise.[270]

3. *Environmental Cases*

In 51 out of a total of 101 NGO cases filed between 2000 and November 2010, NGOs claimed a violation of the environmental rules of chapter V of the OECD Guidelines.[271] Out of the 101 cases filed up to November 2010, 31 were rejected, 26 have been concluded, 16 are pending, 6 blocked, 7 withdrawn, 7 closed, and 8 just filed.[272] In the following, four cases are presented in brief in order to provide an overview of various benefits and constraints contained in the OECD Guidelines' complaint procedure.[273]

a. Oxfam Canada vs. First Quantum Mining

In July 2001, Oxfam Canada and partner NGOs in Zambia instituted proceedings before the Canadian NCP against First Quantum Mining, which at the time partly owned Mopani Copper Mines.[274] According to the complaint, Mopani threatened squatter communities near the town of Mufulira, Zambia, with eviction.[275] Most of the squatters were ex-miners and had been long-term tenants of Zambian Consolidated Copper Mines (ZCCM) which still owned 10% of Mopani.

Complainants argued that Mopani failed to adhere to the OECD Guidelines in various ways. For example, it had refused to enter into a dialogue with local community representatives and NGOs and therefore failed to follow the standard set

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[268] OECD Guidelines for Multinational Enterprises, Part II, Implementation Procedures, Procedural Guidance at I.C.2.a).

[269] *Ibid.* at I.C.4.a).

[270] *Ibid.*

[271] OECD Watch, *Quarterly Case Update of OECD Guidelines Cases Filed by NGOs*, OECD Watch (ed.) (November 2010), 15. All cases initiated by NGOs are available at the OECD Watch database at http://oecdwatch.org/cases.

[272] OECD Watch, *Quarterly Case Update of OECD Guidelines Cases Filed by NGOs*, OECD Watch (ed.) (November 2010), 15. The main reason given for the rejection of cases has been the lack of an investment nexus, see Funk, "Limits of Environmental International Voluntary Initiatives with Respect to the OECD Guidelines Chapter on Environmental and Corporate Social Responsibility" (2010) *the diplomat*, 38, 50.

[273] For further case studies see Funk, *ibid.* at 48 et seq.; Morgera, "Environmental Outlook on the OECD Guidelines for Multinational Enterprises: Comparative Advantage, Legitimacy, and Outstanding Questions in the Lead up to the 2006 Review" (2005) 18 *Geo. Int'l Envtl. L. Rev.*, 751, 763 et seq. Focusing on the Colombian and Peruvian petroleum industries, Moser, "MNCs and Sustainable Business Practice: The Case of the Colombian and Peruvian Petroleum Industries" (2001) 29 *World Development*, 291.

[274] *Oxfam Canada vs. First Quantum Mining*, Statement NCP Canada of 4 February 2002; case file available at http://oecdwatch.org/cases/Case_19.

[275] For background information see the Oxfam report Land Tenure Insecurity on Zambia's Copperbelt, 1998.

out in Chapter II.7 of the Guidelines. With respect to environmental obligations, claimants argued that Mopani did not "engage in adequate and timely communication and consultation with the communities directly affected by the environmental health and safety policies of the enterprise and by their implementation" as required by Chapter V.2.

In October 2001, the Canadian NCP organized a meeting between First Quantum, Oxfam, local NGOs, and local leaders of the Zambian community. A resolution was reached containing three core provisions according to which all evictions would stop, Mopani would cooperate with the local NGOs and council to find a resettlement solution with help from the World Bank, and the dialogue between Mopani and the civil society would continue.[276]

The case is usually cited as a success story of the OECD Guidelines.[277] However, in March 2007 OECD Watch received a case study conducted by the Umuchinshi Initiative, a group of Canadian law students, regarding the evictions at Mufulira by Mopani.[278] According to this study the resolution was not complied with by Mopani. Instead, evictions from the mine land began again in July 2006 entailing severe economic and social hardship for the individuals involved. The study highlights the lack of monitoring competences as a crucial weakness of the OECD Guidelines.[279]

b. Survival International vs. Vedanta Resources plc

In December 2008, Survival International, a UK-based NGO working for tribal peoples' rights worldwide, lodged a complaint at the UK NCP against the British mining company Vedanta Resources regarding a Vedanta aluminum refinery and a planned bauxite mine on Niyam Dongar Mountain in Orissa, India.[280] Allegedly, the company's activities violated the rights of the Dongria Kondh tribe, one of the most isolated tribes in India, to whom the Niyam Dongar is a sacred mountain crucial for their cultural identity and livelihood.

The complainants argued that Vedanta had not complied with standards set out in Chapter II and Chapter V of the OECD Guidelines because the company had not communicated with the Dongria Kondh tribe and had failed to consider the implications of its activities for the tribe. Such potential implications, for example, included evictions and pollution of local streams and arable land by air-borne particles from the mine. The UK NCP contacted Vedanta which refuted all allegations, rejected the

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[276] See also summary of the statement of the Canadian NCP of 4 February 2002 at http://oecdwatch.org/cases/Case_19/.

[277] Freeman/Heydenreich et al., *Guide to the OECD Guidelines for Multinational Enterprises' Complaint Procedure*, OECD Watch (ed.) (November 2006), 28.

[278] Umuchinshi Initiative, *Can the OECD Guidelines Protect Human Rights on the Ground? A Case Study*, The Umuchinshi Initiative (ed.) University of Toronto, Faculty of Law (2007).

[279] For more details see the case study of the Umuchinshi Initiative *ibid*.

[280] *Survival International vs. Vedanta Resources plc*, Statement of NCP UK of 25 September 2009, case file available at http://oecdwatch.org/cases/Case_165.

offer to enter into mediation, and refused to submit any evidence to substantiate its claims.

Following its own investigations, the UK NCP issued its final statement in September 2009 stating that it upheld the allegations of Survival International. With respect to the environmental chapter of the Guidelines it stated:

> The UK NCP [...] upholds Survival International's allegation that Vedanta Resources plc (Vedanta) has not complied with Chapter V(2)(b) of the Guidelines. The UK NCP concludes that Vedanta failed to put in place an adequate and timely consultation mechanism fully to engage the Dongria Kondh, an indigenous community who would be directly affected by the environmental and health and safety impact of its plans to construct a bauxite mine in the Niyamgiri Hills, Orissa, India.[281]

As regards chapter II of the Guidelines the NCP stated:

> The UK NCP also upholds Survival International's allegation that Vedanta has not behaved consistently with Chapter II(2) of the Guidelines. The UK NCP concludes that Vedanta failed to engage the Dongria Kondh in adequate and timely consultations on the construction of the bauxite mine; it did not consider the impact of the construction of the mine on the rights and freedoms of the Dongria Kondh, or balance the impact against the need to promote the success of the company. For these reasons, Vedanta did not respect the rights and freedoms of the Dongria Kondh consistent with India's commitments under various international human rights instruments, including the UN International Covenant on Civil and Political Rights, the UN Convention on the Elimination of All Forms of Racial Discrimination, the Convention on Biological Diversity and the UN Declaration on the Rights of Indigenous People.[282]

In its statement the UK NCP did not only criticize Vedanta, but also outlined examples of good practice by the company.[283] It finally came up with two very precisely formulated recommendations for next steps.[284] According to the first recommendation, Vedanta should immediately and adequately start a consultation process with the Dongria Kondh and respect the outcome of this process. It recommended that the guidelines produced by the Secretariat of the Convention on Biological Diversity in 2004 should be used to conduct the consultation process.[285] Furthermore, the NCP recommended that Vedanta should conduct a human and indigenous rights impact assessment as part of its project management process. It referred to reports by *John Ruggie*, the Special Representative of the Secretary General of the United Nations on the issue of human rights and transnational corporations and other

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[281] *Ibid*. at summary of the conclusions.
[282] *Ibid*.
[283] *Ibid*. at 68–71.
[284] *Ibid*. at 72 et seq.
[285] Akwé: Kon Guidelines, Voluntary guidelines for the conduct of cultural, environmental and social impact assessments regarding developments proposed to take place on, or which are likely to impact on, sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities, Secretariat of the Convention on Biological Diversity, 2004; available at https://www.cbd.int/doc/publications/akwe-brochure-en.pdf.

business enterprises, in which he outlined the appropriate scope of a company's human rights due diligence process.[286]

To ensure a timely follow up, the UK NCP asked both parties to provide it with an update on the implementation of these recommendations within three months.[287] Vedanta replied that its activities, including the consultation process, were already in compliance with Indian law and with the recommendations made by the NCP in its final statement. Survival International claimed that Vedanta had ignored the recommendations, threatened and intimidated Survival International employees and their guides at a follow-up trip, and that several NGOs and members of Dongria Kondh had stated that the company had not entered into consultations with those affected by the project.

Despite a follow-up statement from the UK NCP in March 2010 repeating the original recommendations, Vedanta did not change its position.

c. *Climate Change Cases*

Two recent complaints filed with the German NCP addressed, inter alia, climate change responsibilities in the energy and car industry and were both rejected. In October 2009, Greenpeace Germany instituted a procedure against Vattenfall regarding the company's coal-fired power plant in Hamburg-Moorburg, which is currently under construction.[288] The complaint alleges that the high level of CO2 emissions from the power plant is incompatible with chapters II.1. and V. (sustainable development, ratio between CO2 budget and electricity production) and chapter V.6.a) (comparative efficiency, double standards comparing renewable energy sources in Sweden and environmentally harmful coal energy in Germany).[289] In addition, Greenpeace argued that Vattenfall breached chapters II.5 and V.8 of the OECD Guidelines by submitting a request for arbitration with the ICSID against Germany, demanding compensation of 1.4 billion € because of stringent environmental conditions imposed in the construction permit.[290]

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[286] In April 2005, the UN Commission on Human Rights requested the UN Secretary-General to appoint a Special Representative on human rights and transnational corporations and other business enterprises, Commission on Human Rights Resolution 2005/69 (20 April 2005); approved by ECOSOC Decision 2005/273 (25 July 2005); decision available at http://www.un.org/en/ecosoc/docs/2005/decision%202005-273.pdf. In his capacity as a special representative, he developed a "protect, respect, and remedy" framework, see his latest report: Business and Human Rights: Further steps towards the operationalization of the "protect, respect and remedy" framework, UN A/HCR/14/27, 9 April 2010, available at http://198.170.85.29/Ruggie-report-2010.pdf.

[287] *Survival International vs. Vedanta Resources plc*, Statement of NCP UK of 25 September 2009, at 81.

[288] *Greenpeace Germany vs. Vattenfall*, Statement of NCP Germany of 15 March 2010.

[289] For details of the reasoning of the complaint regarding CO2 emissions of the power plant see *Greenpeace Germany vs. Vattenfall*, Complaint of 29 October 2009, at 5–9.

[290] *Ibid*. at 9–12. The case at ICSID is described in chapter 4.II.B.3.d.

In March 2010, the German NCP stated that it did not accept the complaint because it did not justify further investigation. With regard to the first two claims the NCP argued that it

> cannot identify any conceivable violation of the Guidelines, including Chapter V.6.a), in the mere determination of Vattenfall's insistence on the legally acceptable generation of electricity from coal. The Guidelines' recommendations that enterprises make a contribution to sustainable development cannot be interpreted to mean there is no leeway for business decisions and only by refraining from using this technology would Vattenfall "duly allow for" protecting the environment. Likewise, the contribution to be made does not necessitate actively supporting every single goal of a sustainable policy.[291]

With regard to the ICSID proceedings Vattenfall initiated against Germany, the German NCP stated:

> Germany complies with the practices of the International Centre for Settlement of Investment Disputes (ICSID), thereby allowing enterprises the opportunity to initiate arbitration proceedings with the Federal Republic of Germany. It cannot be an intention of the OECD Guidelines to strip parties of judicial remedies that have been conceded to them elsewhere.[292]

In May 2007, German watch initiated proceedings before the German NCP against Volkswagen arguing that Volkswagen's climate damaging product range and business strategy is incompatible with the OECD Guidelines in several ways.[293] In November 2007 the German NCP rejected the complaint.[294]

> The OECD guidelines are neither a substitute for national laws and regulations nor should they be understood as overriding them. They consist of supplementary principles and behavioral codes and thus support responsible business practice, particularly in foreign markets. Through the guidelines, the highest standard possible should be attained also in those countries in which national laws and regulations are perhaps insufficient. The OECD Guidelines are purposely broadly formulated since they are cross-sectoral guidelines. The interpretation of these guidelines, and thus the definition of 'responsible business practice' must therefore take place with an eye to generally accepted and established norms and standards; in this case for the automobile industry. The cases you have brought to our attention are therefore not violations of the OECD Guidelines.[295]

4. *Evaluation*

OECD countries are the source of most of the world's foreign direct investment (FDI) flows and home to most multinational enterprises. In view of this, the OECD Guidelines have a high potential to successfully contribute to sustainable

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[291] *Greenpeace Germany vs. Vattenfall*, Statement of NCP Germany of 15 March 2010, English translation, at 1.b).

[292] *Ibid.* at 2.

[293] For the details of the complaint see *Germanwatch vs. Volkswagen*, Complaint of 7 May 2007.

[294] *Germanwatch vs. Volkswagen*, Statement of NCP Germany of 20 November 2007.

[295] *Ibid.* at 1.

development.[296] They are often referred to as a leading international instrument for the implementation of corporate social responsibility.[297]

The legal nature of the Guidelines as soft law and the equally soft implementation mechanism they establish differs significantly from the judicial, arbitral, or non-compliance control mechanisms discussed so far. Due to this unique character the NCPs established under the OECD Guidelines are addressed here in a separate category.[298]

Chapter V of the OECD Guidelines contains a number of helpful rules for responsible business conduct with regard to environmental protection and the assurance of health and safety standards including, for example, gathering and dissemination of environmental information, setting and monitoring of environmental, health and safety objectives, communication with the local communities, and the conduct of Life-Cycle and Environmental Impact Assessments.[299] However, the standards are still significantly lower is than the requirements, for example in the field of environmental information and participation, of European regional law such as the UNECE Aarhus Convention for the administration of business conduct within the region. The OECD Guidelines are also formulated in a way that leaves much room for interpretation. They do not contain any recommendations specific to climate change, despite the urgency in this area of environmental protection, and, as the brief discussion of environmental cases has shown, the German NCP at least is reluctant to interpret the Guidelines in a way that would allow for climate change responsibilities to be addressed.

As regards the institutional arrangements, the implementation documents of the OECD Guidelines offer a large degree of flexibility.[300] There are no detailed rules of procedure or time limits established by the Procedure Guidance. The practice among different NCPs varies significantly, for example as regards whether a statement is issued at all in cases where companies do not enter into a dialogue, explicit statement of a breach of the OECD Guidelines, details of the reasoning behind findings in final statements, handling of confidentiality issues, and the degree to which the NCP

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[296] See also brochure of the OECD Investment Committee "Promoting Investment for Growth and Sustainable Development", available at http://www.deti.ie/trade/bilateral/Investment%20Committee%20Brochure.pdf.

[297] *OECD*, Environment and the OECD Guidelines for Multinational Enterprises, *OECD Publishing* (*ed.*), 5; Morgera, "Environmental Outlook on the OECD Guidelines for Multinational Enterprises: Comparative Advantage, Legitimacy, and Outstanding Questions in the Lead up to the 2006 Review" (2005) 18 *Geo. Int'l Envtl. L. Rev.*, 751, 775.

[298] For the conclusion that the OECD Guidelines are a mostly positive example of effective governance through decentralized soft implementation, see Schuler, "Effective Governance through Decentralized Soft Implementation: The OECD Guidelines for Multinational Enterprises" (2008) 9 *Ger. L.J.*, 1753.

[299] See also Morgera, "Environmental Outlook on the OECD Guidelines for Multinational Enterprises: Comparative Advantage, Legitimacy, and Outstanding Questions in the Lead up to the 2006 Review" (2005) 18 *Geo. Int'l Envtl. L. Rev.*, 751, 756 et seq.

[300] Freeman/Heydenreich et al., *Guide to the OECD Guidelines for Multinational Enterprises' Complaint Procedure*, OECD Watch (ed.) (November 2006), 17.

engages in own investigation of the issues highlighted in the complaint. NCPs also interpret substantive issues in the OECD Guidelines differently, for example regarding supply chain responsibilities and the investment nexus, but also regarding the procedural consequences of parallel proceedings in national courts.[301]

The UK NCP might serve as a good example for timely reaction, reasoned decision-making, integration of helpful work under other environmental and human rights protection regimes such as the CBD and the UNHCR, and follow-up.[302] Nevertheless, the case against *Vedanta Resources* has shown that the voluntary nature of the proceedings makes it impossible even for very active NCPs to compel companies to enter into a dialogue. Thus, in cases where the company is not willing to respond to the complaint, the implementation mechanism of the OECD Guidelines is toothless. Even if the company joins mediation or conciliation procedures and an agreement is reached, the NCPs cannot monitor the implementation of such an agreement, as seen in the case against *First Quantum*.[303]

5. *Conclusion and Recommendations*

The OECD Guidelines for Multinational Enterprises have to be welcomed as an early initiative to promote responsible foreign investment and business activities. However, despite these guidelines having been in existence for more than 30 years, there are many examples worldwide of irresponsible conduct by foreign enterprises, which make their profits through socially and environmentally damaging resource exploitation and production.[304] As seen above in the subchapter on regional human rights courts, in a significant number of cases such business conduct even amounts to human rights violations. Thus, also bearing in mind the brief case law review, it can be concluded that the Guidelines have not yet sufficiently promoted or ensured sustainable development through international investment and multinational enterprises.[305]

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[301] Oldenziel/Wilde-Ramsing et al., *10 Years On*, OECD Watch (ed.) (June 2010), 11; Freeman/Heydenreich et al., *ibid.* at 11, 19. See also Morgera, "Environmental Outlook on the OECD Guidelines for Multinational Enterprises: Comparative Advantage, Legitimacy, and Outstanding Questions in the Lead up to the 2006 Review" (2005) 18 *Geo. Int'l Envtl. L. Rev.*, 751, 763 et seq., 774.

[302] See similar conclusion of OECD Watch in Oldenziel/Wilde-Ramsing et al., *ibid.* at 11. OECD Watch developed a model NCP in 2007, which it plans to update for the 2011 reform of the Guidelines, the 2007 report on the Model NCP is available at http://oecdwatch.org/publications-en/Publication_2223/.

[303] See also Freeman/Heydenreich et al., *Guide to the OECD Guidelines for Multinational Enterprises' Complaint Procedure*, OECD Watch (ed.) (November 2006), 19.

[304] See, for example, work of CorpWatch at http://www.corpwatch.org/index.php or the corporate research database crocodyl at http://www.crocodyl.org/. Listing a number of concrete case studies, Greenpeace International, *Corporate Crimes – The Need for an International Instrument on Corporate Accountability and Liability*, June 2002, available at http://www.greenpeace.org/international/Global/international/planet-2/report/2002/5/corporate-crimes.pdf.

[305] Similar Morgera, "Environmental Outlook on the OECD Guidelines for Multinational Enterprises: Comparative Advantage, Legitimacy, and Outstanding Questions in the Lead up to the 2006

However, in comparison to other instruments of corporate responsibility, such as the UN Global Compact or the Global Reporting Initiative (GRI), the OECD Guidelines are more specific and, at the same time, cover a wide range of issues, especially with regard to the environment.[306] In addition, as a soft law regional international instrument the 2000 reform stands out as a good example of strengthening the recognition and implementation of the Guidelines. The direct access of NGOs to NCPs and the work of OECD Watch significantly contribute to making the OECD Guidelines more visible and their implementation more transparent.[307] These reforms were especially important because voluntary regimes rely heavily on reputation, and reputation is only an issue if conflicts with the OECD Guidelines become visible. Nevertheless, despite some media attention, the leverage of cases under the OECD Guidelines with regard to public accountability of multinational enterprises is not yet satisfactory.[308]

There are no studies on how the OECD Guidelines actually influence the conduct of multinational enterprises.[309] It would be interesting to see if companies use, for example, EMS, EIA, and Life Cycle Assessment (LCA) regularly as a result of the Guidelines and if, therefore, social and environmental international standards for resource exploitation and production are rising.

The conclusion with regard to the voluntary nature of the Guidelines is twofold. On the one hand, soft-law and the consensual, non-adversarial character of dealing with cases under the OECD Guidelines allows for constructive and tailored solutions. Discussion of cases before the NCPs may bring a lot of knowledge and creativity to the table and thus overcome financial, know-how, and procedural barriers that may have kept a company from complying with the Guidelines. The *First Quantum* agreement may have been seen as a positive example but, apparently, it has not been implemented successfully. The final statement from the NCP in the *Vedanta Resources* case also highlights this possibility.[310]

On the other hand, a voluntary regime presupposes the willingness of all parties involved to recognize the problem at issue and work towards a constructive solution.

Review" (2005) 18 *Geo. Int'l Envtl. L. Rev.*, 751, 766 et seq.; Oldenziel/Wilde-Ramsing et al., *10 Years On*, OECD Watch (ed.) (June 2010), 54.

306 Gordon, *The OECD Guidelines and Other Corporate Responsibility Instruments: A Comparison*, OECD (ed.) Working Papers on International Investment (2001), 7, 14. See also Morgera, "Environmental Outlook on the OECD Guidelines for Multinational Enterprises: Comparative Advantage, Legitimacy, and Outstanding Questions in the Lead up to the 2006 Review" (2005) 18 *Geo. Int'l Envtl. L. Rev.*, 751, 775.

307 See also Morgera, *ibid.* at 776 et seq.

308 See also Funk, "Limits of Environmental International Voluntary Initiatives with Respect to the OECD Guidelines Chapter on Environmental and Corporate Social Responsibility (2010) *the diplomat*, 38, 57.

309 Highlighting the difficulty of such a study but also some positive impacts of the OECD Guidelines Oldenziel/Wilde-Ramsing et al., *10 Years On*, OECD Watch (ed.) (June 2010), 21.

310 For a survey of more cases with a partly positive outcome see Oldenziel/Wilde-Ramsing et al., *ibid.* at 21 et seq.

There does not seem to be sufficient incentive for companies and, in some cases, for NCPs to use the OECD Guidelines effectively. A voluntary regime coupled with reluctant key actors simply does not work. The local distance between OECD citizens and the companies' facilities abroad as well as the distance between products and resource exploitation or production activities make it difficult, if not impossible, for a regime that is merely based on visibility and reputation to succeed. This conclusion is supported by the preliminary finding that there is not a single environmental case that can be cited as a truly positive example of the implementation of the OECD Guidelines.

To further strengthen international corporate responsibility and the OECD Guidelines the following recommendations may be considered.[311] First of all, considering the significant weaknesses inherent in voluntary mechanisms, governments should work towards a legally binding regime for corporate accountability. For the World Summit on Sustainable Development, Friends of the Earth International published a proposal for such a legally binding instrument.[312]

If the OECD Guidelines remain a voluntary regime, there is nothing that could overcome the natural constraints on such a regime, including the fact that companies cannot be compelled to enter into a procedure before an NCP. However, since the reluctance of companies to cooperate has been identified as a main weakness of the Guidelines, a reform should consider how visibility and public perception of damaging business conduct abroad can be increased. For example, OECD institutions themselves could monitor and report on the conduct of its multinational enterprises abroad or cooperate with other initiatives that already involve in such activities and make them more visible.

In addition, it would be beneficial for companies, NGOs, and NCPs to further clarify and develop the procedure before the NCPs, especially from the perspective of standardizing implementation. There is an exchange between NCPs in yearly meetings but significant differences in handling the procedure remain. More concretely such procedural reforms should include an obligation on NCPs to always issue a statement on a case, even if the company does not enter into the dialogue. Such a statement should also include an opinion from the NCP as to whether there

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311 In 2010, the 42 governments adhering to the OECD Guidelines agreed to update the Guidelines. At the time of writing there were no drafts of the new Guidelines publicly available as yet. See also recommendations by OECD Watch in Oldenziel/Wilde-Ramsing et al., *10 Years On*, OECD Watch (ed.) (June 2010), 54 et seq.

312 Friends of the Earth International, Towards Binding Corporate Accountability, FoEI position paper for the WSSD, January 2002; available at http://www.foe.co.uk/resource/briefings/corporate_accountability.pdf. See also Greenpeace International, *Corporate Crimes – The Need for an International Instrument on Corporate Accountability and Liability*, June 2002, which includes several case studies that underline the need for further action in this regard, available at http://www.greenpeace.org/international/Global/international/planet-2/report/2002/5/corporate-crimes.pdf. See also Clapp, "Global Environmental Governance for Corporate Responsibility and Accountability" (2005) 5 *GEP*, 23, 29 et seq.

is sufficient evidence of a breach of the OECD Guidelines or not.[313] Furthermore, initial assessments should be conducted within a certain timeframe and should be publicly available. Standards for the reasoning in accepting, rejecting, and assessing cases should be improved. Confidentiality of significant parts of the case file and the procedure remains a serious problem for a voluntary regime based on reputation and therefore a procedural reform should render the process and documents more accessible for the public.[314] Finally, it seems advisable to strengthen investigative and monitoring competences of the NCPs.[315]

It also seems advisable to further develop the substantive law of the OECD Guidelines and perhaps include reference to standards for communication with local communities, as the UK NCP did, in the rules themselves. This would also strengthen the integrity of the international regimes contributing to sustainable development. Furthermore, a subchapter on implementable climate change related responsibilities should be introduced to enable the Guidelines to contribute to solving this serious international environmental problem.[316] Considering the different approaches to dealing with supply chain responsibilities among the NCPs, and especially the limiting effect of the "investment nexus" criterion introduced by the Investment Committee in 2003, clear supply chain responsibilities not limited to direct investment should be incorporated into the OECD Guidelines to further strengthen them.[317]

NGOs seem to be one of the main triggers of proceedings under the NCPs. In many cases there is evidence that, even after a procedure before the NCP, the company in question may fail to comply with the OECD Guidelines. If countries want to strengthen the influence of the Guidelines, they should consider giving NGOs a right to appeal to the OECD's Investment Committee.[318] As a standing international review body the Investment Committee might be more successful in engaging companies in meaningful dialogue and might also be appropriate for improving the consistency and predictability of decisions. This might also contribute positively to

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313 See also Freeman/Heydenreich et al., *Guide to the OECD Guidelines for Multinational Enterprises' Complaint Procedure*, OECD Watch (ed.) (November 2006), 17 et seq.

314 See also Freeman/Heydenreich et al., *ibid.* at 18, 22.

315 See also Freeman/Heydenreich et al., *ibid.* at 18.

316 See also Oldenziel/Wilde-Ramsing et al., *10 Years On*, OECD Watch (ed.) (June 2010), 38. As positive steps in this regard, the OECD Survey on business practices to reduce GHG emissions and the 2010 OECD report 'Transition to a low carbon economy: Public Goals and Corporate Practices' should be mentioned; for a summary of recent OECD activities with regard to climate change see http://www.oecd.org/environment/cc/41810213.pdf.

317 See also Oldenziel/Wilde-Ramsing et al., *10 Years On*, OECD Watch (ed.) (June 2010), 29.

318 See also Funk, "Limits of Environmental International Voluntary Initiatives with Respect to the OECD Guidelines Chapter on Environmental and Corporate Social Responsibility (2010) *the diplomat*, 38, 53; Oldenziel/Wilde-Ramsing et al., *ibid.* at 55; Freeman/Heydenreich et al., *Guide to the OECD Guidelines for Multinational Enterprises' Complaint Procedure*, OECD Watch (ed.) (November 2006), 19. There is little reference to work of the Investment Committee regarding the implementation of the OECD Guidelines on the OECD website. A case database similar to the one established by OECD Watch would be helpful tool to increase transparency.

a mainstreaming of procedural standards and interpretation of the substantive rules of the Guidelines and thus the predictability and "legal" certainty of the regime.

B. *Commission for Environmental Cooperation under NAAEC*

The North American Agreement on Environmental Cooperation (NAAEC) is a side agreement to the NAFTA between the United States, Mexico, and Canada aimed at better conservation and protection of the North American environment. It has been in force since 1994. Part V of NAAEC provides for consultation and arbitration in cases of a persistent pattern of failure to effectively enforce environmental laws.

Part III of NAAEC sets up a Commission for Environmental Cooperation (CEC), comprising a Council, a Secretariat, and a Joint Public Advisory Committee. Articles 14 and 15 of the NAAEC provide for a Citizen Submissions Procedure. Any NGO or person asserting that a party is failing to effectively enforce its domestic environmental legislation can file a submission with the CEC Secretariat located in Montreal.[319] Thus, the procedure does not include proceedings against private actors. The Secretariat prepares a factual record on the case, if the Council authorizes it to do so by a two-thirds vote.[320] Again by a two-thirds vote the Council may make the factual record publicly available.[321]

As of May 2011, the Secretariat had received 77 submissions.[322] It had issued 16 factual records published on the CEC website and closed 48 proceedings without issuing factual records. 13 submissions are still pending.[323] Submissions were mainly filed by Canadian and Mexican citizens and NGOs. Most probably due to the U.S. citizen suit provisions, U.S. litigators prefer lawsuits before national courts to reach legally binding decisions. The procedure is not further discussed here, as it serves to control compliance with domestic environmental law. Nevertheless, it is a notable regional international initiative to promote proper implementation of domestic environmental law.[324] Next to the Aarhus and two further UNECE non-compliance procedures and the procedure under the OECD Guidelines, it is the only international non-compliance procedure that can be triggered by any citizen or NGO of the member states in the interests of environmental protection.

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[319] Article 14(1) NAAEC.

[320] Article 15(2) NAAEC.

[321] Article 15(7) NAAEC.

[322] See CEC registry at http://www.cec.org/Page.asp?PageID=751&ContentID=&SiteNodeID=250&BL_ExpandID=156.

[323] *Ibid.*

[324] For more detailed information on the NAAEC complaint procedure and a comparison with the non-compliance procedure under the Aarhus Convention see Fitzmaurice, "Environmental Justice through International Complaint Procedures?" in Ebbesson/Okowa (eds.), *Environmental Law and Justice in Context* (2009), 211. See also Bowdery, "The CECs Citizen Submission Procedure: Innovative Model Institution or the Toothless Tiger?" (2006) available at http://apps.americanbar.org/environ/committees/lawstudents/pdf/Bowdery.pdf.

V. Conclusions

Chapter 3 examined three regional human rights courts, briefly introduced two American frameworks for arbitration, explored in depth the compliance mechanism established under the Aarhus Convention, and finally reviewed the National Contact Points under the OECD Guidelines for Multinational Enterprises as well as, in brief, the Commission for Environmental Cooperation under NAAEC.[325] Several general and institution-specific conclusions may be drawn.

Although arbitral tribunals were only briefly addressed in this chapter, it became clear that there are significant differences among courts, arbitral tribunals, compliance committees under MEAs, and other compliance review bodies that justify differentiated analyses and recommendations. As standing bodies, with fixed procedural rules, hearings that are generally open to the public, public availability of the judgments and decisions, the three regional human rights courts as well as the Aarhus Compliance Committee differ from the arbitral and other compliance review bodies examined above. As standing bodies working transparently in international law enforcement, the former are better suited to dealing with public interest environmental issues and contributing to the coherent further development of international law in general.

Compared with the other bodies examined in chapter 3, the Compliance Committee established under the Aarhus Convention is most tailored to the specific needs of addressing and enforcing international environmental law. The African Commission on Human and Peoples' Rights, to a lesser extent the African Court on Human and Peoples' Rights, and especially the Aarhus Compliance Committee are the only three regional judicial and quasi-judicial institutions that are able to hear public interest cases in the first place. In the only environmental case heard by the AfComHPR so far, the *Ogoniland* case, the damage had already occurred and the AfComHPR ordered the payment of damages and a comprehensive cleanup. Nevertheless, the AfComHPR also interpreted Article 16 and 24 of the African Charter on Human and Peoples' Rights in such a way as to include, to a certain extent, similar procedural environmental rights as those safeguarded by the UNECE Aarhus Convention. To this extent, African human rights litigation also includes a preventive and precautionary element. However, the measures that can be taken by the Compliance Committee and by the MOP under the Aarhus Convention are still more tailored to addressing identified case-specific shortcomings at an earlier stage. The case law of the Aarhus Compliance Committee demonstrates a rather successful record in engaging parties concerned in a constructive dialogue on compliance issues and in effectively tackling the identified shortcomings. It remains to be seen how the case law under the AfComHPR and the AfCtHPR further develops.

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[325] A synthesis chart with the key characteristics of the international judicial and quasi-judicial bodies analyzed can be found in the appendix.

As regards human rights courts in general, it can be concluded that, with access for individuals and NGOs, transparent and predictable procedures, and legally binding judgments, they have some characteristics that render them accountable judicial institutions of international law enforcement. However, they are not tailored to the specific needs of the effective enforcement of (international) environmental law. The European and the Inter-American human rights courts cannot hear cases that are initiated in the public interest. Moreover, many violations of environmental law do not amount to a human rights violation. Thus, human rights courts can and should contribute to the enforcement of international environmental law as far as this overlaps with the protection of human rights, but they are not and should not be the future international environmental courts.

Compared to universal international arbitration frameworks, the regional frameworks briefly addressed in this chapter, NAFTA and CAFTA-DR, provide for some progressive features in terms of transparency. In investor-state arbitration under NAFTA, a tribunal first accepted the participation of amici curiae. In addition to the acceptance of amici curiae briefs, procedural rules for investor-state arbitration under CAFTA-DR explicitly provide for publicly accessible documents and hearings. Nevertheless, the case law briefly summarized above shows how investor-state arbitration as a procedure itself makes appropriate environmental law enforcement even more difficult for local authorities than it already is. Furthermore, investor-state arbitration under NAFTA and CAFTA-DR still has the traditional characteristics of arbitral procedures, such as no standing decision-making bodies and determination of procedure and content of the arbitral proceedings through the parties. Even these more transparent arbitral procedures are not, therefore, suited to appropriately including and addressing affected environmental protection interests.

Applying the criteria for democratic international judicial and quasi-judicial decision-making and compliance review for sustainable development to the bodies examined above, the Compliance Committee established under the Aarhus Convention can be seen as a role model. It is widely accessible to individuals and NGOs that aim to address cases of non-compliance with the provisions of the Aarhus Convention and thus access to environmental information, participation in decision-making processes and access to justice in environmental matters. The Compliance Committee is a standing body; its members are independent of governments, and serve in their personal capacity. Thus, the committee is in a position to develop a coherent body of authoritative interpretation of the provisions of the Aarhus Convention. Its procedures and decisions are fully transparent and accessible to anybody who is interested through timely and comprehensive online documentation as well as open hearings. Following the findings of compliance theory, the measures that can be taken by the Compliance Committee as well as the MOP to address cases of non-compliance comprise “carrots” and “sticks” and could be applied in a case-specific manner. Thus, the substance of as well as procedure established under the Aarhus

Convention are instructive for the national as well as international handling of environmental problems. It is recommended that other countries consider becoming members of the Aarhus Convention or establish a similar MEA in their region. Furthermore, compliance committees under other MEAs should follow the example of the Aarhus Compliance Committee and consider providing for the real independence of members of the compliance committee, an NGO trigger of the compliance procedure, as well as full transparency of the decision-making process and the decisions.

The compliance review procedure established under the OECD Guidelines for Multinational Enterprises is a progressive mechanism, compared to other instruments of corporate social and environmental responsibility. The mere existence of a review procedure of soft law guidelines supports their implementation. Furthermore, the NGO trigger ensures that environmental cases reach the National Contact Points. However, measured against the criteria of democratic governance for sustainable development, the review procedure still has significant shortcomings. The procedure lacks transparency and visibility; for example the results of initial assessments of cases through the National Contact Points are not publicly available. Furthermore, National Contact Points often do not give reasons for accepting, rejecting, or assessing a case. The voluntary nature of the procedure also poses a challenge, especially given the reluctance of multinational enterprises to enter into meaningful dialogue and action.

Environmental NGOs can also trigger a review procedure before the Commission for Environmental Cooperation established under NAAEC. The Commission for Environmental Cooperation is a notable example of an American regional institution merely instituted to oversee compliance with environmental law. However, it does not review compliance with international environmental law but with the domestic environmental law of the three member states.

Chapter 4

Universal International Judicial and Quasi-Judicial Bodies

This chapter explores three universal judicial institutions (I), three fora for arbitration (II), one non-compliance procedure (III), and finally the question whether a new International Court for the Environment is needed (IV). The analysis follows the same structure as applied in chapter 3 and thus, jurisdiction, institutional arrangements, access to the court, and its environmental case law are examined and evaluated. The overall research question is, as above, whether universal international judicial and quasi-judicial bodies appropriately contribute to the realization of democratic global governance for sustainable development. With respect to each body, strengths and weaknesses in fulfilling this task are discussed and recommendations for improvements made. Conclusions are drawn in subchapter V.

I. Judicial Dispute Settlement

The International Court of Justice, the WTO Dispute Settlement System, and the International Tribunal for the Law of the Sea have all dealt with disputes involving environmental interests. How they did this is discussed and evaluated below.

A. *International Court of Justice*

The International Court of Justice (ICJ) was established in 1945 as the principal judicial organ of the United Nations.[1] It began its work in April 1946 and is located at the Peace Palace in The Hague (Netherlands). The ICJ's task is to settle legal disputes between states and to give advisory opinions on legal questions. Its organization and composition is regulated in the Statute of the International Court of Justice (ICJ Statute) which is annexed to the Charter of the United Nations and is an integral part thereof. Thus, all members of the United Nations are parties to the ICJ's Statute.[2] However, the ICJ does not have compulsory international jurisdiction. It is competent to hear a case only if the state in question has accepted its jurisdiction.

[1] Article 7 and chapter XIV of the Charter of the United Nations.

[2] The United Nations currently has 192 member states and therefore has an almost global membership, http://www.un.org/en/members/index.shtml. Non-member states with permanent observer status are the Holy See and Palestine.

Cathrin Zengerling, Greening International Jurisprudence, pp. 171–326.
ISBN 978-90-04-25730-6.

The ICJ and its predecessor, the Permanent Court of International Justice (PCIJ), are the only courts that work on a global scale and with a general subject matter jurisdiction. The PCIJ was founded in 1922 through the Covenant of the League of Nations and was dissolved in 1946, at the same time as the League of Nations. From 1946 to July 2010 the ICJ had dealt with 121 contentious cases and 26 advisory proceedings, an average of 2.3 cases per year.[3] The PCIJ rendered 83 judgments, substantive orders, and advisory opinions, an average of 3.3 cases each year.[4] The ICJ budget accounts for less than 1% of the total UN budget.[5]

The ICJ's judgments are binding, final and there is no possibility for appeal. The ICJ has a high compliance rate.[6] Should a party fail to comply with a judgment, according to Article 94 of the UN Charter, the other party may have recourse to the Security Council, which may make recommendations or decide upon measures to be taken to give effect to the judgment. However, this mechanism has not been used to date.

1. *Jurisdiction and Applicable Law*

The ICJ deals with two types of cases. Contentious cases encompass legal disputes between states and are only referred to it by states under Article 36 ICJ Statute. Furthermore, the ICJ gives advisory opinions on legal questions brought before it by duly authorized international organs and agencies.

Article 36(1) ICJ Statute states that

> [t]he jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.

More than 300 treaties in force contain a provision that provides for the jurisdiction of the ICJ; among them are several MEAs.[7] In addition to these ways to gain jurisdiction, according to Article 36(2) ICJ Statute, states parties can declare at any time that they recognize the jurisdiction of the ICJ as compulsory in all legal disputes concern-

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[3] See list of all cases http://www.icj-cij.org/docket/index.php?p1=3&p2=2.

[4] Janis, "Individuals and the International Court" in Muller/Raic et al. (eds.), *The International Court of Justice* (1997), 205, 208. citing 1984–1985 ICJ Yearbook, 189–194.

[5] Higgins, "Some Misconceptions about the Judicial Settlement of International Disputes (2007) *Hague YIL*, 13, 17.

[6] Higgins, *ibid*. at 16; Jennings, "The Role of the International Court of Justice in the Development of International Environment Protection Law" (1992) 1 *RECIEL*, 240, 243. More critical Forsythe, "The International Court of Justice at Fifty" in Muller/Raic et al. (eds.), *The International Court of Justice* (1997), 385, 396 et seq., Dunoff, "Institutional Misfits: The GATT, the ICJ & (and) Trade-Environment Disputes" (1994) 15 Mich. J. Int'l L., 1043, 21.

[7] Higgins, *ibid*. For example, Article 27(3)(b) 1992 Convention on Biological Diversity, Article 14(2)(a) 1992 United Nations Framework Convention on Climate Change, Article 15(2) 1991 UNECE Convention on Environmental Impact Assessment in a Transboundary Context, Article 9 1994 Protocol on further Reduction of Sulphur Emissions to the 1979 Convention on Long-Range Transboundary Air Pollution.

ing the interpretation of a treaty, any question of international law, the existence of any fact that would constitute a breach of an international obligation, or the nature or extent of the reparation to be made for the breach of an international obligation. So far 66 states have committed to this 'compulsory' jurisdiction under Article 36(2), mostly with certain restricting conditions.[8]

The sources of applicable law are defined in Article 38 ICJ Statute: international conventions, establishing rules expressly recognized by the contesting states; international custom, the general principles of law, and, subject to Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. The Court can also decide a case ex aequo et bono if the parties agree thereto. Therefore, multilateral environmental agreements, which are binding upon the parties to the dispute, are applicable in cases before the ICJ.

In addition to deciding contentious cases, the ICJ has advisory jurisdiction over legal questions referred to it by the General Assembly, the Security Council, or other organs of the United Nations and specialized agencies, which are duly authorized by the General Assembly, if the legal questions arising lie within the scope of their activity.[9] The sources of applicable law in advisory cases are the same as in contentious cases. Generally, advisory opinions have a consultative character and are not binding on the requesting bodies. However, certain regulations can stipulate in advance that the advisory opinion shall have binding effect.

In some cases the ICJ also exercises appellate jurisdiction. For example, it can act as a court of appeal for decisions of the International Civil Aviation Organization (ICAO) Council or the International Labor Organization (ILO) Administrative Tribunal.

2. *Institutional Arrangements*

The ICJ consists of fifteen judges with nationalities from different states.[10] The judges are elected by the General Assembly and by the Security Council for terms of office of nine years.[11] The official languages of the ICJ are English and French.

According to Article 26(1) ICJ Statute, the Court may form one or more chambers composed of three or more judges to deal with particular categories of cases. In July 1993 the ICJ set up a seven-member Chamber for Environmental Matters to rule on environmental disputes that fall within the jurisdiction of the ICJ. The formation of

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[8] See list of declarations recognizing the jurisdiction of the court as compulsory at http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3. Out of the permanent members of the Security Council, only the United Kingdom has recognized the jurisdiction of the ICJ as compulsory and only four of the G-8 states have made such a declaration (UK, Germany, Canada, and Japan).

[9] Article 96 UN Charter, Article 65 ICJ Statute.

[10] Article 3 ICJ Statute.

[11] Articles 4, 13 ICJ Statute.

the Environmental Chamber was a consequence of the 1992 UNCED. Chapter 39.10 of Agenda 21 encourages States to resolve disputes relating to sustainable development through recourse to the ICJ. Parties have to agree to bring a case before the chamber rather than before the plenary Court. The Environmental Chamber has not been used and since 2006 it has not been reconstituted.

The ICJ may at any time during the procedure draw on expert advice.[12] Hearings before the ICJ are public unless the Court decides otherwise, or unless the parties demand that the public not be admitted.[13] Applications, documents of written proceedings, transcripts or oral proceedings, orders, and judgments are published on the ICJ's website. Since 2009 the ICJ has also webcast public hearings.

3. *Access to the Court*

International NGOs are not accepted as official actors before the ICJ, neither as parties to a case nor as amici curiae. With respect to contentious cases, access of NGOs to the court is not regulated at all (a). In advisory proceedings the court on a few occasions accepted documents submitted by INGOs (b). Since 2004, INGOs have been explicitly mentioned in the Practice Directions but the wording does not give them the status of potential parties or amicus curiae in ICJ proceedings (c).

a. *No Access to Contentious Cases*

Article 34(1) of the ICJ Statute provides that

> only states may be parties in cases before the Court.[14]

Thus, individuals and non-governmental organizations cannot be plaintiffs or defendants in a case before the ICJ.[15] Article 34(2) ICJ Statute widens the scope of participation with regard to "public international organizations". The ICJ may request such organizations to provide information in relation to a specific case. Furthermore, public international organizations are allowed to present information relevant to ICJ cases on their own initiative. As the travaux préparatoires show, the drafters of Article 34(2) intended "public international organizations" to be limited to organizations of which only states were members.[16] Also Article 69(4) of the Rules of the Court defines "public international organization" as an "international organization of

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[12] Article 50 ICJ Statute.

[13] Article 46 ICJ Statute.

[14] The French wording is "Seuls les Etats ont qualité pour se présenter devant la Cour" and arguably is even stricter than the English text ("se présenter" vs. "may be parties"), see Bartholomeusz, "The Amicus Curiae before International Courts and Tribunals" (2005) 5 *Non-St. Actors & Int'l L.*, 209, 213.

[15] McCallion, International Environmental Justice: Rights and Remedies (2002) 26 *Hastings Int'l & Comp. L. Rev.*, 427, 433.

[16] See Shelton, "The Participation of Nongovernmental Organizations in International Judicial Proceedings" (1994) *Am. J. Int'l L.*, 611, 621 with further references.

States". In practice, the ICJ has very occasionally requested information from IGOs.[17] Also, only states have the right to intervene in contentious proceedings.[18]

The states-only presumption derives from Article 34 of the 1920 Statute of the PCIJ[19] and Article 24 of the 1899 PCA Convention for the Pacific Settlement of International Disputes.[20] Looking for a justification of such narrow access conditions, one finds that *Bentham* introduced the words "international law" as equivalent to the classical "law of nations", which he understood as referring to law between states only. However, according to *Blackstone*, the classical law of nations did consider states as well as individuals as subjects of international law.[21] In the discussion on the wording of the access provision of the PCA, the narrow positivist view finally prevailed over the classical tradition.[22] The second paragraph of Article 34 ICJ Statute on public international organizations was introduced with the founding of the ICJ.

In March 1950 the International League for the Rights of Man tried to participate in the contentious *Asylum* case.[23] It requested the Court to "determine whether the League is a public international organization within the meaning of Article 34."[24] The Registrar declared Article 34 not to be applicable since the League "cannot be categorized as public international organization as envisaged by Statute."[25] Apparently, there has been no other attempt by an NGO to participate as amicus curiae in contentious cases independently of a party's submission.[26] In the *Gabcikovo-Nagymaros* case the National Heritage Institute and the International River Network

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[17] In the *Aerial Incident of 3 July 1988* case the ICJ asked the International Civil Aviation Organization (ICAO), a UN specialized agency, to provide some factual information. As far as the author is aware, the UNEP has never been invited to provide information to the ICJ. See Bartholomeusz, "The Amicus Curiae before International Courts and Tribunals" (2005) 5 *Non-St. Actors & Int'l L.*, 209, 214.

[18] Articles 62, 63 ICJ Statute and Articles 81–86 Rules of the Court.

[19] For a summary of the PCIJ practice in dealing with NGOs see Leroux, "NGOs at the World Court: Lessons from the Past" (2006) 2 *Int'l Comm. L. Rev.*, 203, 205 et seq.

[20] Janis, "Individuals and the International Court" in Muller/Raic et al. (eds.), *The International Court of Justice* (1997), 205, 206. Article 26 of the 1899 Convention for the Pacific Settlement of International Disputes allowed non-signatory powers in some circumstances to have "recourse on this Tribunal".

[21] Sir William Blackstone, 4 *Commentaries on the Laws of England* 66, chapter 5, 1st ed. (1765–1769).

[22] Janis, "Individuals and the International Court" in Muller/Raic et al. (eds.), *The International Court of Justice* (1997), 205, 206 et seq.; Forsythe, "The International Court of Justice at Fifty" in Muller/Raic et al. (eds.), *The International Court of Justice* (1997), 385, 403.

[23] *Asylum* case (*Columbia vs. Peru*), Judgment of 20 November 1950, ICJ Reports 1950, p. 266.

[24] *Asylum* case, *ibid*., letter by Mr. Robert Delson, member of the board of directors of the International League for the Rights of Man of 7 March 1950" in case correspondence at 227 available at http://www.icj-cij.org/docket/files/7/8909.pdf.

[25] Answer of the Registrar via telegram of 16 March 1950, *ibid.* at 228.

[26] Valencia-Ospina, "Non-Governmental Organizations and the International Court of Justice" in Treves/Di Rattalma et al. (eds.), *Civil Society, International Courts and Compliance Bodies* (2005), 227, 228; Leroux, "NGOs at the World Court: Lessons from the Past" (2006) 2 *Int'l Comm. L. Rev.*, 203, 218 at footnote 64.

prepared an amicus brief which was filed as part of the submissions of the Hungarian government.[27]

b. *Limited Access to Advisory Proceedings*

INGOs cannot initiate advisory proceedings. According to Article 65(1) of the ICJ Statute

> [T]he Court may give an advisory opinion on a legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request.

The use of the word "body" instead of "public international organization" or "organ" thereof seems to be due to reasons of style.[28] Article 96 of the UN Charter makes clear that "body" only encompasses the General Assembly, the Security Council, or other organs of the United Nations and specialized agencies authorized by the General Assembly. However, as the practice of the PCIJ and the ICJ shows, INGOs gained access to advisory proceedings on several occasions.

International non-governmental organizations began to develop in the early and mid-20th century and the PCIJ was the first organ of the international judiciary confronted with the task of including them in its proceedings. Studies reveal that during the PCIJ era private organizations were allowed to present arguments either in writing or orally in four out of a total of 27 advisory proceedings.[29] In all of those cases, the International Labor Organization was involved and in all of those cases the international NGO admitted to the proceedings was a trade union.[30] The PCIJ records do not clarify the grounds on which the trade unions were admitted to the proceedings. They were not called in as experts, as would be possible under Article 50 of the PCIJ Statute, and it is likely that their stake in the decision was crucial for their inclusion.[31] Trade unions are members of state delegations to the ILO and therefore already belong to the ILO structure. The initiative to admit these non-state actors to the proceedings always rested with the PCIJ.[32]

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[27] Lindblom, *Non-Governmental Organisations in International Law* (2005), 304.

[28] Valencia-Ospina, "Non-Governmental Organizations and the International Court of Justice" in Treves/Di Rattalma et al. (eds.), *Civil Society, International Courts and Compliance Bodies* (2005), 227, 229.

[29] Leroux, "NGOs at the World Court: Lessons from the Past" (2006) 2 *Int'l Comm. L. Rev.*, 203, 207. The proceedings were: *Nomination of the Worker's Delegate for the Netherlands at the Third Session of the International Labour Conference*, PCIJ Rep Series B No 1 (1922); *Competence of the International Labour Organisation in regard to international regulation of the conditions of labour of persons employed in agriculture*, PCIJ Rep Series B No 2 & 3 (1922); *Competence of the International Labour Organisation to Regulate, Incidentally, the Personal Work of the Employer*, PCIJ Rep Series B No 13 (1926); *Interpretation of the Convention of 1919 Concerning Employment of Women during the Night*, PCIJ Rep Series A/B No 50 (1932).

[30] Leroux, *ibid.* at 208.

[31] *Ibid.*

[32] *Ibid.* at 209.

With respect to the ICJ and according to Article 66(2) ICJ Statute, "international organizations" can participate under certain conditions in advisory opinion cases:

> The Registrar shall [...] notify any state entitled to appear before the Court or international organization considered by the Court, or, should it not be sitting, by the President, as likely to be able to furnish information on the question, that the Court will be prepared to receive, within a time-limit to be fixed by the President, written statements, or to hear, at a public sitting to be held for the purpose, oral statements relating to the question.

The use of the words "international organization" in Article 66(2) ICJ Statue instead of "public international organization" as in Article 34(2) ICJ Statue could indicate, that INGOs may fall under the provision and be permitted to furnish information relating to advisory proceedings. It still remains unclear whether this is the case.[33] In practice, the ICJ has never asked an international NGO to provide information in relation to a specific case. Between 1947 and 1993, the ICJ received only a few requests from international NGOs to submit documents under this provision.[34] For example, in 1950 the International League for the Rights of Man sought participation in the *International Status of South West Africa* case.[35] The League argued that it could bring its expertise to the Court and provide valuable information other than that provided for by the States involved.[36] Shortly after the request, the Registrar replied that the Court would welcome a written presentation from the League and extended the deadline. Unfortunately, the League subsequently failed to comply with the formal procedure and did not submit a presentation within the deadline. Consequently, the Court dismissed the documents.[37]

Another example is the advisory proceeding *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* from 1970. First, Professor Reisman from Yale University[38] and subsequently the International League of Rights of Man,[39] and other NGOs sought permission to submit statements to the case. All requests were refused. The longer reply to Professor Reisman's request mentions, in addition to the

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[33] Valencia-Ospina, "Non-Governmental Organizations and the International Court of Justice" in Treves/Di Rattalma et al. (eds.), *Civil Society, International Courts and Compliance Bodies* (2005), 227, 230.

[34] Leroux, "NGOs at the World Court: Lessons from the Past" (2006) 2 *Int'l Comm. L. Rev.*, 203, 215.

[35] *International Status of South West Africa*, Advisory Opinion, 11 July 1950.

[36] Leroux, "NGOs at the World Court: Lessons from the Past" (2006) 2 *Int'l Comm. L. Rev.*, 203, 212. with further references.

[37] *Ibid.* at 213.

[38] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* (1970), letter of Professor Reisman from Yale University of 10 September 1970 and answer of ICJ Registrar dated 6 November 1970" in case correspondence at 636–639 available at http://www.icj-cij.org/docket/files/53/11825.pdf.

[39] Letter of the Chairman of the Board of Directors of the International League for the Rights of Man of 10 November 1970 and answer of the Registrar as of 4 February 1971, *ibid.* at 639 and 672.

argument that he, as an individual, does not fall under "international organization" as required by Article 66(2) ICJ Statute, the reason that

> the Court would be unwilling to open the floodgates to what might be a vast amount of proffered assistance.[40]

It remained unclear if "international organization" in Article 66(2) ICJ Statute aims to encompass international NGOs or refers to intergovernmental organizations only.

c. *INGOs in Practice Direction*

From 1993 onwards, starting with the *Nuclear Test* cases, NGOs have requested to submit documents in every single advisory proceeding.[41] However, the ICJ has apparently always rejected the requests.[42] Confronted with this growing interest, in 2004 the ICJ amended section XII of its Practice Directions and for the first time explicitly included NGOs in its framework.[43] The ICJ adopted Practice Directions first in October 2001, as an indication to parties and participants as to the procedure they should follow in the litigation. They do not alter the Rules of the Court but are additional and reflect the Court's ongoing review of its working methods. Practice Direction XII(1), already part of the text since 2001, states that

> [w]here an international non-governmental organization submits a written statement and/or document in an advisory opinion case on its own initiative, such statement and/or document is not to be considered as part of the case file.

The Practice Direction XII(2) amended in 2004 now clarifies that in advisory cases documents of international NGOs

> shall be treated as publications readily available and may accordingly be referred to by States and intergovernmental organizations presenting written and oral statements in the case in the same manner as publications in the public domain.[44]

Practice Direction XII(3) regulates that written documents submitted by international NGOs will be placed in the Peace Palace and all States and IGOs presenting written or oral statements will be informed about the location where these documents by INGOs can be consulted. Furthermore, it states that

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[40] Answer of ICJ Registrar dated 6 November 1970 in case correspondence, *ibid.* at 639.

[41] Leroux, "NGOs at the World Court: Lessons from the Past" (2006) 2 *Int'l Comm. L. Rev.*, 203, 217. For example, *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (1993), *Legality of the Threat or Use of Nuclear Weapons* (1995). In the *Nuclear Test* cases the ICJ for the first time received numerous briefs under Article 66(2) ICJ Statute and also letters from individuals and signatures numbering in the millions. *Difference relating to immunity from legal process of a Special Rapporteur of the Commission of Human Rights* (1998), request of International Commission for Jurists; *Legal Consequences of the Construction of a Wall in the Occupied Palestine Territory* (2003), submission of "the civil coalition of Israel".

[42] See also Lindblom, *Non-Governmental Organisations in International Law* (2005), 305 et seq.

[43] The Practice Direction is available at http://www.icj-cij.org/documents/index.php?p1=4&p2=4&p3=0.

[44] See also Higgins, "Some Misconceptions about the Judicial Settlement of International Disputes" (2007) *Hague YIL*, 13, 16.

> [a]ll States as well as intergovernmental organizations presenting written or oral statements under Article 66 of the Statute will be informed as to the location where statements and/or documents submitted by international non-governmental organizations may be consulted.

d. *Indirect Access*

Proceedings before the ICJ are largely transparent. The hearing in court is generally public, unless the ICJ decides or the parties demand otherwise.[45] Copies of the pleadings and the annexed documents can be made accessible to the public on or after the opening of the oral proceedings.[46]

NGOs can bring their points of view to the attention of the Court via indirect means and have often done so. With respect to contentious cases, they can try to convince a state to initiate proceedings against another state. Furthermore, they can contact international intergovernmental organizations, especially when the NGO has official consultative or observer status, and provide information that IGOs can include in their statements.[47] At least theoretically, INGOs can still be heard as experts.[48]

In advisory proceedings, INGOs can exert influence on IGOs to bring a legal question before the ICJ. For example, in 1994 the General Assembly requested the ICJ's advisory opinion on the legality of the threat and use of nuclear weapons following pressure from NGOs.[49] The main campaign was initiated by the International Association of Lawyers against Nuclear Arms (IALANA). Together with other groups it launched the "World Court Project" to obtain a proclamation from the ICJ that the use of nuclear weapons is not permitted under international law.

4. *Environmental Case Law*

The ICJ so far dealt with only a few cases related to environmental protection. These cases are briefly presented below. It has to be noted that even in these judgments or advisory opinions the ICJ usually did not directly refer to environmental issues.[50]

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[45] Article 46 ICJ Statute.

[46] Article 53(2) Rules of the Court.

[47] Article 34(2) ICJ Statute, Article 69 Rules of the Court.

[48] Article 50 Rules of the Court. In practice, the ICJ has never called NGOs as experts, see also Bartholomeusz, "The Amicus Curiae before International Courts and Tribunals" (2005) 5 *Non-St. Actors & Int'l L.*, 209, 225; Riedinger, *Die Rolle nichtstaatlicher Organisationen bei der Entwicklung und Durchsetzung internationalen Umweltrechts* (2001), 222.

[49] In his separate opinion in the Advisory Opinion, Judge Guillaume "wondered whether, in such circumstances [NGO pressure on UN organs], the request for opinions could still be regarded as coming from the Assemblies which had adopted them or whether, piercing the veil, the Court should have dismissed them as inadmissible"; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996 at 287, available at http://www.icj-cij.org/docket/files/95/7509.pdf.

[50] Fitzmaurice, "Equipping the Court to Deal with Developing Areas of International Law: Environmental Law" in Peck/Lee (eds.), *Increasing the Effectiveness of the International Court of Justice* (1997), 397, 402.

The most significant decision of the PCIJ from an environmental perspective was the *Territorial Jurisdiction of the International Commission of the River Oder* case.[51] The case did not directly discuss any environmental issues but it supported the 'community of interest' rule for shared access to international rivers, which is still the basis for sustainable and equitable management of watercourses.[52]

a. *Corfu Channel and Barcelona Traction*

The ICJ contributed to the formation of certain principles which are crucial also in the environmental field. For example, in the *Corfu Channel* case of 1947 the ICJ held that every state has an obligation "not to allow knowingly its territory to be used for acts contrary to the rights of other States."[53] In the *Barcelona Traction* case it recognized the principle of erga omnes obligations:

> 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, all States can be held to have a legal interest in their protection; they are obligations erga omnes. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.[54]

b. *Nuclear Tests*

The ICJ has dealt with five cases related to the use of nuclear power. In the 1974 *Nuclear Tests* Cases, Australia and New Zealand filed actions against France to stop France from holding further nuclear tests in the atmosphere in the South Pacific. In its judgments the ICJ held that the claims of Australia and New Zealand no longer had any objective inasmuch as France had undertaken the obligation to hold no further atmospheric nuclear tests. Therefore, the Court was not called upon to give a decision thereon.[55] In paragraph 63 of its judgment, the Court stated that "if the

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[51] *Territorial Jurisdiction of the International Commission of the River Oder (Czechoslovakia, Denmark, France, Germany; Great Britain, Sweden/Poland)* [1929] PCIJ (ser. A) no. 23, 5.

[52] *Ibid.* at 29, the decision is available at http://www.icj-cij.org/pcij/serie_A/A_23/74_Commission_internationale_de_l_Oder_Arret.pdf.

[53] *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)*, Judgment of 9 April 1949, ICJ Reports 1949, p. 22.

[54] *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Judgment, ICJ Reports 1970, p. 32.

[55] *Nuclear Tests (Australia v. France)*, Judgment of 20 December 1974, ICJ Reports 1974, p. 253; *Nuclear Tests (New Zealand v. France)*, Judgment of 20 December 1974, ICJ Reports 1974, p. 457. Before the ICJ declared the case moot on the basis of France's unilateral declaration to halt its atmospheric testing, the procedure gives an interesting insight into the peculiarities of international environmental judicial procedures. One of the arguments brought forward by the plaintiffs was that the tests violated international law because they polluted the global commons area of the South Pacific and therefore posed an important question regarding state responsibility. When the ICJ rejected France's argument that the court lacked jurisdiction over this issue, France refused

basis of this Judgment were to be affected, the Applicant could request an examination of the situation."[56]

In 1995, France announced that it would conduct a final series of eight underground nuclear weapons tests in the South Pacific starting in September 1995. New Zealand filed an action against France under paragraph 63 of the ICJ's earlier judgment cited above.[57] The ICJ decided that New Zealand's request did not fall within the provision of the said paragraph 63 and dismissed the case. It found that the "basis" of the 1974 judgment had not been affected because it was solely based on France's promise not to conduct any further atmospheric nuclear tests. The present case involved only underground nuclear tests.[58]

In all three decisions the ICJ could have included environmental issues in its judgment but it did not. For example, the ICJ could have taken the opportunity to consider principles of international environmental law such as the duty to carry out environmental impact assessments, the precautionary principle, the concept of intergenerational equity, or the polluter pays principle.[59]

c. *Nuclear Weapons*

The ICJ dealt with the legality of the threat and use of nuclear weapons in two advisory cases. In the first case the World Health Organization (WHO) asked the ICJ whether, in view of the health and environmental effects, the use of nuclear weapons by a State in war or other armed conflict would be a breach of its obligations under international law including the WHO Constitution.[60] In the second case the UN General Assembly requested the ICJ to determine whether the threat or use of nuclear weapons is in any circumstances permitted under international law.[61]

In the advisory proceeding initiated by the WHO, the ICJ held that it lacked jurisdiction to give the requested advisory opinion. It argued that the question did not arise under the scope of the activities of the WHO as it did not relate to the effects of the use of nuclear weapons on health, but to the legality of the use of such weapons

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to appear before the Court and ignored an interim order of protection issued by the ICJ. See also Dunoff, "Institutional Misfits: The GATT, the ICJ & (and) Trade-Environment Disputes" (1994) 15 *Mich. J. Int'l L.*, 1043, 25.

[56] *Nuclear Tests* cases, *ibid.*

[57] Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the *Nuclear Tests* (*New Zealand v. France*) Case, ICJ Reports 1995, p. 288.

[58] *Ibid.* at p. 306, para 63.

[59] Fitzmaurice, "Equipping the Court to Deal with Developing Areas of International Law: Environmental Law" in Peck/Lee (eds.), *Increasing the Effectiveness of the International Court of Justice* (1997), 397, 404. The Dissenting Opinion of Judge Weeramantry in the 1974 Judgment gives an example of how the Court could have approached the cases with a more open attitude to environmental matters.

[60] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, 8 July 1996, ICJ Reports 1996, p. 66.

[61] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, ICJ Reports 1996, p. 226.

in view of their health and environmental effects. The ICJ stated that questions on the legality of nuclear weapons are matters of arms control and disarmament and therefore a matter for the UN itself and not a specialized agency.[62]

With respect to the request filed by the UN General Assembly in its advisory opinion, the ICJ held that the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular to the principles and rules of humanitarian law. However, in view of the current state of international law, and of the elements of fact at its disposal, the Court could not 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 stake. Referring explicitly to environmental issues the Court further found that

> while the existing international law relating to the protection and safeguarding of the environment does not specifically prohibit the use of nuclear weapons, it indicates important environmental factors that are properly to be taken into account in the context of the implementation of the principles and rules of the law applicable in armed conflict.[63]

d. *Gabcikovo-Nagymaros*

In 1993 Hungary and Slovakia agreed to bring a case before the ICJ concerning the construction and operation of the Gabcikovo-Nagymaros Dam project.[64] The project was a joint investment between the two states aimed mainly at the production of hydroelectricity. The 1977 foundation treaty of the project also covered some environmental issues such as the protection of the area along the banks against flooding, the protection of the Danube water quality and compliance with the obligations for the protection of nature arising in connection with the construction and operation of the system of locks. The case mainly dealt with the interpretation of the 1977 treaty between the states. The ICJ found both parties to be in material breach of the treaty obligations and that each party must compensate the other party for the damage caused by it. It held that Hungary was not entitled to suspend and abandon its work on the dam project in 1989. It also found that Czechoslovakia had the right to start the preparation of an alternative provisional solution in 1991 but not to put it into operation as a unilateral measure in 1992. With respect to environmental matters the ICJ stated as follows:

> [The] need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development. For the purposes of the present case,

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[62] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, 8 July 1996, ICJ Reports 1996, pp. 66, 84, paras 31 and 32. See also Lakshman Guruswamy, "Commentary on Speech of Fitzmaurice" in Peck/Lee (eds.), *Increasing the Effectiveness of the International Court of Justice* (1997), 418, 427.

[63] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, ICJ Reports 1996, pp. 226, 243, para. 33.

[64] *Gabcikovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment, ICJ Reports 1997, p. 7.

> this means that the Parties together should look afresh at the effects on the environment of the operation of the Gabcikovo power plant. In particular they must find a satisfactory solution for the volume of water to be released into the old bed of the Danube and into the side-arms on both sides of the river.[65]

e. *Pulp Mills on the River Uruguay*

Pulp Mills on the River Uruguay is arguably the most important environmental case decided by the ICJ so far. Argentina instituted proceedings before the ICJ against Uruguay in 2006 alleging that Uruguay had breached its obligations under the 1975 bilateral Statute of the River Uruguay between the parties. With the Statute of the River Uruguay, Argentina and Uruguay put in place a relatively modern legal instrument for the joint management of a shared natural resource with a view to the "optimum and rational utilization of the River Uruguay" (Article 1 of the Statute), including measures of conservation (Chapter IX of the Statute) and pollution prevention (Chapter X of the Statute). Argentina argued that Uruguay was in breach of its obligations under the bilateral Statute of the River Uruguay because of the authorization, construction, and future commissioning of two pulp mills on the river which allegedly would negatively affect the water quality of the river and dependent areas.

During the course of the proceedings the ICJ issued two orders on requests for provisional measures and one judgment. In May 2006, Argentina requested the Court to order the suspension of construction of the mills, but the Court refrained from doing so by fourteen votes to one.[66] In November 2006, in turn, Uruguay asked the Court to indicate provisional measures against Argentina in ordering that "Argentina shall take all reasonable and appropriate steps at its disposal to prevent or end the interruption of transit between Uruguay and Argentina, including the blockading of bridges and roads between the two states."[67] By fourteen to one votes the ICJ decided not to issue the requested provisional measures.[68]

As regards the main claims, Argentina asked the Court to find that by authorizing the construction of two pulp mills Uruguay had violated its obligations under the 1975 Statute of the River Uruguay. It furthermore requested the Court to adjudge and declare that Uruguay must resume strict compliance with its obligations under the Statute, cease immediately the internationally wrongful acts by which it has engaged its responsibility, re-establish the situation that existed before these acts were committed, pay compensation to Argentina for the damage caused by these internationally wrongful acts that would not be remedied by that situation being

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[65] *Ibid*. at p. 75.

[66] *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Provisional Measures, Order of 13 July 2006, ICJ Reports 2006, p. 113, at 87.

[67] *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Provisional Measures, Order of 23 January 2007, ICJ Reports 2007, p. 3, at 13.

[68] *Ibid*. at 56.

restored, of an amount to be determined by the Court at a subsequent stage of these proceedings, and provide adequate guarantees that it will refrain in future from preventing the Statute from being applied, in particular the consultation procedure.[69] The ICJ, by thirteen votes to one, found that Uruguay has breached its procedural obligations under Articles 7 to 12 of the River Uruguay Statute to inform, notify and negotiate with Argentina and that the declaration by the Court of this breach constitutes appropriate satisfaction. By eleven votes to three, the Court found that Uruguay has not breached its substantive obligations under Articles 35, 36, and 41 regarding appropriate conservation and pollution prevention measures of the River Uruguay Statute. Unanimously, all other claims were rejected.[70]

In its judgment the ICJ differentiated between the breach of procedural and substantive obligations arising from the 1975 River Uruguay Statute. The Court approached the question of breach of substantive obligations on environmental protection in a comparatively detailed manner.[71] As regards the burden of proof, the Court maintained that Argentina as the applicant is obliged to prove its allegations and that neither a precautionary approach nor the 1975 Statute require any shifting of the burden of proof towards Uruguay.[72]

One of the main substantive allegations of Argentina was that Uruguay breached its obligations under Article 41 of the River Uruguay Statute by allowing certain discharges from the pulp mills into the river. Article 41a of the Statute states that

> [w]ithout prejudice to the functions assigned to the Commission in this respect, the Parties undertake:
> (a) to protect and preserve the aquatic environment and, in particular, to prevent its pollution, by prescribing appropriate rules and measures in accordance with applicable international agreements and in keeping, where relevant, with the guidelines and recommendations of international technical bodies.

Argentina also tried to invoke through this provision other "applicable international agreements" such as the Convention on Biological Diversity and the Ramsar Convention.[73] Uruguay argued that it fulfilled its duty to prevent pollution under Article 41 of the Statute because the provision only requires a certain conduct and not a result and that its obligation in relation to pollution prevention conduct was fulfilled because it required that the plants meet best available technology (BAT) standards.[74]

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[69] *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment of 20 April 2010, at 23.
[70] *Ibid*. at 282.
[71] *Ibid*. at 159–266.
[72] *Ibid*. at 164.
[73] *Ibid*. at 191.
[74] *Ibid*. at 192.

In closer addressing the substantive obligations the Court found that

> in order for the Parties properly to comply with their obligations under Article 41 (a) and (b) of the 1975 Statute, they must, for the purposes of protecting and preserving the aquatic environment with respect to activities which may be liable to cause transboundary harm, carry out an environmental impact assessment.[75]

It went even further and explicitly stated that it considers an environmental impact assessment a requirement under general international law in cases of transboundary industrial activities:

> [T]he obligation to protect and preserve, under Article 41 (a) of the Statute, has to be interpreted in accordance with a practice, which in recent years has gained so much acceptance among States that it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource. Moreover, due diligence, and the duty of vigilance and prevention which it implies, would not be considered to have been exercised, if a party planning works liable to affect the régime of the river or the quality of its waters did not undertake an environmental impact assessment on the potential effects of such works.[76]

Nevertheless, it is important to note that both parties to the dispute had already agreed that an EIA would be necessary; they only disagreed on the content. As regards the content the ICJ did not further specify any obligations. It noted that

> neither the 1975 Statute nor general international law specify the scope and content of an environmental impact assessment.[. . .][I]t is for each State to determine in its domestic legislation or in the authorization process for the project, the specific content of the environmental impact assessment required in each case, having regard to the nature and magnitude of the proposed development and its likely adverse impact on the environment as well as to the need to exercise due diligence in conducting such an assessment.[77]

The Court refused to draw on any other conclusions from the Espoo Convention or the UNEP Goals and Principles as invoked by Argentina, because Argentina and Uruguay were not parties to the Espoo Convention and the UNEP Goals and Principles are also not legally binding to the parties. However, the Court did highlight that an EIA must be conducted prior to the implementation of a project and that, where necessary, the environmental effects of a project should be continuously monitored.[78]

As regards the content of the EIA, the Court discussed in more detail if Uruguay had breached any obligation to consider alternative locations for the pulp mills and to consult with affected populations on both sides of the river. However, it could not

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[75] *Ibid.* at 204.
[76] *Ibid.*
[77] *Ibid.* at 205.
[78] *Ibid.*

identify such breaches. Evaluating the factual evidence presented, it concluded that the Argentinian population affected actually did have a chance to participate in the proceedings. From a purely legal perspective, however, the Court underlined that no legal obligation to consult the affected populations arises from the instruments brought forward by Argentina, such as Articles 2.6 and 3.8 of the Espoo Convention, Article 13 of the 2001 International Law Commission draft Articles on Prevention of Transboundary Harm from Hazardous Activities, and Principles 7 and 8 of the UNEP Goals and Principles.[79]

In addition to the EIA, the Court considered whether a number of technical and scientific issues actually constituted a breach by Uruguay of its substantive obligations under Article 41 of the River Uruguay Statute. More precisely, the Court discussed questions of the production technology used in the pulp mill, the impact of the discharges on the quality of the waters of river (under dispute were dissolved oxygen, total phosphorus, phenolic substances, nonylphenols and nonylphenolethoxylates, and dioxins and furans), effects on biodiversity, and air pollution. In its decision-making the Court formally applied rules of burden of proof as identified above and stated with regard to each of these technical and scientific subjects that there is no conclusive evidence in the record to show that Uruguay has breached its obligations.[80]

The decision is also interesting with regard to expert advice.[81] Both parties presented their experts as counsel or advocates which means that their statements could not be questioned by the other party or the Court. Although the ICJ highlighted that it would have been more helpful to hear these experts as expert witnesses,[82] it did not make use of its rights under Article 50 of the Statute of the ICJ and Article 62 of the Rules of the Court to arrange for independent experts to give their opinions on certain highly technical issues relating to the case. As far as the author is aware, there were also no amicus curiae briefs submitted to the ICJ.[83]

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[79] *Ibid.* at 215 and 216.

[80] *Ibid.* at e.g. 228, 265.

[81] See especially the joint dissenting opinion of Judges Al-Khasawneh and Simma, available on the ICJ's website as part of the case file. Both judges dissented with regard to the second finding of the majority that Uruguay was not in breach of any substantive obligation under the River Uruguay Statute, mainly because they disagreed with the methodology applied by the Court in its decision-making; see also at the evaluation section below at Chapter 4.I.A.5.c.

[82] *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment of 20 April 2010, at 167.

[83] The case was discussed in other international fora as well such as Mercosur and especially before the Compliance Advisory Ombudsman (CAO) of the World Bank. The pulp mill construction was financed by the International Finance Corporation (IFC) and the CAO oversees compliance of IFC projects with social and environmental norms. In September 2005, the Center for Human Rights and Environment (CEDHA), an international environmental NGO, filed a complaint to the CAO under these IFC/World Bank rules.

f. *Herbicide Spraying and Whaling*

In 2008, Ecuador instituted proceedings against Colombia concerning aerial spraying of toxic herbicides at locations near, at and across its border with Ecuador.[84] Ecuador alleged that the spraying had already caused serious damage to people, to crops, to animals, and to the natural environment and posed a grave risk of further damage over time and, inter alia, requested the ICJ to adjudge and declare, firstly, that Colombia had violated its obligations under international law by causing or allowing the deposit on the territory of Ecuador of toxic herbicides that have caused damage to human health, property and the environment; and, secondly, that Colombia should indemnify Ecuador for any loss or damage caused by its internationally unlawful acts, namely the use of herbicides, including by aerial dispersion. The damages should include, in addition to injury and damage to persons and property, also environmental damage or the depletion of natural resources. The case is still pending, so far the court has only fixed time limits for the written pleadings.

In 2010, Australia initiated proceedings against Japan before the ICJ for alleged breach of international obligations concerning whaling. Australia argued that

> Japan's continued pursuit of a large scale programme of whaling under the Second Phase of its Japanese Whale Research Programme under Special Permit in the Antarctic ("JARPA II") [is] in breach of obligations assumed by Japan under the International Convention for the Regulation of Whaling ("ICRW"), as well as its other international obligations for the preservation of marine mammals and marine environment.[85]

Australia requested the ICJ to adjudge and declare that Japan is in breach of its international obligations in implementing the JARPA II program in the Southern Ocean, and to order that Japan (a) cease implementation of JARPA II; (b) revoke any authorizations, permits or licenses allowing the activities which are the subject of this application to be undertaken; and (c) provide assurances and guarantees that it will not take any further action under the JARPA II or any similar program until such program has been brought into conformity with its obligations under international law.[86] In addition to the breaches of the obligations under the ICRW, Australia alleged that Japan was in breach, inter alia, of its obligations under the Convention on International Trade in Endangered Species of Wild Fauna and Flora and under the Convention on Biological Diversity.[87] The case is still pending.

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[84] *Aerial Herbicide Spraying (Ecuador v. Colombia)*; ICJ Press Release No. 2008/5, 1 April 2008, available at http://www.icj-cij.org/docket/files/138/14470.pdf.

[85] *Whaling in the Antarctic (Australia v. Japan)*; ICJ Press Release No. 2010/16, 1 June 2010, available at http://www.icj-cij.org/docket/files/148/15953.pdf.

[86] *Ibid.*

[87] *Ibid.*

5. *Evaluation*

As the core judicial organ of the United Nations, the ICJ is positioned to play a central role in the settlement of international disputes as well as in the interpretation and further development of international law. The analysis of the ICJ's environmental case law shows, however, that the ICJ is not yet appropriately equipped to deal with international environmental cases, nor does it sufficiently apply the rules of international environmental law in its judgments and advisory opinions. Its April 2010 *Pulp Mills* decision is a step in the right direction but there are still some shortcomings.

a. *Jurisdiction and Institutional Arrangements*

The ICJ has a broad jurisdiction. According to Article 36(1) ICJ Statute, it can deal with any case parties decide to refer to it. With procedures for contentious cases and advisory opinions, it is not limited to confrontational matters but also ready to contribute to the interpretation of international law if the UN General Assembly, the Security Council or a UN specialized agency refers a legal question to it. The applicable law encompasses all international law applicable between the parties to the dispute.

However, this wide-ranging potential has not been reflected in the case law of the ICJ, especially not in the field of international environmental law. The PCIJ dealt with an average of 3.3 cases per year, the ICJ with 2.3 cases per year. Thus, the workload of the ICJ is lower than that of the PCIJ and generally not very high. On the one hand, this is surprising considering that the number of states and international organizations that might bring cases to the ICJ has been steadily increasing since the PCIJ was set up in 1921.[88] On the other hand, it is important to note that the number of international judicial institutions and the number of cases brought to it in total has also been steadily increasing. With respect to the ICJ, it seems justified to conclude that governmental officials and international civil servants are very reluctant to initiate proceedings before the ICJ. The reasons for this reluctance are probably that they are unwilling to confront and thus also politically embarrass other states or organizations and that they lose to a certain degree their own control over disputes by referring them to the ICJ.[89]

From 1921 until now the PCIJ and ICJ have handled 230 cases, an average of 2.6 cases per year. They have ruled primarily on technical disputes concerning boundaries and territory.[90] Only ten out of 230 cases are in some way related to environmental issues. Five out of these ten cases dealt with nuclear tests and nuclear

[88] Janis, "Individuals and the International Court" in Muller/Raic et al. (eds.), *The International Court of Justice* (1997), 205, 209.

[89] Forsythe, "The International Court of Justice at Fifty" in Muller/Raic et al. (eds.), *The International Court of Justice* (1997), 385, 385; Janis, *ibid.* at 209, 216. *Janis* therefore sees the role of the ICJ as "marginal" and "disappointing".

[90] Forsythe, "The International Court of Justice at Fifty" in Muller/Raic et al. (eds.), *The International Court of Justice* (1997), 385, 386.

weapons, issues with severe environmental impact but as highly political questions maybe not the best occasions for an international court to apply and further develop rules and principles of international environmental law. Not a single case has been referred to the Environmental Chamber the Court set up in 1993.

The overwhelming majority of states participate in multilateral environmental agreements such as, for example, the United Nations Framework Convention on Climate Change, the Kyoto Protocol, or the Convention on Biological Diversity.[91] There are also numerous potential conflicts between rules of international environmental law and other fields of international law such as world trade law for example. Nevertheless, the environmental case load of the ICJ is close to zero. One explanation for this situation is that interests protected in MEAs are mostly of a common good character and states are not be the best stakeholders for these kinds of interests; just as individuals with exploitation rather than protection interests on the national level do not invoke environmental law before national judiciaries.

b. *Access*

The group of actors that can initiate proceedings before the ICJ is limited. Contentious cases can be brought to the ICJ only by states. Advisory proceedings can also be instituted by the UN General Assembly, the UN Security Council or a UN specialized agency. As shown above, only very few environmental cases reach the ICJ. If there is political interest in having the ICJ deal with more environmental cases the standing provisions need to be widened.[92]

International environmental cases have special features that differentiate them from the traditional concept of international law and its adjudication.[93] Global and many transboundary environmental cases affect not only two but more states and other interest groups. International environmental law often governs the common interests of states and aims at co-operation rather than co-existence. Also technical expertise is particularly important in many environmental cases. The ICJ Statute and the Rules provide for interventions,[94] participation of international organizations

[91] See also Lakshman Guruswamy, "Commentary on Speech of Fitzmaurice" in Peck/Lee (eds.), *Increasing the Effectiveness of the International Court of Justice* (1997), 418, 420.

[92] Leroux, "NGOs at the World Court: Lessons from the Past" (2006) 2 *Int'l Comm. L. Rev.*, 203, 204; Janis, "Individuals and the International Court" in Muller/Raic et al. (eds.), *The International Court of Justice* (1997), 205, 209 with respect to individuals and referring to examples of the European regional courts such as the ECJ and the ECtHR; Fitzmaurice, "Equipping the Court to Deal with Developing Areas of International Law: Environmental Law" in Peck/Lee (eds.), *Increasing the Effectiveness of the International Court of Justice* (1997), 397, 413 et seq.; Forsythe, "The International Court of Justice at Fifty" in Muller/Raic et al. (eds.), *The International Court of Justice* (1997), 385, 401; Lakshman Guruswamy, "Commentary on Speech of Fitzmaurice" in Peck/Lee (eds.), *Increasing the Effectiveness of the International Court of Justice* (1997), 418, 426.

[93] Fitzmaurice, *ibid*. at 399. See also Lakshman Guruswamy, *ibid*. at 418, 419.

[94] Articles 62 and 63 ICJ Statute.

in advisory proceedings[95] and for calling of experts.[96] However, the ICJ has applied these rules very rarely, interpreted them narrowly and therefore has not used them with a view to the special needs of environmental cases.[97]

There is no amicus curiae provision in the Statute, Rules of the Court or its Practice Directions. The Practice Directions as amended in 2004 explicitly mention INGOs with respect to advisory proceedings, but they do not grant them a special role in the proceedings. This legal status quo is insufficient from an environmental perspective. The amendments to Practice Direction XII can be seen as a step towards inclusion of international NGOs since here, for the first time in the whole history of the PCIJ and ICJ, INGOs are explicitly mentioned and recognized as actors in the realm of the ICJ. Furthermore, section XII(3) provides for a new informative service because it ensures that INGO statements will be placed in the Peace Palace and that states and IGOs that present arguments in proceedings will be informed of the location of the INGO statement submitted.[98]

However, the amendments can also be interpreted as a backward step. Practice Direction XII(2) only clarifies that actual parties to ICJ cases can refer to documents submitted by INGOs in the same way as to any other document publicly available. Thus, the Practice Direction gives INGOs the same status as any other organization or individual that publishes a paper, which means that an INGO has no special status at all within the framework of the ICJ. Considering that ICJ practice in the past might have been an indicator for a somewhat higher status for INGOs, the wording of Practice Direction XII can be seen as a backward step. Also, section XII(3)(2) appears to narrow the options for INGOs to become involved in advisory proceedings. Whereas Article 66 refers to states and "international organizations", Practice Direction XII(3)(2) explicitly mentions states and "intergovernmental organizations [...] under Article 66". This could be seen as an attempt to clarify that "international organizations" in Article 66 is meant to only encompass intergovernmental organizations and not INGOs.[99] On the other hand, section XII(3)(2) can be interpreted as limiting the group of those who will be informed about the location of the INGO statements to states and IGOs, in the belief that INGOs will ensure communication amongst themselves.

All in all, it can be said that there has been a small advance in the inclusion of INGOs in the ICJ proceedings in that they have, since 2004, for the first time been

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95 Article 66 ICJ Statute.

96 Article 50 ICJ Statute.

97 Fitzmaurice, "Equipping the Court to Deal with Developing Areas of International Law: Environmental Law" in Peck/Lee (eds.), *Increasing the Effectiveness of the International Court of Justice* (1997), 397, 412, 414, 415.

98 Bartholomeusz, "The Amicus Curiae before International Courts and Tribunals" (2005) 5 *Non-St. Actors & Int'l L.*, 209, 223 et seq.

99 Leroux, "NGOs at the World Court: Lessons from the Past" (2006) 2 *Int'l Comm. L. Rev.*, 203, 219 et seq.

explicitly mentioned in the Practice Directions. However, INGOs are far from being potential parties in ICJ proceedings and they also do not qualify as amici curiae, at least not as the term is understood in national jurisdictions.[100]

Procedures before the ICJ are transparent. Public hearings, the availability of documents in the case file, and since 2009 the webcast of public hearings enable the interested public to follow and comment on the proceedings.

c. *Environmental Case Law*

What has been pointed out above with respect to the ICJ's interpretation of procedural norms in environmental cases is also true for the ICJ's application and interpretation of substantive environmental law. The ICJ is very reluctant to apply and interpret international environmental law. On the one hand, it can be said that the ICJ has not had many occasions to elaborate on environmental law, especially considering that the five environmental cases related to nuclear power might have been politically very difficult to decide. On the other hand, nuclear tests can be seen as the kind of activity that cannot be dealt with without reference to environmental impact assessments, the precautionary principle, and the polluter pays principle. Although the definition and rank of these environmental principles is not clear, the ICJ could nevertheless have contributed to further their clarification and development.[101] However, in none of the environment-related cases, with an exception of *Pulp Mills on the River Uruguay* case, did the ICJ apply international environmental law or discussed these principles.

The 2010 judgment on *Pulp Mills on the River Uruguay* is maybe the most remarkable decision on an environmental case issued by the ICJ. It is somewhat more progressive than its previous environment-related decisions in that the Court considered in depth several environmental arguments as outlined above.[102] The decision is especially noteworthy because the ICJ finds that there is now a requirement under general international law to undertake an environmental impact assessment where there is a risk that a proposed industrial activity may have a significant adverse impact in a transboundary context. However, the Court also noted that there is no general international law on the content of such an environmental impact assessment.

Furthermore, the criticism of the dissenting Judges *Al-Khasawneh* and *Simma* is shared here, namely that the Court in the case in question

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[100] See also Leroux, "NGOs at the World Court: Lessons from the Past" (2006) 2 *Int'l Comm. L. Rev.*, 203, 219. See also Introduction part V for the definition of amici curiae as understood in this study.

[101] Fitzmaurice, "Equipping the Court to Deal with Developing Areas of International Law: Environmental Law" in Peck/Lee (eds.), *Increasing the Effectiveness of the International Court of Justice* (1997), 397, 410; Lakshman Guruswamy, "Commentary on Speech of Fitzmaurice" in Peck/Lee (eds.), *Increasing the Effectiveness of the International Court of Justice* (1997), 418, 419.

[102] See Chapter 4.I.A.4.e.

> has missed what can aptly be called a golden opportunity to demonstrate to the international community its ability, and preparedness, to approach scientifically complex disputes in a state-of-art manner.[103]

The core argument here is that the Court refrained from seeking independent expert advice on the highly complex technical and scientific issues it had to deal with to come to a conclusion regarding the question of whether Uruguay breached any of its substantive obligations under the River Uruguay Statute.[104] This encompassed questions on, for example, which types of modeling are appropriate in evaluating hydrodynamics of a river or what effects certain pollutants have on the ecosystem of the River Uruguay. Applying burden of proof rules, the Court finally concluded that Uruguay had not breached its substantive obligations under the River Uruguay Statute because the Court could not identify any conclusive evidence of such a breach in the record as brought forward by Argentina. Where a judgment rests in such a decisive manner on highly complex technical and scientific questions, a decision based solely on the Judges' impression of expertise provided by the parties is not sufficiently well-reasoned. Establishing the decisive facts of a case with the help of independent expert advice here becomes a matter of "good administration of justice", transparency, and procedural fairness.[105]

As regards the further development of principles relevant to environmental law through ICJ jurisprudence, environmental cases could also be a field to further develop the idea of erga omnes obligations, as expounded for the first time in the *Barcelona Traction* case. However, the ICJ has not returned to these kinds of obligations in an environmental context.[106] In the *Gabcikovo-Nagymaros* case the Court also included a paragraph on environmental issues in its ruling, but it could have dealt with these issues much more concretely considering the body of international environmental law applicable to the case. The *Herbicide Spraying* and *Whaling* cases were only recently submitted and it remains to be seen if and how the ICJ will apply substantive international environmental law in these cases.

Based on the concrete wording of provisions in MEAs, there seem to be plenty examples of where the ICJ, at least in the absence of a World Environment Court as proposed below,[107] could play a helpful interpretative and adjudicatory role. For example, the UNFCCC mentions "common but differentiated responsibilities" or

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[103] Joint dissenting opinion of Judges *Al-Khasawneh* and *Simma* at 28, available on the ICJ's website as part of the case file.

[104] *Ibid*. at 2, 3, and 6.

[105] *Ibid*. at 14 with further references.

[106] The International Law Commission further developed this idea in Article 48 of its 2001 Draft Articles on the Responsibility of States for Internationally Wrongful Acts of State Responsibility, Report of the ILC on the Work of its Fifty-third Session, UN GAOR, 56th session, Supp No 10, UN Doc A/56/10 2001.

[107] See chapter 4.IV.

"to the extent feasible" without closer definition.[108] It is not argued here that a ruling of the ICJ on these issues is the primary way of gaining a legal interpretation but, as the core judicial organ of the United Nations and equipped with a broad jurisdiction, more authoritative restatements in the field of international environmental law are feasible and needed.[109] The ICJ could also contribute to the development of treaty provisions into general law.[110]

6. *Conclusions and Recommendations*

In summary, the ICJ does not yet sufficiently contribute to the application and development of international environmental law. As the core judicial organ of the United Nations, the ICJ is in an ideal position to settle international disputes and to interpret and further develop international law in a balanced way with a view to sustainable development. Among its strengths are this central position, its long tradition, its general jurisdiction, and its accessibility via contentious and advisory procedures. However, its limited accessibility in terms of parties, its very cautious practice of making use of amici curiae and expert advice, and its rather reluctant approach to dealing in appropriate depth with factual and legal environmental issues relevant to its cases are the crucial weaknesses in the ICJ's manner of dealing with international environmental law.

Several suggestions for improvements may be made. Firstly, the ICJ should apply more substantive international environmental law to its cases which involve environmental protection interests and contribute to the further interpretation and development of such law.[111] It should especially deal with legal and factual environmental issues in appropriate depth. Secondly, the ICJ should allow environmental NGOs, as key stakeholders of environmental interests, to participate in contentious and advisory proceedings as amici curiae in order to include greater consideration of environmental interests and knowledge in its cases. Thirdly, the ICJ could also make more use of Articles 66 and 50 of the ICJ Statute to hear international organizations in advisory proceedings and experts in advisory or contentious cases in order to include more environmental expertise in its decision-making processes.

In chapter 4.IV below, the idea of a new international court for the environment is discussed. The establishment of a new world environment court is favored over

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[108] For more examples, see Lakshman Guruswamy, "Commentary on Speech of Fitzmaurice" in Peck/Lee (eds.), *Increasing the Effectiveness of the International Court of Justice* (1997), 418, 423.

[109] Jennings, "The Role of the International Court of Justice in the Development of International Environment Protection Law" (1992) 1 *RECIEL*, 240, 244. See also Lakshman Guruswamy, "Commentary on Speech of Fitzmaurice" in Peck/Lee (eds.), *Increasing the Effectiveness of the International Court of Justice* (1997), 418, 429 explicitly referring to the difficulty of dealing with political questions.

[110] Jennings, *ibid*. at 241.

[111] See also Fitzmaurice, "Equipping the Court to Deal with Developing Areas of International Law: Environmental Law" in Peck/Lee (eds.), *Increasing the Effectiveness of the International Court of Justice* (1997), 397, 415.

putting in place a new strengthened Environmental Chamber at the ICJ.[112] However, if states agree that more environmental cases are to reach the ICJ, stakeholders of environmental protection interests should have the right to trigger advisory and maybe even contentious proceedings under clearly defined conditions.[113] As a first step, for example, UNEP and the CSD could have the right to invoke environmental community obligations before the ICJ.[114]

With regard to further development of the ICJ jurisdiction, it is also important to note that the ICJ can already exercise appellate jurisdiction over decisions of the ICAO and ILO. As the core judicial organ of the United Nations, it might be worth considering an appeal function for the ICJ with respect to decisions of regime courts, such as the WTO dispute settlement bodies or ITLOS, especially with regard to cases which could be dealt with under the jurisdictions of different regime courts and bearing in mind the in-built bias of these regime courts.[115] A new 'sustainable development' chamber could be established to deal with such appeals.

Wider ICJ jurisdiction and wider access provisions would further develop and strengthen its role in international adjudication. The ICJ's classic function of peaceful settlement of disputes would be complemented through two new functions of, as *Shany* puts it, norm advancement and regime maintenance.[116]

B. *WTO Dispute Settlement System*

The WTO provides the common institutional framework for the conduct of trade relations among its members, and its main purpose is the liberalization of international trade.[117] It was established in 1995 through a multilateral treaty, the 1994 Marrakesh Agreement. Today the WTO has 153 members[118] and represents more than 95% of total world trade.[119]

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[112] See chapter 4.IV.D.2.b.

[113] See also *Petersmann* who underlines the importance of direct access for individuals and other non-state actors to the ICJ to strengthen the role of the UN legal and dispute settlement system, Petersmann, "Constitutionalism and International Adjudication" (1999) *N.Y.U. J. Int'l L. & Pol.*, 753, 789.

[114] Lakshman Guruswamy, "Commentary on Speech of Fitzmaurice" in Peck/Lee (eds.), *Increasing the Effectiveness of the International Court of Justice* (1997), 418, 426. See also Jennings, "The Role of the International Court of Justice in the Development of International Environment Protection Law" (1992) 1 *RECIEL*, 240, 242.

[115] Shany, "No Longer a Weak Department of Power? Reflections on the Emergence of a New International Judiciary" (2009) 20 *EJIL*, 73, 81.

[116] *Ibid.*

[117] Article II(1) 1994 Marrakesh Agreement Establishing the World Trade Organisation.

[118] As of 23 July 2008; out of about 195 states in the world.

[119] Fergusson, *The World Trade Organization: Background and Issues*, Congressional Research Service, available at http://www.nationalaglawcenter.org/assets/crs/98–928.pdf. From 1948 to 1994, the General Agreement on Tariffs and Trade (GATT) provided rules for world trade.

The WTO dispute settlement mechanism was established by the 1994 Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU).[120] It is based on the rules and practices developed under the previous GATT 1947 dispute settlement system. The main objective of the dispute settlement mechanism is to "to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law".[121] The WTO dispute settlement system is one of the furthest developed international dispute settlement mechanisms.

If a dispute arises between WTO members it is first referred to consultations. If no agreement is reached, a state may request adjudication by an ad hoc panel. On appeal the Appellate Body reviews the panel decision on legal grounds. Neither panel nor Appellate Body reports are themselves binding. However, they become binding if they are adopted by the Dispute Settlement Body (DSB), the WTO's political organ comprising all WTO members. The procedure for adoption of the reports is rather unique in the international regime: they are adopted by the DSB unless the DSB decides by consensus not to adopt them within 30 days following circulation to the Members.[122] If a party to a dispute does not comply with a decision, it may face trade sanctions.

As at 13 March 2011, 423 complaints had been notified to the WTO and the Appellate Body has issued 101 reports.[123] Thus, from 1995 until 2011 the WTO Dispute Settlement Mechanism dealt with an average of about 28 cases per year and the Appellate Body adopted about 7 reports per year. The WTO dispute settlement system is highly active and vital to the development, consolidation, and constitutionalization of the WTO regime. A number of disputes involved environmental issues and the decisions have implications for the implementation of environmental law.[124]

1. *Jurisdiction and Applicable Law*

The jurisdiction of the WTO dispute settlement system comprises all disputes between WTO members arising under any provision of the agreements listed in Appendix 1 to the DSU.[125] These encompass all agreements under the WTO umbrella, for example, the WTO agreement itself, and the three core multilateral trade agreements

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[120] 1994 Marrakesh Agreement, Annex 2 (DSU). For a concise environment-related overview of the WTO dispute settlement body see Sands, *Principles of International Environmental Law* (2003), 220 et seq.

[121] Article 3(2) DSU.

[122] Article 16(4) DSU for panel reports and Article 17(14) DSU for Appellate Body reports.

[123] See list at http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm and http://www.wto.org/english/tratop_e/dispu_e/ab_reports_e.htm.

[124] Sands, *Principles of International Environmental Law* (2003), 222.

[125] Article 1(1) DSU.

such as the 1947 General Agreement on Tariffs and Trade (GATT),[126] the 1995 General Agreement on Trade in Services (GATS)[127] and the 1994 Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).[128]

The jurisdiction of the WTO dispute settlement bodies does not encompass international law outside the WTO regime. However, with respect to cases that might require interpretation of WTO norms in the light of other international law, the Appellate Body has held in the *Reformulated Gasoline* case that the

> General Agreement [was] not to be read in clinical isolation from public international law.[129]

According to Article 3(2) DSU, which requires interpretation "in accordance with customary rules of interpretation of public international law", in the *Biotech Products* case the panel referred to Article 31 of the 1969 Vienna Convention on the Law of Treaties (VCLT) to determine how the precautionary principle, the CBD and the Cartagena Protocol could influence the interpretation of the SPS Agreement.[130] Article 31(3)(c) VCLT states that in interpreting a treaty

> [t]here shall be taken into account [...] any relevant rules of international law applicable in the relations between the parties.

The panel interpreted Article 31(3)(c) VCLT very narrowly:

> it makes sense to interpret Article 31(3)(c) as requiring consideration of those rules of international law which are applicable in the relations between all parties to the treaty which is being interpreted. Requiring that a treaty be interpreted in the light of other rules of international law which bind the States parties to the treaty ensures or enhances the consistency of the rules of international law applicable to these States and thus contributes to avoiding conflicts between the relevant rules.[131]

Not all members of the WTO were party to the CBD and the Cartagena Protocol and consequently, these international environmental agreements did not have to be taken into account in interpreting the SPS Agreement. Such a narrow interpretation of Article 31(3)(c) of the Vienna Convention means that there will hardly ever be any references inter se, as it is very unlikely that all members of a WTO agreement are simultaneously all members of another multilateral environmental agreement.[132]

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[126] 1994 Marrakesh Agreement, Annex 1A.

[127] *Ibid.* Annex 1B.

[128] *Ibid.* Annex 1C.

[129] *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, at III.B. See also Marceau, "A Call for Coherence in International Law-Praises for the Prohibition Against 'Clinical Isolation' in WTO Dispute Settlement" (1999) 33 *J World Trade*, 87.

[130] *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, adopted 21 November 2006.

[131] *Ibid.* at 7.70.

[132] With respect to the specific case, however, it should be noted that not all parties to the dispute were party to the affected MEAs. Thus, even if the Panel had interpreted Article 31(3)(c)

It is a highly critical issue whether and if so how the WTO dispute settlement bodies should consider other public international law, including MEAs.[133] In the *Sardines* case, for example, the Appellate Body applied the Codex Alimentarius in a decisive manner without consulting with any experts or official bodies of the Codex Alimentarius regime.[134]

2. *Institutional Arrangements*

The WTO dispute settlement system consists of three main institutions: the Dispute Settlement Body (DSB), ad hoc panels, and the standing Appellate Body. The DSB is the WTO's political organ, comprises all WTO members and administers the rules and procedures, consultation and dispute settlement provisions as set out in the DSU.[135] It has the authority to establish panels, adopt panel and Appellate Body reports and maintains surveillance of implementation of rulings and recommendations.[136] Ad hoc panels are established at the request of a complaining party.[137] They are generally composed of three well qualified governmental and/or non-governmental individuals.[138] The function of a panel is to assist the DSB in assessing the facts of a case and the applicability of and conformity with the relevant covered agreements.[139] The standing Appellate Body is established by the DSB and hears appeals from the panel cases. It is composed of seven persons, three of whom will be appointed to hear a case.[140]

Proceedings before the WTO dispute settlement bodies differ crucially from proceedings before the ICJ and ITLOS in that panel and appellate review proceedings are confidential.[141] The hearings and documents in a case are not publicly accessible unless a party decides on its own to disclose its statements to the public. Only the panel and Appellate Body reports are published. However, since the Appellate Body ruling in *EC-Bananas III*, it has been accepted that parties and third parties include

VCLT less narrowly, it could not have applied the CBD and the Cartagena Protocol in interpreting the SPS Agreement.

133 *Vranes*, Trade and the environment (2009), 69 et seq, 92; Marceau, "A Call for Coherence in International Law-Praises for the Prohibition Against "Clinical Isolation" in WTO Dispute Settlement" (1999) *33 J World Trade*, 87; Tarasofsky, *Report on Trade, Environment, and the WTO Dispute Settlement Mechanism* (2005), 8. See also Chapter 4.I.B.5.b. below.

134 *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, adopted 23 October 2002, at 5. For the critique see Tarasofsky, *ibid.* at 8.

135 Article 2(1) DSU.

136 *Ibid.*

137 Article 6 DSU.

138 Article 8(1) DSU.

139 Article 11 DSU.

140 Article 17(1) DSU.

141 Articles 14(1), 17(10), and 18(2) DSU.

non-state actor representatives in their delegations in hearings before the panels or the Appellate Body.[142]

There is no special chamber within the WTO dispute settlement mechanism to deal with environmental cases. The main organ working at the intersection of trade and environment is the Committee on Trade and Environment (CTE).[143] It was set up in 1994 and its mandate is to identify the relationship between trade measures and environmental measures in order to promote sustainable development.[144]

3. *Access*

Proceedings before the WTO dispute settlement system can only be initiated by members and only members can join proceedings as third parties.[145] Neither the DSU nor the Working Procedures for Appellate Review[146] provide for a legal framework for the participation of entities other than members. Nevertheless, non-governmental organizations and other entities have frequently filed submissions in WTO proceedings. The Appellate Body held that it is within the discretion of the panels and the Appellate Body to hear and consider unsolicited submissions of entities other than states. However, up until now it has never formally considered any of the briefs filed by NGOs or other non-governmental actors in WTO proceedings.

a. *No Direct Access*

Only WTO members and therefore only states[147] have direct access to the dispute settlement system either as parties or as third parties.[148] Interestingly, there is no actual standing requirement in the DSU; a complainant does not have to show a "legal interest" in the case.[149]

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[142] *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, adopted 25 September 1997, at 10. See also van den Bossche, "NGO Involvement in the WTO: A Comparative Perspective" (2008) 11 *J. Int'l Econ. L.*, 717, 742.

[143] For more details on the CTE see Tarasofsky, "The WTO Committee on Trade and Environment: Is It Making a Difference?" 3 *Max Planck UNYB* (1999), 471. The WTO also cooperates with UNEP and collaborates with the secretariats of certain MEAs, for more details see Zengerling, "Sustainable Development and International (Environmental) Law" (2010) 8 *EurUP*, 175, 178.

[144] WTO, Uruguay Round Agreement, Decision on Trade and Environment, adopted 15 April 1994; available at http://www.wto.org/english/tratop_e/envir_e/issu5_e.htm.

[145] With respect to the law-making procedure, Article V(2) of the Marrakesh Agreement states: "The General Council may make appropriate arrangements for consultation and cooperation with non-governmental organizations concerned with matters related to those of the WTO." Based on this mandate, the General Council adopted the 'Guidelines for Arrangements on Relations with Non-Governmental Organizations' in 1996. For more information regarding NGO involvement in WTO law-making procedures see van den Bossche, "NGO Involvement in the WTO: A Comparative Perspective" (2008) 11 *J. Int'l Econ. L.*, 717, 722 et seq.

[146] Working Procedures for Appellate Review, WT/AB/WP/5, 4 January 2005.

[147] With some exceptions such as, for example, the EU and Hong Kong.

[148] Articles 9 and 10 DSU. See also *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, at 101.

[149] See *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997, at 132–138; the Appellate Body cited Article 3(7)

b. *Amici Curiae*

The question whether entities other than parties or third parties to a dispute may submit unsolicited statements to the panels or the Appellate Body is neither addressed in the DSU nor in the Working Procedures for Appellate Review. When amicus curiae briefs are attached to the submissions of a party or third party to the procedure, they are considered as being an integral part of the submission of the party.[150] When amicus curiae briefs are filed directly with the WTO dispute settlement bodies, the Appellate Body held with respect to panel proceedings in the *Shrimp-Turtle* decision that it follows from the panels' rights under Articles 13 and 12(1) DSU that

> [a] panel has the discretionary authority either to accept and consider or to reject information and advice submitted to it, whether requested by a panel or not.[151]

As regards appellate proceedings, the Appellate Body considers that it has the same authority under Article 17(9) of the DSU which grants the Appellate Body broad competence to design its working procedures.[152] In the *Shrimp-Turtle* case the Appellate Body admitted three amicus curiae briefs attached to the appellant's submission and one that had not been annexed.[153] However, it is important to note that the Appellate Body so far has never actually considered any unsolicited submission.[154] Thus, despite the lack of a legal obligation for the panels to consider submissions made by NGOs and other entities, the WTO dispute settlement bodies can decide whether

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of the DSU, which states: "Before bringing the case, a Member shall exercise its judgment as to whether action under these procedures would be fruitful". It then stated "we believe that a Member has broad discretion in deciding whether to bring a case against another Member under the DSU. […] a Member is largely self-regulating in deciding whether any such action would be 'fruitful'." *Ibid.* at 134, 135. See also Steger, "Amicus Curiae: Participant or Friend? The WTO and NAFTA Experience" in von Bogdandy/Mavroidis et al. (eds.), *European Integration and International Co-ordination* (2002), 419, 423 et seq.

150 *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, at 89–91.

151 *Ibid.* at 105–108.

152 *United States – Imposing of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/AB/R, adopted 7 June 2000, at 43.

153 Bartholomeusz, "The Amicus Curiae before International Courts and Tribunals" (2005) 5 *Non-St. Actors & Int'l L.*, 209, 256. See also Distefano, "NGOs and the WTO Dispute Settlement Mechanism" in Treves/Di Rattalma et al. (eds.), *Civil Society, International Courts and Compliance Bodies* (2005), 261, 262 et seq. For example the Center for International Environmental Law (CIEL) filed an amicus curiae brief which is available at http://www.ciel.org/Publications/shrimpturtle-brief.pdf.

154 Bartholomeusz, *ibid.* For example, in the *Sardines* case, a private individual and Morocco filed unsolicited amicus briefs. The Appellate Body referred to its decisions in the *Shrimp-Turtle* case and the *Lead and Bismuth II* case and again underlined that it has the legal authority to accept and consider both amicus briefs. However, in both cases it found that the amicus briefs do not assist it in its findings and therefore it did not consider them; *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, adopted 23 October 2002, at 160, 168, 170.

and how they consider amici curiae submissions at their own discretion. The Appellate Body has confirmed this in the *Lead and Bismuth II* case.[155]

Many WTO members are strongly opposed to this interpretation.[156] They are of the opinion that the Appellate Body has overstepped its authority and that only WTO members can have access to WTO dispute settlement procedures.[157]

In the *Asbestos* case the Appellate Body expected to receive a large number of amicus curiae briefs. Pursuant to Rule 16(1) of the Working Procedures, it adopted an additional procedure which specified certain criteria for amicus curiae submissions especially for this case.[158] Entities other than parties or third parties to the case had to apply for leave to file their submissions. The Appellate Body reviewed the duly submitted applications and denied leave to file briefs in all cases.[159] All in

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[155] *United States – Imposing of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/AB/R, adopted 7 June 2000, at 39–41. The Appellate Body explicitly clarified that "*only* Members of the WTO have a legal right to participate as parties or third parties in a particular dispute [...]. Individuals and organizations, which are not Members of the WTO, have no legal *right* to make submissions or to be heard by the Appellate Body. The Appellate Body has no legal *duty* to accept or consider unsolicited *amicus curiae* briefs submitted by individuals or organizations, not Members of the WTO. The Appellate Body has a legal *duty* to accept and consider *only* submissions from WTO Members which are parties or third parties in a particular dispute." *Ibid.* at 40–41. The Appellate Body did not consider the two amicus briefs filed by US industry associations; *ibid.* at 42. See also Bartholomeusz, "The Amicus Curiae before International Courts and Tribunals" (2005) 5 *Non-St. Actors & Int'l L.*, 209, 258.

[156] See also Mavroidis, "Amicus Curiae Briefs before the WTO: Much Ado about Nothing" in von Bogdandy/Mavroidis et al. (eds.), *European Integration and International Co-ordination* (2002), 317 and Distefano, "NGOs and the WTO Dispute Settlement Mechanism" in Treves/Di Rattalma et al. (eds.), *Civil Society, International Courts and Compliance Bodies* (2005), 261, 266 et seq.

[157] See, for example, General Council, Minutes of the Meeting of 22 November 2000, WT/GC/M/60. Amicus participation had also been discussed and rejected during the Uruguay Round and during a DSU review. The United States was the main supporter of a formal amicus procedure; for example, U.S. President Clinton said in a keynote address after the panel issued its report in the *Shrimp-Turtle* case: "Today, there is no mechanism for private citizens to provide input in these disputes. I propose that the WTO provide the opportunity for stakeholders to convey their views, such as the ability to file 'amicus briefs', to help inform the panels in their deliberations." Statement by H.E. Mr. William J. Clinton in Geneva on the occasion of the 50th Anniversary of the GATT/WTO, World Trade WT/Fifty/H/ST/8, 18 May 1998. For a more in-depth discussion of this issue see Bartholomeusz, "The Amicus Curiae before International Courts and Tribunals" (2005) 5 *Non-St. Actors & Int'l L.*, 209, 254 et seq. In 2002, the U.S. tabled a proposal on how to achieve a more open and transparent process, including a formal amicus participation, at a special negotiating session of the WTO DSB (TN/DS/W/13). The EU tabled a similar proposal and supported the U.S., TN/DS/W/1 and TN/DS/W/7. See IISD Doha Round Briefing Series, February 2003, available at http://www.wto.org/english/forums_e/ngo_e/iisd_disputesettlement_e.pdf. However, many developing countries rejected the proposals. See Razzaque, "Transparency and Participation of Civil Society in International Institutions Related to Biotechnology" in Razzaque/Thoyer et al. (eds.), *Participation for Sustainability in Trade* (2007), 137, 149.

[158] *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001, at 52–57.

[159] *Ibid.* For a more in-depth discussion see Johnson/Tuerk, "CIEL's Experience in WTO Dispute Settlement" in Treves/Di Rattalma et al. (eds.), *Civil Society, International Courts and Compliance Bodies* (2005), 243, 246 and Bartholomeusz, "The Amicus Curiae before International Courts and Tribunals" (2005) 5 *Non-St. Actors & Int'l L.*, 209, 259 et seq. The WTO tribunals have not to date issued such guidelines in any other case. However, the procedure developed by the Appellate Body

all, it received and denied 17 applications to file such submissions and also refused to accept 14 unsolicited submissions from NGOs that were not submitted under the additional procedure.

c. *Experts*

According to Article 13(1) of the DSU, each panel has the right to seek information and technical advice from any individual or body which it deems appropriate. In order to obtain information on a factual issue concerning a scientific or technical matter raised by a party to a dispute, a panel can request an advisory report from an expert review group.[160] Appendix 4 to the DSU sets out the procedure with respect to such expert review groups. With respect to the Appellate Body, Annex 1b to the Working Procedures for Appellate Review refers to the participation of experts.

Under GATT 1947, only one panel sought expert advice in a dispute settlement.[161] From 1995 until 2001, nine panels have requested expert advice under Article 13(1) of the DSU.[162] Three of these cases involved environmental issues: *EC-Hormones* case, *US-Shrimp/Turtle* case, and *EC-Asbestos* case. For example, in the *US-Shrimp/Turtle* case the panel decided to consult with scientific experts on two main topics: approaches to sea turtle conservation in light of local conditions and the habitat and migratory patterns of sea turtles.[163] With respect to the first issue and relevant to the findings, experts agreed that shrimp harvesting with commercial shrimp trawling vessels with mechanical retrieval devices is a significant cause of sea turtle mortality and that the proper use of Turtle Excluder Devices (TEDs) would be an effective tool for the preservation of sea turtles.[164] To date, no panel has taken advantage of the provision in Article 13(2) and set up an expert review group.[165]

4. *Environmental Case Law*

In a number of cases, the WTO dispute settlement bodies have had to deal with environmental issues. To date, however, there has never been a direct conflict between a WTO agreement and an MEA applicable to all parties to the dispute. From a trade

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could provide guidance with respect to future formal regulation of amicus curiae participation at the WTO.

[160] Article 13(2) of the DSU.

[161] In the case *Thailand – Restrictions on importation of and internal taxes on cigarettes* (BISD 37S/200) the panel asked the World Health Organization for advice.

[162] Pauwelyn, "The Use of Experts in WTO Dispute Settlement" (2008) 51 *Int'l & Comp. L.Q.*, 325, 325.

[163] *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/R, Report of the Panel, page 157 at 5.1 et seq; available at http://www.wto.org/english/tratop_e/dispu_e/58r01.pdf.

[164] *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, at 140.

[165] Pauwelyn, "The Use of Experts in WTO Dispute Settlement" (2008) 51 *Int'l & Comp. L.Q.*, 325, 326.

perspective the cases can be grouped according to the scope of pollution and the impact of the trade measure (domestic, cross-border, global).[166] Mostly, the cases dealt with the question of whether national environmental legislation that involves trade measures such as import restrictions is compatible with WTO law: *Tuna-Dolphin* cases, *Biotech Products* case, and *Reformulated Gasoline* case. In three cases, the *Beef Hormones* case, *Shrimp/Turtle* cases and the *Asbestos* case, the Appellate Body applied international environmental law. The main cases are briefly described and discussed below.

a. *Tuna-Dolphin*

The *Tuna-Dolphin* cases[167] were decided in 1991 and 1994 under the GATT panel system. The first case was brought by Mexico and others against the United States, the second by the European Community and the Netherlands following the Mexican case. Both panel reports were circulated but never adopted. Although they do not have the status of a legal interpretation of GATT law, they help to understand the GATT point of view.

The United States imposed restrictions on imports of yellow fin tuna harvested in a manner that resulted in excessive by-catch of dolphins in the eastern tropical Pacific Ocean. Under the 1972 US Marine Mammal Protection Act (MMPA), tuna imports were prohibited unless the harvesting states maintained a program to reduce incidental taking of marine mammals comparable with that of the United States, and unless the average rate of such incidental taking was similar to that for United States-flagged vessels engaged in tuna fishing. Imports were also prohibited from intermediary nations that processed tuna that had not been caught in conformity with MMPA standards.

In both *Tuna-Dolphin* cases, the GATT panels rejected the arguments of the United States that the import bans were justified under Article XX(b) of GATT as measure necessary to protect animal life. The panels had adopted a narrow interpretation of Article XX(g) of GATT and decided that it is illegal to use domestic measures for an extraterritorial purpose, here to affect the environmental policy of other states:

> The Panel noted that the objective of sustainable development, which includes the protection and preservation of the environment, has been widely recognized by the contracting parties to the General Agreement. The Panel observed that the issue in this dispute was not the validity of the environmental objectives of the United States to protect and conserve dolphins. The issue was whether, in the pursuit of its environmental objectives, the United States could impose trade embargoes to secure changes in the policies which other contracting parties pursued within their own jurisdiction. The Panel therefore had to resolve whether

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[166] Khalilian, *The WTO and Environmental Provisions: Three Categories of Trade and Environment Linkage*, Kiel Institute for the World Economy, Kiel Working Papers No. 1485 (February 2009), 15.

[167] *United States – Restrictions on Imports of Tuna*, GATT Doc. DS21/R (1991) and *United States – Restrictions on Imports of Tuna*, GATT Doc. DS29/R (1994).

> the contracting parties, by agreeing to give each other in Article XX the right to take trade measures necessary to protect the health and life of plants, animals and persons or aimed at the conservation of exhaustible natural resources, had agreed to accord each other the right to impose trade embargoes for such purposes. The Panel had examined this issue in the light of the recognized methods of interpretation and had found that none of them lent any support to the view that such an agreement was reflected in Article XX.[168]

If there had been a multilateral agreement protecting dolphins, the decision might have been different:

> The issue of whether the GATT permitted the use of trade restrictions as part of a multilateral system for the conservation of plant or animal life, or of an exhaustible natural resource in a global commons, was not the issue before this Panel. The measures taken by the United States had never been agreed to multilaterally.[169]

b. *Reformulated Gasoline*

In the *US – Reformulated Gasoline* case,[170] Venezuela and Brazil filed a complaint with the WTO dispute settlement body against the United States alleging that the U.S. applied discriminatory rules on gasoline imports. Based on the 1990 US Clean Air Act imported gasoline had to meet more stringent chemical characteristics than domestically refined gasoline. The Appellate Body ruled that the U.S. Gasoline Rule was consistent with Article XX(g) of the GATT 1994 but that it was applied in a discriminatory manner and therefore failed to meet the requirements of the chapeau of Article XX GATT 1994.[171]

c. *Beef Hormones*

In the *Beef Hormones* case[172] the United States claimed that measures taken by the EC under the Council Directive Prohibiting the Use in Livestock Farming of Certain Substances Having a Hormonal Action are inconsistent with GATT Articles III or XI, SPS Agreement Articles 2, 3 and 5, TBT Agreement Article 2 and the Agreement on Agriculture Article 4. The EC measures restricted imports of meat and meat products from the U.S. The Appellate Body held that the EC import restrictions on meat and meat products from cattle treated with specific hormones were not consistent with Articles 3.3 and 5.1 of the SPS Agreement.

The application of the precautionary principle was one of the issues brought forward by the EC and discussed in the panel proceedings as well as on appeal. The Appellate Body upheld in this respect the panel's finding that the precautionary

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168 *United States – Restrictions on Imports of Tuna*, GATT Doc. DS29/R (1994), at 5.42.

169 *Ibid*. at 4.43.

170 *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996.

171 *Ibid*. at 29.

172 *European Communities – Measures Concerning Meat and Meat Products*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998.

principle does not override the explicit wording of Articles 5.1 and 5.2 of the SPS Agreement and also stated that the precautionary principle has been incorporated in, inter alia, Article 5.7 of the SPS Agreement.[173]

d. *Asbestos*

In the *Asbestos* case[174] Canada brought a case against the EC alleging that an import ban and other measures imposed by France on the basis of a specific decree with respect to asbestos and products containing asbestos violated Articles 2, 3 and 5 of the SPS Agreement, Article 2 of the TBT Agreement, and Articles III, XI and XIII of GATT 1994. The Appellate Body held that the French decree was consistent with the EC's obligations under the WTO agreements and did not violate any of the above mentioned provisions. With respect to Article XX(b) GATT 1994 the panel and the Appellate Body ruled that the French decree is necessary to protect human life or health and also complies with the requirements of the chapeau.[175]

The case is also interesting because at the appeal procedure the Appellate Body adopted a special procedure to deal with amicus curiae submissions.[176]

e. *Shrimp-Turtle*

The *Shrimp-Turtle* cases[177] dealt with a conflict between national environmental law of the United States, international environmental law and WTO law. International environmental treaties considered in the judgment were 1982 UNCLOS, 1992 CBD and the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). India, Malaysia, Pakistan and Thailand brought the first *Shrimp-Turtle* case against the United States alleging that the United States' import ban on shrimps harvested using methods that involved high rates of mortality for species of sea turtles protected by CITES was inconsistent with WTO Agreements. Import was only allowed for certified nations and certification was granted for nations harvesting shrimp in sea turtle habitats where it was established that sea turtle excluder devices or other preventative measures were used. The import ban was based on the US Endangered Species Act of 1973.

The Appellate Body held that the import ban serves an environmental objective that is legitimate under Article XX(g) of the GATT 1994 but that it was applied in a discriminatory manner not compatible with the requirements of the chapeau of Article XX.[178] Thus, the Appellate Body applied a two stage test: First, it determined

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[173] *Ibid.*, at 253(c).

[174] *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001.

[175] *Ibid.* at 175.

[176] See above at Chapter 4.I.B.3.b.

[177] *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998.

[178] *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, at 186.

whether the measure relates to "the conservation of exhaustible natural resources" as presupposed in Article XX(g) GATT. In the second step, it asked whether the measure was consistent the chapeau, namely not being implemented in a discriminatory manner.

Under the first step, the Appellate Body had to interpret the term "exhaustible natural resources" and in doing so explicitly referred to the concept of sustainable development, Agenda 21, 1982 UNCLOS, 1992 CBD, and 1973 CITES.[179] First, it held that "natural resources" encompass living and non-living resources:

> From the perspective embodied in the preamble of the WTO Agreement, we note that the generic term "natural resources" in Article XX(g) is not "static" in its content or reference but is rather "by definition, evolutionary". It is, therefore, pertinent to note that modern international conventions and declarations make frequent references to natural resources as embracing both living and non-living resources. For instance, the 1982 United Nations Convention on the Law of the Sea [...] repeatedly refers in Articles 61 and 62 to "living resources" in specifying rights and duties of states in their exclusive economic zones. The Convention on Biological Diversity uses the concept of "biological resources". Agenda 21 speaks most broadly of "natural resources" and goes into detailed statements about "marine living resources".[180]
>
> We hold that, in line with the principle of effectiveness in treaty interpretation, measures to conserve exhaustible natural resources, whether living or non-living, may fall within Article XX(g).[181]

Then, the Appellate Body interpreted the term "exhaustible":

> The exhaustibility of sea turtles would in fact have been very difficult to controvert since all of the seven recognized species of sea turtles are today listed in Appendix 1 of the Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES"). The list in Appendix 1 includes all species threatened with extinction which are or may be affected by trade.[182]

The Appellate Body underlined that all parties to the dispute were at the same time parties to CITES and therefore shared the same policy of protecting the endangered sea turtles.[183]

The US import ban, however, failed the second stage of the test because it was applied in a discriminatory manner in two main ways. Firstly, the Appellate Body held that it is not consistent with the chapeau of Article XX of the GATT that the U.S. embargo actually requires other WTO members to adopt essentially the same regulatory program, without allowing for some flexibility taking into account different conditions in the member states.[184] Furthermore, the Appellate Body saw discrimination in that shrimp caught with the proper methods fell under the import

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[179] *Ibid*. at 129–131.
[180] *Ibid*. at 130.
[181] *Ibid*. at 131.
[182] *Ibid*. at 132.
[183] *Ibid*. at 135 and footnote 121.
[184] *Ibid*. at 164.

ban solely because they were caught in waters of countries that had not been certified by the U.S.[185]

In the follow-up case Malaysia alleged that the United States was not implementing the ruling of *Shrimp-Turtle I* correctly.[186] Both the panel and the Appellate Body disagreed and held that temporary measures imposed by the United States were permissible pending international agreement on sea turtle conservation.[187]

f. *Biotech Products*

In the case *Biotech Products*,[188] Argentina, Canada, and the United States filed a complaint against the European Communities (EC) alleging that an EC moratorium and other measures affecting the approval of biotech products were inconsistent with WTO law. The panel held that the EC de facto moratorium on the import of GMO products and other measures regarding the approval procedure were not compatible with the rules of the SPS Agreement.[189] In its findings the panel had to consider whether the 1992 CBD and the Cartagena Protocol on Biosafety, a Protocol to the CBD, or the precautionary principle lead to a certain interpretation of the risk assessment as regulated in the 1994 SPS Agreement. With respect to the Cartagena Protocol, it is important to note that it was not in force by the time of the dispute, and among the disputants only the EC was a party. Argentina and Canada had signed but not ratified the protocol and the U.S. had not even signed it.

The panel applied Article 31(3)(c) VCLT and interpreted it very narrowly as outlined in more detail above.[190] It did not take the CBD or the Cartagena Protocol into account, since not all members of the WTO were at the same time parties to these international environmental treaties. On the precautionary principle the panel found that

> [...] the legal status of the precautionary principle remains unsettled, [and] [...] prudence suggests that we not attempt to resolve this complex issue, particularly if it is not necessary to do so.[191]

Therefore, the precautionary principle was not applicable between the parties and did not influence the interpretation of the SPS Agreement in this case.

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185 *Ibid*. at 165.

186 *United States – Import Prohibition of Certain Shrimp and Shrimp Products (Shrimp-Turtle II)*, WT/DS58/AB/RW, adopted 21 November 2001.

187 *Ibid*. at 152, 153.

188 *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, adopted on 21 November 2006. For example, CIEL filed an amicus curiae brief in this case which is available at http://www.ciel.org/Publications/ECBiotech_AmicusBrief_2June04.pdf.

189 *Ibid*. at 8.13, 8.14.

190 See Chapter 4.I.B.1 (jurisdiction).

191 *Ibid*. at 7.89.

g. *Seal Products*

In two separate proceedings in November 2009, Canada and Norway requested consultations with the European Communities.[192] The complainants alleged that EC Regulation 1007/2009 of the European Parliament and of the EC Council of 16 September 2009 on trade in seal products, and subsequent related measures entail an import ban on all seal products and is inconsistent with WTO law, especially Article 2 TBT Agreement, Articles I, III, IV GATT 1994 and Article 4 of the Agriculture Agreement. The cases are still pending. As of May 2011 the DSB had established both panels but their members had not yet been appointed.

5. *Evaluation*

From 1995 until March 2011, 423 complaints had been notified to the WTO dispute settlement system and the Appellate Body had adopted 101 reports.[193] Despite having been in existence for 48 years longer, from 1946 until now the ICJ has dealt only with a total of 147 advisory proceedings and contentious cases and thus only with about a third of the cases submitted to the WTO. Whereas the ICJ deals with an average of 2.3 cases per year, 28 cases reach the WTO dispute settlement system per year.[194]

The WTO and in particular its dispute settlement mechanism is the furthest developed universal international legal regime in terms of institutional setting, activity, and influence.[195] Only the ECJ and the ECtHR on a regional international level are more active judicial bodies. The more active an international judiciary the more important the question of its legitimacy becomes. This is a crucial issue confronting all international, including the European, judicial bodies.[196] By way of example for other international judicial for a, the legitimacy debate with reference to the WTO is discussed below.

a. *Legitimacy*

From a legitimacy perspective, the WTO has been criticized in various ways.[197] In terms of *von Bogdandy* the WTO

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[192] *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, DS400 (Canada) and DS401 (Norway).

[193] See above at Chapter 4.I.B. (introduction).

[194] According to a calculation based on the years 1995–2000, states refer ten times more cases to the WTO dispute settlement than to the ICJ, v. Bogdandy, "Law and Politics in the WTO – Strategies to Cope with a Deficient Relationship" (2001) 5 *Max Planck UNYB*, 609, 646.

[195] See also v. Bogdandy, *ibid.* at 618, 644.

[196] See also Möllers, *Die drei Gewalten* (2008), 162 et seq.

[197] Howse, "How to Begin to Think About the 'Democratic Deficit' at the WTO" in Griller (ed.), *International Economic Governance and Non-Economic Concerns* (2003), 79; Krajewski, *Democratic Governance as an Emerging Principle of International Economic Law*, Society of International Economic Law (SIEL), Working Paper No. 14/08 (2008), 2.

> is a crucial element of an ongoing process which separates law from politically accountable institutions, with profound implications and perhaps even substantial harm for democratic self-determination.[198]

WTO decisions have a high impact on national economic law and politics.[199] Furthermore, the WTO has a great deregulatory impact and the new space is filled with private legal frameworks not bound to any democratic decision-making procedures and not adequately representing the interests of third parties and the public.[200]

On paper the Marrakesh Agreement sets up the WTO with separate legislative, executive and the adjudicative branches, somewhat parallel to the traditional legal concept of separation of powers.[201] According to the principles of separation of powers and democracy on state level, the legitimacy of a legal system derives from a democratic legislative process that transforms political opinions into law. The judiciary applies these laws deductively to cases of conflicts. In reality, however, the different WTO powers do not work in a balanced way as yet, but are characterized by a dominating judiciary and a weak legislative and executive branch with an enormous democratic deficit.[202] The highly active WTO judiciary deduces its very influential judgments from a body of law that came into being without an appropriate legislative process.

Usually international law-making is justified through a so-called legitimacy chain.[203] Representatives of the state executive negotiate international agreements and in most cases national parliaments have to agree to them during the process of ratification. Only after this parliamentary consent are international agreements binding law at state level. It has to be highlighted, however, that this legitimacy chain in

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[198] v. Bogdandy, "Law and Politics in the WTO – Strategies to Cope with a Deficient Relationship" (2001) 5 *Max Planck UNYB*, 609, 611.

[199] Krajewski, *Democratic Governance as an Emerging Principle of International Economic Law*, Society of International Economic Law (SIEL), Working Paper No. 14/08 (2008), 5.

[200] v. Bogdandy, "Law and Politics in the WTO – Strategies to Cope with a Deficient Relationship" (2001) 5 *Max Planck UNYB*, 609, 611. Generally critical of the influence of private regimes on the international level Eichler, "Globalisierung des Wirtschaftsrechts unter besonderer Berücksichtigung der Lex Mercatoria" in Schulte/Stichweh (eds.), *Weltrecht* (2008), 167, 174 et seq.; Koenig-Archibugi, "Transnational Corporations and Public Accountability" in Held/Koenig-Archibugi (eds.), *Global Governance and Public Accountability* (2007), 110; Teubner, *Global Law Without a State* (2006); Fischer-Lescano/Teubner, "Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law" (2003) 25 *Mich. J. Int'l L.*, 999, 1009 et seq. Less critical Möllers, *Die drei Gewalten* (2008), 221.

[201] v. Bogdandy, *ibid*. at 615.

[202] Krajewski, *Legitimizing Global Economic Governance through Transnational Parliamentarization*, Transformations of the State, Collaborative Research Center 597, TransState Working Papers No. 136 (2010), 11 et seq.; Möllers, *Die drei Gewalten* (2008), 204.

[203] Krajewski, *Democratic Governance as an Emerging Principle of International Economic Law*, Society of International Economic Law (SIEL), Working Paper No. 14/08 (2008), 4; Krajewski, *Legitimizing Global Economic Governance through Transnational Parliamentarization*, Transformations of the State, Collaborative Research Center 597, TransState Working Papers No. 136 (2010), 11 et seq.

general has several flaws.[204] With respect to the WTO, it cannot generate sufficient legitimacy because, unlike other international regimes, the WTO determines very significantly domestic policies in the economic realm and therefore needs a better democratic justification.[205] As *von Bogdandy* points out, in a balanced legal system the judiciary is appropriately democratically embedded if the legislator can intervene at any moment, since such an option for intervention entails political and thus democratic legitimacy.[206] In case of the WTO, a change in the will of the majority of citizens in a state or the European Union will most likely not entail changes in WTO law.[207] From a legitimacy perspective, therefore, the influence of the WTO in general and its dispute settlement bodies in particular must be regarded very critically.[208]

On the other hand, it should be noted that the WTO Appellate Body was more open to the acceptance of amici curiae briefs in its proceedings than the WTO members.[209] Amicus curiae participation is not a substitute for a proper legislator, of course, but it adds at least some transparency and knowledge and therefore legitimacy to the judicial process.[210]

In contrast, *Möllers* argues that enhanced NGO participation in WTO dispute settlement rather aggravates the legitimacy problem because this merely adds a random 'pseudo-legitimacy' to a system which is not embedded in democratic legislative processes.[211] According to his opinion, WTO judicial bodies derive legitimacy through a certain judicial procedure and (ideally) democratically legitimized parties to the dispute. To regain some legitimacy the WTO dispute settlement bodies should argue less politically and not decide on the relationship between trade and environment, but instead confine themselves to answering narrow and concrete

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[204] Krajewski, *Democratic Governance as an Emerging Principle of International Economic Law*, *ibid.*

[205] See also v. Bogdandy, "Law and Politics in the WTO – Strategies to Cope with a Deficient Relationship" (2001) 5 *Max Planck UNYB*, 609, 622; Atik, "Democratizing the WTO" (2000) 33 *Geo. Wash. Int'l L. Rev.*, 451.

[206] v. Bogdandy, *ibid.* at 625.

[207] *Ibid.* at 650.

[208] See also Atik, "Democratizing the WTO" (2000) 33 *Geo. Wash. Int'l L. Rev.*, 451, 455. Scholars in the field of international politics and law have discussed several strategies of how to substitute for the absence of an international legislator. *Von Bogdandy* developed the strategy of coordinated interdependence, see v. Bogdandy, "Law and Politics in the WTO – Strategies to Cope with a Deficient Relationship" (2001) 5 *Max Planck UNYB*, 609, 651. See also Krajewski, *Legitimizing Global Economic Governance through Transnational Parliamentarization*, Transformations of the State, Collaborative Research Center 597, TransState Working Papers No. 136 (2010), 14 et seq.

[209] This would be criticized, however, by *Möllers* as out of place judicial political activism Möllers, *Die drei Gewalten* (2008), 206, 208.

[210] Krajewski, *Democratic Governance as an Emerging Principle of International Economic Law*, Society of International Economic Law (SIEL), Working Paper No. 14/08 (2008), 9. See also *Brunkhorst*, Solidarität (2002), 213 et seq.; Shell, "Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization" (1995) 44 *Duke L.J.*, 829, 907, 910. With regard to NGO participation in law-making procedures in the WTO see Howse, "How to Begin to Think About the "Democratic Deficit" at the WTO" in Griller (ed.), *International Economic Governance and Non-Economic Concerns* (2003), 79, 89.

[211] Möllers, *Die drei Gewalten* (2008), 206.

legal questions.[212] This argument has to be rejected. In applying norms such as Article XX GATT or not applying conflicting international environmental law, the WTO dispute settlement bodies do influence the relationship between trade and environment. The case law discussed above has shown that in all environmental cases the compatibility of environmental protection measures with WTO law was the core legal question to be answered. Consequently, the WTO dispute settlement body did either uphold or outlaw an environmental protection measure. This shows that limitation to "pure" legal trade questions does not prevent other areas of law from being affected. This is actually not possible. Not addressing the consequences of trade disputes on environmental and social interests is not "non-political" but side-stepping the issue and thereby at least equally political. Furthermore, it is not convincing that parties or amici curiae to a dispute need to be democratically legitimized in addition to deriving their right to access to a judiciary from a level-specific legislative process.[213]

b. *Jurisdiction and Applicable Law*

The personal jurisdiction of the WTO dispute settlement bodies is limited to WTO members; the subject matter jurisdiction is limited to disputes arising under the WTO agreements. This is an appropriate jurisdictional framework. It becomes more complicated if international environmental law is applicable to a WTO case.[214] This can happen in two main ways. Firstly, an MEA is directly applicable between the parties to a conflict. Secondly, an MEA should be applied to interpret WTO law, as for example "exhaustible natural resource" in Article XX GATT.

i. WTO Cases and Conflict between Substantive Applicable Law

The first case is addressed in Article 30 of the VCLT. It has to be noted though that Article 30 VCLT refers to the "application of successive treaties relating to the same subject matter" and an MEA arguably might not be seen as such a successive treaty to a WTO agreement. For example, the later Cartagena Protocol on Biosafety might not be seen as successive to the earlier WTO SPS Agreement, as they belong to different regimes. However, for this analysis the applicability of Article 30 VCLT is presupposed, or at least its rationale can be applied to the point at issue. There is a direct conflict between the SPS Agreement and the Cartagena Protocol with respect to the requirements of a risk assessment: According to the Cartagena Protocol socio-

[212] *Ibid*. at 208.

[213] See Chapter 1.IV.

[214] For a thorough analysis of how this can happen and how such conflicts should be dealt with see Vranes, *Trade and the Environment* (2009), 69 et seq, 92. As to the difference between jurisdiction and applicable law see also Pauwelyn, "The Role of Public International Law in the WTO: How Far Can We Go" (2001) 95 *Am. J. Int'l L.*, 535, 577.

economic factors can be taken into account, while according to the SPS Agreement they cannot.[215] Article 30(3) VCLT states that

> [w]hen all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.

Thus, if all parties to the SPS Agreement were parties to the Cartagena Protocol, the risk assessment rules of the later Cartagena Protocol would prevail and socio-economic factors could be taken into account. This is not currently the case, so Article 30(3) VCLT would not be applicable in a case of conflict.[216]

Article 30(4) VCLT promulgates:

> When the parties to the later treaty do not include all the parties to the earlier one:
> (a) as between States Parties to both treaties the same rule applies as in paragraph 3;
> (b) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.

Therefore, if at least two parties to a WTO conflict were parties to the Cartagena Protocol it would be applicable between them. As between these parties and the other parties, the SPS Agreement had to be applied. If all parties to a WTO dispute were parties to both, the SPS Agreement and the Cartagena Protocol, according to Article 30(4)(a) VCLT, the Cartagena Protocol would provide the rules for a risk assessment.

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[215] The Cartagena Protocol provides for a science-based risk analysis in Articles 10–15 and Annex III CP. However, it also explicitly mentions the precautionary principle in Articles 10(6) and 11(8) CP and recognizes socio-economic factors as part of the analysis, Article 26(1) CP. Especially the latter stands in contrast to the purely science-based risk analysis of Article 5 SPS Agreement, where socio-economic factors are not to be taken into consideration. Article 26(1) CP states: "The Parties, in reaching a decision on import under this Protocol or under its domestic measures implementing the Protocol, may take into account, consistent with their international obligations, socio-economic considerations arising from the impact of living modified organisms on the conservation and sustainable use of biological diversity, especially with regard to the value of biological diversity to indigenous and local communities." Arguably, there is no direct conflict between this provision and the WTO SPS Agreement because Article 26(1) of the CP gives states "merely" the right to take socio-economic considerations into account. It does not oblige them to do so. However, here the view is shared that a direct conflict may emerge if a state actually makes use of this right.

[216] It is questionable if Article 30(3) of the VCLT is actually helpful in resolving such conflicts between different international legal regimes because it entails a "precedence race" on the later treaty where a balanace between the two might be a more appropriate method of solving the conflict. "Successive treaty" in Article 30 VCLT should be interpreted narrowly so as to encompass only treaties within the same regime or maybe even the same framework convention. Based on such a narrow understanding of "successive", an MEA is not a "successive" treaty to a WTO Agreement and consequently Article 30(3) VCLT is not applicable in a case of conflict. Thus, the VCLT would give no guidance for such cases of direct conflicts between treaties made under different international legal regimes. It would be the task, for example, of states, international courts, or the International Law Commission to develop rules for coping with such kinds of direct conflict.

None of the WTO cases listed above dealt with such a case of direct conflict. In the *Biotech Products* case, the Cartagena Protocol was not yet in force and the only question was whether and how it had to be considered with respect to the interpretation of the SPS Agreement pursuant to Article 31 VCLT. In case of a direct conflict between an earlier WTO agreement and a later MEA in which an application of international law on conflicts of norms concludes that the MEA provision overrides the WTO provision and, thus, the former needs to be applied to the case at issue, two questions need to be considered. Firstly, it has to be clarified if the WTO dispute settlement bodies have the power to apply the rules of an MEA to the case at issue, because their scope of jurisdiction is explicitly limited to WTO law.[217] The WTO dispute settlement system is not a court of general jurisdiction. Secondly, even if the WTO dispute settlement bodies were in a position to apply international environmental law, is this the correct application. Alternatively, the case might have to be decided by the ICJ or, with respect to the environmental law aspects, in very close cooperation with the Compliance Committee of the respective MEA, for example.[218] There are no clear rules for how to deal with such a situation as yet.[219] The WTO dispute settlement bodies might develop rules if such a conflict arises in one of its future cases.

Another way of dealing with this situation might be to expand substantive WTO law and integrate rules on environmental protection. From an environmental point of view, this is not a favorable solution.[220] Despite the WTO's recognition of the principle of sustainable development, it must be questioned whether the WTO law-making and law-enforcement bodies are able or should be enabled to integrate and apply environmental rules beyond conflict clauses such as Article XX GATT. There are no hierarchies in international law and the environmental regime should be further developed alongside the economic regime. Both regimes should provide for sufficient conflict clauses to be permeable in cases of conflict and for appropriate rules to deal with conflicts procedurally.[221]

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[217] In favor of a restricted applicability of non-WTO international law in WTO proceedings *Vranes*, Trade and the environment (2009), 90.

[218] See also Tarasofsky, *Report on Trade, Environment, and the WTO Dispute Settlement Mechanism* (2005), 8.

[219] See attempts to solve the problem by the International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, United Nations (2006); Vranes, *Trade and the Environment* (2009), 69 et seq.; see also Tarasofsky, *Report on Trade, Environment, and the WTO Dispute Settlement Mechanism* (2005), 6 who considers this a challenging task that has to be dealt with in a case by case approach, and Pauwelyn, "The Role of Public International Law in the WTO: How Far Can We Go" (2001) 95 *Am. J. Int'l L.*, 535, 578.

[220] See also v. Bogdandy, "Law and Politics in the WTO – Strategies to Cope with a Deficient Relationship" (2001) 5 *Max Planck UNYB*, 609, 671 with further references.

[221] Highlighting that there are no purely economic or purely environmental disputes and that therefore appropriate mechanisms for integration and balancing are key to dealing with such conflicts in future Gündling, "On the Settlement of Investment and Environmental Disputes" in The

ii. Interpretation of WTO Law

MEAs can also become relevant to WTO disputes when they can help to interpret words of WTO agreements as it happened in the *Tuna-Dolphin* and the *Shrimp-Turtle* cases. Article 31 of the VCLT regulates the interpretation of international treaties. The decision of the Appellate Body in the *Shrimp-Turtle* case in particular can be seen as a positive example of applying MEAs in interpreting WTO law. In contrast, the panel decision in the *Biotech Products* case has to be seen critically. Here, the WTO panel interpreted Article 31(3)(c) of the VCLT very narrowly in stating that the Cartagena Protocol could only be considered within the interpretation of the SPS Agreement if all parties to the WTO were at the same time parties to the Cartagena Protocol. This is not consistent with Article 30 of the VCLT and also not required by the text of Article 31(3)(c) VCLT which refers to the parties to the conflict rather than the parties to the whole treaty. This narrow interpretation has already been criticized rightly by the Study Group on Fragmentation of the International Law Commission.[222] It does not further a proper integration of international environmental law into WTO cases.

c. *Institutional Arrangements*

With the Committee on Trade and Environment, the WTO established a body to deal with the relationship between trade and environmental issues. This is an important step and will be helpful within the process of further communication between both regimes. However, there have not been any concrete outcomes of the CTE's work such as, for example, suggestions for the dealing with conflicting cases as mentioned above. Some authors suggest setting up a special environmental council within the WTO to include the expertise of the UNEP, the CSD, and NGOs.[223]

The WTO dispute settlement bodies do not encompass a special chamber or panel for environmental cases. This is also not necessary insofar as environmental disputes should not be decided by the WTO. However, there should be rules of procedure that ensure communication with MEAs' secretariats and compliance committees whenever the WTO dispute settlement bodies apply international environmental law directly to a case or refer to it in interpreting WTO laws. In addition, with respect to WTO cases that require the application of international environmental law, it could be helpful to look at the non-confrontational procedures before

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International Bureau of the Permanent Court of Arbitration (ed.), *International Investments and Protection of the Environment* (2001), 125.

[222] International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, United Nations (2006), at 450, 471, 472.

[223] Schmidt/Kahl, "Umweltschutz und Handel" in Rengeling (ed.), *Handbuch zum europäischen und deutschen Umweltrecht* (2003), 1785.

compliance committees under MEAs.[224] In some cases it might be beneficial for all parties involved and the environment to consider other options than trade restrictions to come to a solution. It has been suggested that an Environmental Advisory Body could make recommendations for a solution before formal dispute proceedings are instituted.[225]

With respect to the procedure, it is important to change the rules on confidentiality and maybe draft them in a similar way to those of the ICJ reflecting the public interest in the cases.[226]

d. *Access*

To date, NGOs have mainly tried to participate in WTO dispute settlement procedures as amici curiae. The WTO dispute settlement bodies also have the option to hear representatives of NGOs as experts. None of these doors has been widely opened by the WTO dispute settlement bodies.[227] The question of whether NGOs should have standing before the WTO dispute settlement system in the sense that they could initiate a lawsuit against a WTO member state is very rarely discussed, politically not feasible at present, but nevertheless an option worthy of consideration.

i. Direct Access

Only WTO member states have standing before the WTO judiciary. Unlike the ICJ, the WTO dispute settlement mechanism does not provide for advisory proceedings and the right for international organizations to initiate proceedings. Non-state actors do not have the right to bring cases before the WTO judiciary and this issue is, somewhat surprisingly, not much discussed among international legal scholars and politicians. Standing for NGOs before the WTO is usually considered as politically not feasible and very much "off" the track of the current debate that is much more focused on amicus curiae participation.[228]

This is not typical for international economic organizations and their dispute settlement bodies. Rather the international economic regime is among the international regimes that very early opened its doors to non-state actors, private companies as well as non-governmental organizations, with respect to enforcement of their laws. For example, economic regional integration organizations such as NAFTA and CAFTA provide for the access of private investors and NGOs to their dispute

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[224] Tarasofsky, *Report on Trade, Environment, and the WTO Dispute Settlement Mechanism* (2005), 9.

[225] Tarasofsky, *ibid*. with further reference to *Marcau*.

[226] See also Hilf/Salomon, "Das Streitbeilegungssystem der WTO" in: Hilf/Oeter, *WTO-Recht* (2010), 183.

[227] For an overview of recent debate in this respect within the WTO see Ahlborn/Pfitzer James Headen, *Transparency and Public Participation in WTO Dispute Settlement*, CIEL (ed.) (2009).

[228] Charnovitz, "Participation of Nongovernmental Organizations in the World Trade Organization" (1996) 17 *U. Pa. J. Int'l Econ. L.*, 331, 348.

settlement bodies.[229] Furthermore, bi- and multilateral investment treaties give private investors the right to initiate trials against a state, for example at the ICSID.[230]

As states in other international economic legal systems have agreed to give non-state actors access to judicial, arbitral and non-compliance proceedings, this option is at least worth considering.[231]

Given the case law described above, it is difficult to imagine which cases could be brought to the WTO by environmental NGOs since the environmental protection arguments are usually on the defendant's side. Article XX GATT allows for the justification of trade restrictions for environmental reasons. At first sight there are no "active" environmental protection clauses in the texts of WTO agreements that could be enforced before the dispute settlement bodies. However, studies have identified and the Doha Round is currently debating a number of "win-win" situations between economic liberalization and environmental protection goals, namely in the field of the removal of subsidies.[232] For example, as part of a research project of the Climate Legacy Initiative of the U.S. Vermont Law School, *Wirth* outlines several concrete proposals, such as elimination of climate-degrading subsidies on fossil fuels and in the field of agriculture, enhanced liberalized trade in climate-friendly goods and

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[229] Charnovitz, *ibid*. at 349; McGee Jr/Woolsey, "Transboundary Dispute Resolution as a Process and Access to Justice for Private Litigants: Commentaries on Cesare Romano's The Peaceful Settlement of International Environmental Disputes: A Pragmatic Approach (2000) (2001) 20 *UCLA J. Envtl. L. & Pol'y*, 109, 116. Usually, the European Union is also cited as an example on these occasions, but given the current state of development the author does not consider it comparable to the WTO any longer because it is not limited to the economic realm. It became a supranational regime *sui generis* with unique features.

[230] For more details see Chapter 4.II.B. below.

[231] See also Steger, "Amicus Curiae: Participant or Friend? The WTO and NAFTA Experience" in von Bogdandy/Mavroidis et al. (eds.), *European Integration and International Co-ordination* (2002), 419, 420; Johnson/Tuerk, "CIEL's Experience in WTO Dispute Settlement" in Treves/Di Rattalma et al. (eds.), *Civil Society, International Courts and Compliance Bodies* (2005), 243, 243. Against the extension of standing to NGOs: Nichols, "Extension of Standing in World Trade Organization Disputes to Nongovernment Parties" (2004) 25 *U. Pa. J. Int'l Econ. L.*, 669, 677. For example, *Shell* proposed a "Trade Stakeholder Model" as a new model of global trade governance based on the existing WTO. According to this model, not only states but also businesses and groups that are "broadly representative of diverse citizen interests" could directly participate in trade disputes. The Trade Stakeholder Model "seeks to break the monopoly of states on international dispute resolution machinery and to extend the power to enforce international legal norms beyond states to individuals", *Shell*, Trade legalism and international relations theory: an analysis of the World Trade Organization, 44 Duke L.J. (1995), 829, 910. Responding to *Nichols*' critique see also Shell, "The Trade Stakeholders Model and Participation by Nonstate Parties in the World Trade Organization" (2004) 25 *U. Pa. J. Int'l Econ. L.*, 703. However, insofar as *Shell* envisages a further development of the WTO along the lines of the European Union his view is not shared here.

[232] Wirth, "CLI Recommendation No. 15" in Weston, Burns H./Bach, Tracy (eds.) Vermont Law School; The University of Iowa, *CLI Study: Recalibrating the Law of Humans with the Laws of Nature – Climate Change, Human Rights, and Intergenerational Justice* (2009); Doha Ministerial declaration, WT/MIN(01)/DEC/1, adopted 14 November 2001, at 31–33. See also current list of activities of the WTO and the challenges of climate change at http://www.wto.org/english/tratop_e/envir_e/climate_challenge_e.htm and current debate under Doha mandate on trade and environment at http://www.wto.org/english/news_e/news11_e/envir_10jan11_e.htm.

services, and support of climate-friendly investments.[233] Furthermore, *Khalilian* refers to a number of trade measures as tools to enforce international environmental law.[234] Environmental NGOs could function as watchdogs in the implementation process of such trade rules enhancing environmental protection. They could be granted limited standing before the WTO dispute settlement bodies or a procedural right to notify the WTO secretariat of possible breaches by WTO members of such rules.

With regard to disputes that involve Art. XX GATT or similar exception clauses, it seems sufficient that NGOs can support the defendant's side with their informed arguments or submit amicus curiae statements. The relevant procedures should be improved according to the recommendations made below.

ii. Amici Curiae

It must be welcomed that the WTO Appellate Body is open to consideration of amicus curiae briefs if it deems them to be helpful and has even started to develop a procedure to deal with cases that might receive a lot of public attention and thus many amicus briefs.[235] Nevertheless it is important to note that to date the WTO dispute settlement bodies have never actually found that an amicus submission added decisive information to the case and therefore ultimately rejected all amicus briefs they received. Furthermore, it has to be born in mind that the openness of the Appellate Body towards amicus submissions is not shared by many of the WTO members, the legislative organ of the WTO.

There are several arguments against NGOs as amici curiae that should be addressed.[236] Firstly, NGOs might manipulate WTO decision-making processes towards their own not democratically legitimized special interests. NGOs do

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[233] Wirth, *ibid*. He also proposes border tax adjustments but such measures would be in conflict with the current understanding of WTO law. Labeling is another important topic in this context.

[234] Khalilian, *The WTO and Environmental Provisions: Three Categories of Trade and Environment Linkage*, Kiel Institute for the World Economy, Kiel Working Papers No. 1485 (February 2009), 1, 2. With respect to the relationship between WTO and UNCLOS see Myers, "Trade Measures and the Environment: Can the WTO and UNCLOS Be Reconciled?" (2005) 23 *UCLA J. Envtl. L. & Pol'y*, 37, 19.

[235] Also in favor of amicus briefs in WTO disputes are, for example, Charnovitz, "Participation of Nongovernmental Organizations in the World Trade Organization" (1996) 17 *U. Pa. J. Int'l Econ. L.*, 331, 351; Steger, "Amicus Curiae: Participant or Friend? The WTO and NAFTA Experience" in von Bogdandy/Mavroidis et al. (eds.), *European Integration and International Co-ordination* (2002), 419, 422; van den Bossche, "NGO Involvement in the WTO: A Comparative Perspective" (2008) 11 *J. Int'l Econ. L.*, 717, 749; Esty, "Non-Governmental Organizations at the World Trade Organization: Cooperation, Competition, or Exclusion" (1998) 1 *J. Int'l Econ. L.* (1998), 123, 127 et seq.; Johnson/Tuerk, "CIEL's Experience in WTO Dispute Settlement" in Treves/Di Rattalma et al. (eds.), *Civil Society, International Courts and Compliance Bodies* (2005), 243, 260. See also Warwick Commission, *The Multilateral Trade Regime – Which Way Forward?* (2008), 34 et seq.

[236] See also van den Bossche, "NGO Involvement in the WTO: A Comparative Perspective" (2008) 11 *J. Int'l Econ. L.*, 717, 720; Peel, "Giving the Public a Voice in the Protection of the Global Environment" (2001) 12 *Colo. J. Int'l Envtl. L. & Pol.*, 47, 71 et seq.; Esty, "Non-Governmental Organizations at the World Trade Organization: Cooperation, Competition, or Exclusion" (1998) 1 *J. Int'l Econ. L.*, 123, 147.

represent special interests and they are not democratically legitimized in the sense of being elected or representing the majority opinions of a specific population. In addition, there is no clear definition for NGOs and a huge variety of different organizational forms of NGOs exists.[237]

The first argument against NGO participation is not convincing. NGOs are not very likely to manipulate WTO decision-making because the panels and the Appellate Body have full discretion over whether and how they wish to consider NGO submissions. Furthermore, the DSB can reject the dispute settlements findings and thus their binding character. The full control of the influence of the NGO submissions on the findings and on the development of WTO law remains in the hands of the WTO organs. In addition, NGOs treat their submissions very openly. They are usually available for everybody online and thus open for critique from anybody interested in the subject. The "special" interests represented by NGOs are not so special at the end of the day. They need to be based on international law in order to be considered by the WTO dispute settlement bodies. Since the dispute settlement bodies are bound to the application of public international law, legal and factual information on environmental interests brought forward by environmental NGOs can only be convincing if and insofar as there is already international law e.g. in forms of MEAs or customary international law protecting such interests. Otherwise there is no legal argument to be made.

This is also exactly where NGO submissions can be helpful, as with their special expertise and interests they might bring to the attention of the parties and the dispute settlement bodies international environmental law and connected legal arguments and factual information that is not known to them or not brought forward by the parties because it does not serve their interests. If it is applicable to the case, however, it should be considered by the dispute settlement bodies, as WTO law is "not to be read in clinical isolation from public international law."[238]

In addition, an accreditation procedure can ensure that, for example, only environmental NGOs dedicated to the protection of environmental interests according to their articles of association and an extensive history and reputation in the protection of environmental interests significant to the case at issue may represent these environmental interests.

Secondly, some critiques argue that NGO participation as amicus curiae is superfluous because NGOs can and should bring their arguments to the attention of the parties to the dispute who then can decide if they want to include them in their briefs. As argued above, especially in international cases that affect environmental interests, it is very likely that states' interests do not encompass cross-border or

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[237] Referring to this also Möllers, *Die drei Gewalten* (2008), 206. For a further discussion of a definition of international NGOs see chapter 1.III.B.

[238] *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, at III.B.

global commons protection interests that are backed up by international environmental law. The dispute settlement bodies and not the parties should decide on their legal relevance to the case at issue.

Thirdly, many so called developing countries are not in favor of greater involvement of NGOs for several reasons. One argument often brought forward is that environmental interests as often represented by NGOs run against developing countries' interest in economic development. This is a short sighted argument. The interests of people who live in developing countries are often at the heart of international environmental agreements. MEAs such as the Kyoto Protocol or the Convention on Biological Diversity aim to further the environmentally sound and socially equitable economic development of developing countries. MEAs usually contain provisions on technology transfer and international cooperation. Therefore the consideration of MEAs in WTO disputes is more likely to be advantageous for the economic development of developing countries. Mere trade restrictions justified through environmental protection under GATT provisions do not enable the negotiation of technology support and other more equitable solutions.[239]

Another argument brought forward against amicus participation in WTO proceedings by developing countries is that their limited resources prevent them from effectively reacting to NGO amicus briefs.[240] As shown in the *Asbestos* guidelines there are ways to deal with this problem. For example, the time limit can be prolonged in the interest of developing countries or the length of the NGO briefs can be limited.[241] Finally, an often cited fear of developing countries is that NGOs represent developed countries' interests. Allowing them to participate in WTO proceedings would only further 'eco-imperialism' and add even more negotiation power to developed countries than they already have.[242] Since there is no fixed definition of NGOs and there are many NGOs that are not totally independent of national governments in the sense that they receive state funding, the argument is partly convincing. Most environmental NGOs, however, see themselves as critical watchdogs of governmental activities; being "non-governmental" is the reason for why they exist. Furthermore, on the international level, NGOs from developed countries usually collaborate with NGOs from developing countries. For example, in the *Shrimp-Turtle* case CIEL submitted its amicus brief together with the Philippine Ecological Network and Red Nacional de Accion Ecologica from Chile.[243] Also, it might be the explicit role of an NGO to assist developing countries in their effective

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[239] The protection of developing countries' interests appeared to be arguably one of the reasons for, or at least an effect of, the WTO Appellate Body's interpretation with respect to the chapeau of Article XX GATT, for example in the *Shrimp-Turtle* cases.

[240] Johnson/Tuerk, "CIEL's Experience in WTO Dispute Settlement" in Treves/Di Rattalma et al. (eds.), *Civil Society, International Courts and Compliance Bodies* (2005), 243, 256.

[241] *Ibid*. at 257.

[242] *Ibid*. at 258.

[243] For more examples see Johnson/Tuerk, *ibid.*

participation in WTO proceedings.[244] Furthermore, there is a development towards more balanced representation of NGOs worldwide in international fora as can be seen, for example, in the geographic distribution of NGOs with an observer status at the ECOSOC.[245]

All in all this discussion has shown that arguments against greater NGO involvement are mostly not convincing. They do not outweigh the benefits of NGO participation in WTO dispute settlement proceedings.

iii. Experts

The WTO dispute settlement bodies have only asked for expert advice on very few occasions. In three of the disputes involving environmental issues, expert opinions helped to clarify the facts relevant to the application of Article XX GATT, for example with respect to measures for sea turtle protection or the health risk of asbestos.

Under Article 13 of the DSU and Annex 1b to the Working Procedures for Appellate Review, there seems to be a sufficient legal basis for the consultation of experts by the WTO panels and the Appellate Body. In practice, the WTO dispute settlement bodies could make more use of these options, considering that expert advice contributes to the quality, transparency, and legitimacy of WTO decisions.[246]

e. *Environmental Case Law*

With respect to the GATT period, *Ernst-Ulrich Petersmann* remarked that the GATT dispute settlement system "has been used more frequently for the settlement of 'environmental disputes' between states than any other international dispute settlement mechanism."[247] The analysis in this chapter shows that this statement is still true for the WTO dispute settlement mechanism. No other international court has dealt with so many state-to-state disputes related to environmental protection as the WTO judiciary.

In the cases described above, the WTO dispute settlement bodies had to decide whether a national trade restriction could be justified on environmental protection grounds under Article XX GATT (*Tuna-Dolphin*, *Reformulated Gasoline, Shrimp-Turtle, Asbestos* cases) or the SPS and the TBT Agreement (*Beef Hormones, Asbestos, Biotech Products* cases). From a trade perspective, the cases can be grouped according

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[244] Tuerk, "The Role of NGOs in International Governance. NGOs and Developing Country WTO Members: Is there Potential for an Alliance?" in Griller (ed.), *International Economic Governance and Non-Economic Concerns* (2003), 169 at 188 et seq.

[245] See also Chapter 1.I.

[246] Pauwelyn, "The Use of Experts in WTO Dispute Settlement" (2008) 51 *Int'l & Comp. L.Q.*, 325, 362.

[247] Petersmann, *International and European Trade and Environmental Law After the Uruguay Round* (1995), 22.

to the scope of the pollution and the impact of the trade measure (domestic, cross-border, global).[248]

i. Article XX GATT and Chapeau

With respect to the interpretation of Article XX GATT, the following conclusions can be drawn. National trade embargoes with an extraterritorial effect based on national environmental legislation to protect cross-border environmental interests in absence of any multilateral environmental agreement providing for trade measures as a form of law enforcement are not compatible with the requirements of the chapeau of Article XX GATT (*Tuna-Dolphin*, *Shrimp-Turtle* cases). Furthermore, Article XX GATT does not justify unilateral trade measures with an extraterritorial effect based on national environmental law to protect internationally protected endangered species if the national requirements do not leave affected countries some space to reach the protected policy goal by alternative means (*Shrimp-Turtle* cases). Trade restrictions based on national environmental legislation with an extraterritorial effect can also not be justified under the chapeau of Article XX GATT if the national law applies higher standards to foreign products than to domestic products (*Reformulated Gasoline* case).

In all but one[249] of these cases, the United States were successfully sued mainly by developing countries for alleged protectionist, but from an environmental protection point of view justifiable, restrictive trade measures based on U.S. environmental law. The panels and the Appellate Body appropriately applied national and international environmental law in their findings with respect to the interpretation of the requirements of Article XX(g) GATT, for example in interpreting "exhaustible natural resources". In all of the cases the panels and the Appellate Body concluded that the requirements of Article XX(g) GATT were fulfilled. The defendants always lost their cases because the trade measures were not compatible with the chapeau of Article XX GATT.

It is questionable if the restrictive interpretation of the wording of the chapeau of Article XX GATT is always appropriate.[250] Article XX GATT requires that the application of trade measures does not constitute an arbitrary or unjustifiable discrimination between countries or a disguised restriction on international trade. These conditions are fulfilled if a trade measure is applied to all countries equally, if the import conditions refer to an internationally accepted policy goal and leave some room for country-specific solutions to reach this policy goal and if the same standard also applies to domestic production. If these conditions are fulfilled it should be

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[248] Khalilian, *The WTO and Environmental Provisions: Three Categories of Trade and Environment Linkage*, Kiel Institute for the World Economy, Kiel Working Papers No. 1485 (February 2009), 15.

[249] *Shrimp-Turtle II*, see above at Chapter 4.I.B.4.e.

[250] Bodansky, "What's so Bad about Unilateral Action to Protect the Environment?" (2000) 11 *EJIL*, 339, 342, 347.

possible to enforce national environmental legislation with an extraterritorial effect notwithstanding any international environmental agreement which addresses the specific case at issue in detail. Especially with respect to trade measures that aim at the protection of endangered species it is important to note that the Convention of Biological Diversity and CITES have almost worldwide membership and therefore its policy goals have a significant weight that needs to be appropriately reflected in WTO decisions.

Such internationally accepted environmental policy goals should enable the justification of unilateral trade measures with extraterritorial effects based on national environmental legislation, also against WTO members that are not parties to these MEAs, under certain urgent circumstances. As *Bodansky* rightly pointed out, often "the choice is not between unilateralism and multilateralism, but between unilateralism and inaction".[251] To deal appropriately with such conflicts, the WTO dispute settlement bodies should further develop the necessity test into a three stage balancing test, including suitability, necessity, and proportionality, as is usually applied when colliding interests have to be balanced against each other in the absence of a formal hierarchy of norms.[252]

ii. Risk Assessment

The other group of environmental disputes decided by the WTO judiciary dealt with the justification of trade restrictions under the risk assessment provisions of the SPS Agreement and the TBT Agreement (*Beef Hormones*, *Asbestos*, *Biotech Products* cases). In all cases the United States or Canada sued the EC alleging that the EC's import restrictions based on health and environmental risk assessments were unlawful under the SPS or TBT Agreement. The EC won the *Asbestos* case and lost the other two cases. In the *Asbestos* case the Appellate Body held that there is no violation of the SPS or the TBT Agreement, that the trade restriction measures were justified under Article XX(b) GATT and applied in a manner consistent with the requirements of the chapeau of Article XX GATT. There was clear scientific evidence for the danger that asbestos products pose to human health. This was different in the *Beef Hormones* and in the *Biotech Products* cases. The WTO dispute settlement bodies could not see sufficient scientific evidence for the danger to human health and the environment of beef hormones and biotech products to justify the EC import restrictions. According to their decision, the trade measures could not be justified through the outcomes of a risk assessment as regulated in the SPS Agreement. The precautionary principle could in both cases not serve as a justification of the EC measures. The Cartagena Protocol on Biosafety which formulates different requirements

[251] *Ibid*. at 339.

[252] Vranes, *Trade and the Environment* (2009), 129 et seq., 154 et seq. Fundamentally, Alexy, *Theorie der Grundrechte* (2006, originally published in 1984).

for risk assessment procedures with respect to GMO products was not applicable between the parties at this point.

The latter two decisions are not convincing. In cases of scientific uncertainty democratically elected sovereign states and Regional Integration Organizations such as the European Union must remain in a position to decide to which environmental and health risk they are prepared to expose their citizens. If the EC society has a more cautious attitude towards the safety of food products and accordingly sets import restrictions in cases of scientific uncertainty, this must be respected. The precautionary principle might not have reached the standard of international customary law as yet, but it remains a strong argument in support of import restrictions on risky food products.[253] A WTO dispute settlement organ is not a legitimate institution to be the ultimate arbiter in these cases of scientific uncertainty. Application of the above-mentioned balancing test might also help to solve these kinds of disputes more appropriately.

6. *Conclusions and Recommendations*

Despite political declarations that trade and sustainable development are "mutually supportive", in reality numerous cases underline the fact that reconciling economic, social, and environmental interests is not so easy at the end of the day. Here it is argued that enhanced participation of environmental NGOs in the WTO dispute settlement furthers the goal of sustainable development.

a. *Accountability and NGO Participation*

Considering the amount of influence of the WTO dispute settlement mechanism carries, there is no appropriate executive and legislative balance. This is a crucial deficit and needs to be further addressed. This research, however, focuses on judicial procedures and it has been argued that enhanced participation of environmental NGOs in the WTO dispute settlement mechanism does add some accountability to its influence because it makes the procedures more transparent and more open to environmental and social arguments. It thereby contributes to ensuring a proper informative basis with regard to the factual and legal environmental aspects relevant to the case at issue.

b. *Balance Trade and Environmental Protection Interests*

So far there has been no direct conflict between WTO law and international environmental law. It remains to be seen what happens, for example, if the WTO dispute

[253] It might be helpful in this context to bear in mind that there are very different opinions on the meaning and benefits of the precautionary principle in Europe and the United States. See, for example, Sunstein, *Laws of Fear* (2008). It is not convincing, however, to criticize the precautionary principle – as *Sunstein* does – via a comparison between the justification of the Iraq war and environmental or health protection measures.

settlement bodies or the Compliance Committee of the Cartagena Protocol on Biosafety have to decide a case that requires the application of the risk assessment according to the SPS Agreement and the Cartagena Protocol on Biosafety.[254] It is also possible to a certain extent to avoid direct conflicts through the framing of the decisive legal question and interpretation of the applicable law. In the case of a direct conflict it has to be further clarified if the WTO is allowed to directly apply non-WTO law to a case and if this is a good solution.

Here it is argued that, if a dispute is originally rather an environmental than an economic dispute, the WTO dispute settlement system is not the appropriate forum.[255] This is also the opinion of the WTO Committee on Trade and Environment; it stated that disputes involving MEAs should be settled within the framework of those MEAs.[256] It should be noted though that the institutional framework of MEAs only provides for non-compliance procedures. With respect to dispute settlement, most MEAs contain provisions to refer cases to the ICJ, arbitration or the ITLOS, but they are hardly ever invoked. Thus, there might be a need for new environmental dispute settlement institutions and procedures and/or an appeal system equipped with jurisdiction and procedures able to accommodate economic, environmental, and other potentially conflicting interests.[257]

As regards interpretation of WTO law that refers to environmental issues, such as Article XX GATT, the example of the *Shrimp-Turtle* cases should be followed. If an MEA is applicable between the parties to a dispute, it should be the basis for the panel or Appellate Body's interpretation of terms like "exhaustible natural resources". From a procedural point of view, it seems appropriate that when WTO dispute settlement bodies consider the direct or indirect application of an MEA they cooperate with the MEAs secretariat and the respective compliance committee and do not act in isolation as it happened in the *Sardines* case with respect to the Codex Alimentarius.

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[254] Another field of possible conflict between international environmental and WTO law is the application of punitive trade restrictions under MEAs, such as, for example, CITES and the Montreal Protocol, see de Sadeleer, "Environmental Justice and International Trade Law" in Ebbesson/Okowa (eds.), *Environmental Law and Justice in Context* (2009), 447, 449 et seq. However, only a very few MEAs provide for trade measures as enforcement tools, *ibid*.

[255] See also Tarasofsky, *Report on Trade, Environment, and the WTO Dispute Settlement Mechanism* (2005), 8. It should be noted, however, that *Gündling's* view is shared here, that there are no purely environmental disputes, Gündling, "On the Settlement of Investment and Environmental Disputes" in The International Bureau of the Permanent Court of Arbitration (ed.), *International Investments and Protection of the Environment* (2001), 125, 128.

[256] See e.g. 1996 Report of the Committee on Trade and Environment, WTO Doc. PRESS/TE/014 (18 November 1996) and some Members have called for MEA dispute mechanisms to be strengthened (Submission by New Zealand, WT/CTE/W/180, 9 January 2001).

[257] See also Tarasofsky, *Report on Trade, Environment, and the WTO Dispute Settlement Mechanism* (2005), 8 et seq. In general Gündling, "On the Settlement of Investment and Environmental Disputes" in The International Bureau of the Permanent Court of Arbitration (ed.), *International Investments and Protection of the Environment* (2001), 125. This will be discussed further in Chapter 4.IV.

When WTO dispute settlement bodies have to balance trade and environmental protection interests as they have to do, for example, in applying Article XX GATT and its chapeau, they may consider the use of a three-stage balancing test, including suitability, necessity, and proportionality.

c. *Widen NGO Access*

Some authors suggest that the substantive law of the WTO should be broadened to encompass more environmental law. Another view is to further develop the WTO along the lines of the European Union and include all fields of policy.[258] None of these options is envisaged here. It is recommended that the WTO members follow their schedule on trade and environment established for the Doha Round and amend the WTO substantive law in those fields where trade and environmental protection can be mutually supportive, e.g. through elimination of environment-degrading subsidies. Since states have activated non-state actors to enforce international law elsewhere, especially in the field of investment protection, they may consider giving environmental NGOs limited standing before the WTO dispute settlement bodies or a procedural right to notify the WTO secretariat about possible breaches by WTO members of such rules.

With regard to meaningful amicus curiae participation by environmental NGOs, it is important that they have access to the hearings and the submissions of the parties in WTO cases that affect environmental interests. Only then they are able to address the crucial factual and legal issues of the cases in their amicus briefs.[259] *Charnovitz*, for example, proposed that the dispute settlement bodies could hold one day of public hearings where NGOs could testify.[260]

To improve the handling of NGO participation in WTO dispute settlement, there could be an accreditation system and special rules for rights and obligations during

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[258] Shell, "Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization" (1995) 44 *Duke L.J.*, 829, 917 et seq.

[259] Johnson/Tuerk, "CIEL's Experience in WTO Dispute Settlement" in Treves/Di Rattalma et al. (eds.), *Civil Society, International Courts and Compliance Bodies* (2005), 243, 256. Esty, "Non-Governmental Organizations at the World Trade Organization: Cooperation, Competition, or Exclusion" (1998) 1 *J. Int'l Econ. L.*, 123, 144. The 2004 Sutherland Report noted in this regard: "The degree of confidentiality of the current dispute settlement proceedings can be seen as damaging to the WTO as an institutions", see Consultative Board to the Director General Supachai Panitchpakdi, *The Future of the WTO: Addressing Institutional Challenges in the New Millennium* (Sutherland Report), WTO 2004, at 261; available at http://www.wto.org/english/thewto_e/10anniv_e/future_wto_e.htm. See also Pauwelyn, "The Use of Experts in WTO Dispute Settlement" (2008) 51 *Int'l & Comp. L.Q.*, 325, 330. This is, however, a very difficult issue politically, considering that WTO Members could not even agree to allow representatives of intergovernmental organizations as observers in meetings of the WTO Committee on Trade and Environment. Howse, "How to Begin to Think About the "Democratic Deficit" at the WTO" in Griller (ed.), *International Economic Governance and Non-Economic Concerns* (2003), 79, 88.

[260] Charnovitz, "Participation of Nongovernmental Organizations in the World Trade Organization" (1996) 17 *U. Pa. J. Int'l Econ. L.*, 331, 355.

the dispute settlement procedure.[261] The accreditation system could filter the NGOs allowed to participate in and contribute to the proceedings according to certain substantive requirements. The rules on participation could set standards for access to hearings and parties' submissions. The rules developed by the WTO Appellate Body in the *Asbestos* case could serve as a good basis. Examples of rules that could also be drawn on are the rules of UN ECOSOC Resolution 1996/31 or of national judicial proceedings such as Rule 37 of the United States Supreme Court on amicus briefs.[262]

Furthermore, an intergovernmental environmental organization such as the UNEP or the IUCN could speak as an "Environmental Advocate" in WTO environmental disputes.[263] NGOs and scientists could provide input to the IGO's statement.

From a procedural point of view, there are several options to further develop the rules on the participation of NGOs as amici curiae. A revision of the rules in the DSU would be the most desirable one but would be politically difficult at present. Furthermore, the Appellate Body could modify its Working Procedures or it could be left to the discretion of the Appellate Body and the panels to decide on the consideration of amicus submissions on a case by case basis.[264]

As regards improved expert participation *Pauwelyn* makes several suggestions worth considering.[265] These include the use of an expert review group in disputes where experts are likely to disagree, ending the confidentiality of WTO proceedings to allow for high quality amici curiae advice, and allowing the Appellate Body to seek expert legal advice from other international organizations. To better cope with the problem of fragmentation of international law, *Pauwelyn* suggests new provisions to request advisory opinions or preliminary rulings from other international tribunals.[266] Other authors suggest changes in the composition of the WTO panels in order to ensure a just representation of environmental interests and scientific expertise.[267]

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[261] See also Esty, "Non-Governmental Organizations at the World Trade Organization: Cooperation, Competition, or Exclusion" (1998) 1 *J. Int'l Econ. L.*, 123, 144; Steger, "Amicus Curiae: Participant or Friend? The WTO and NAFTA Experience" in von Bogdandy/Mavroidis et al. (eds.), *European Integration and International Co-ordination* (2002), 419, 439 et seq.

[262] Chapter 1.III.B. refers to some details of the ECOSOC Resolution. See also Esty, "Non-Governmental Organizations at the World Trade Organization: Cooperation, Competition, or Exclusion (1998) 1 *J. Int'l Econ. L.*, 123, 144.

[263] Charnovitz, "Participation of Nongovernmental Organizations in the World Trade Organization" (1996) 17 *U. Pa. J. Int'l Econ. L.*, 331, 356.

[264] See also Distefano, "NGOs and the WTO Dispute Settlement Mechanism" in Treves/Di Rattalma et al. (eds.), *Civil Society, International Courts and Compliance Bodies* (2005), 261, 269 et seq.

[265] Pauwelyn, "The Use of Experts in WTO Dispute Settlement" (2008) 51 *Int'l & Comp. L.Q.*, 325, 362 et seq.

[266] *Ibid*. at 363.

[267] Nichols, "Extension of Standing in World Trade Organization Disputes to Nongovernment Parties" (2004) 25 *U. Pa. J. Int'l Econ. L.*, 669, 677, 701. Referring to a former PCIJ model *Charnovitz* suggests the use of special chambers in which the judges appoint a special "technical assessor", Charnovitz, "Participation of Nongovernmental Organizations in the World Trade Organization" (1996) 17 *U. Pa. J. Int'l Econ. L.*, 331, 356.

C. *International Tribunal for the Law of the Sea*

The main international treaty governing the law of the sea is the United Nations Convention on the Law of the Sea (UNCLOS). It was opened for signature in 1982 and entered into force in 1994. As of June 2011 it has 162 parties. The seas play a major role in the state of the world's environment. They cover more than 70% of the earth's surface and contain 96.5% of the earth's water resources. Intense uses such as shipping, oil and gas production, fishing, coastal tourism, military activities, and scientific research threaten the marine ecosystems.[268] Among the main environmental problems are pollution, overfishing, climate change, and noise. The UNCLOS and its related agreements aim to provide a holistic regulatory framework for economically profitable and environmentally sound governing of the world's seas.

The UNCLOS established its own regime court: the International Tribunal for the Law of the Sea (ITLOS) located in Hamburg, Germany. Its task is to adjudicate disputes arising out of the interpretation and application of the Convention and its subsequent agreements and it had its first session in 1996. The ITLOS is composed of 21 independent members and has formed a number of chambers, including a chamber for marine environmental disputes.

Between 1996 and September 2011 it dealt with a total of 19 cases, which makes an average of 1.2 cases per year. Nine of these 19 cases were so-called prompt release cases, a special procedure provided for under Articles 292 and 73 UNCLOS to obtain the release of detained vessels and crews. As of September 2011 three of those 19 cases were pending. The majority of the cases dealt with relate in some way to the protection of the marine environment.

1. *Jurisdiction and Applicable Law*

The ITLOS can deal with contentious cases and advisory proceedings. Part XV of the UNCLOS (Articles 279–299) regulates the settlement of disputes. Section 2 of Part XV (Articles 286–296) provides for compulsory procedures entailing binding decisions. State parties are free to choose the forum to settle law of the sea disputes from the ITLOS, ICJ or an arbitral tribunal set up according to Annexes VII or VIII of the Convention.[269] As of September 2011, 30 out of 162 parties to the UNCLOS had declared the ITLOS as their choice of a possible forum for the settlement of disputes, often subject to certain conditions.[270]

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[268] For most of these activities see Nellemann et al. (eds.), *In Dead Water* (2008), at 15.

[269] Article 287 UNCLOS.

[270] See table on choice of procedure under Article 287 UNCLOS at http://www.un.org/Depts/los/settlement_of_disputes/choice_procedure.htm.

The Tribunal has jurisdiction over any dispute concerning the interpretation or application of the Convention.[271] Articles 297 and 298 of the UNCLOS provide for limitations and exceptions to the applicability of this compulsory jurisdiction.[272] If a dispute belongs to the categories as defined in Articles 297 and 298 of the UNCLOS, parties can still by mutual agreement refer it to the ITLOS. Article 288(2) of the UNCLOS opens the scope of jurisdiction to any disputes concerning the interpretation or application of an international agreement related to the purposes of the UNCLOS, if the agreement confers jurisdiction on the Tribunal. There are ten multilateral agreements conferring jurisdiction on the ITLOS.[273]

With respect to disputes arising from activities in the Area, section 5 of Part XI of the UNCLOS (Articles 186–191) establishes the jurisdiction of the Seabed Disputes Chamber. The Seabed Disputes Chamber is also authorized to give advisory opinions.[274] Such advisory opinions may not be requested by state parties but only by the Assembly or the Council of the International Seabed Authority. In case No. 17 of the ITLOS, the Seabed Dispute Chamber for the first time received a request for an advisory opinion.[275] The ITLOS may also give an advisory opinion on a legal question if an international agreement related to the purposes of the Convention specifically provides for such an option.[276] The request may be made by whatever body is authorized by or in accordance with such an agreement.

Any decision rendered by a court or tribunal shall be final and binding to all parties to the dispute.[277] The applicable law encompasses the UNCLOS and other rules of international law not incompatible with the UNCLOS.[278] Part XII of the UNCLOS specifically deals with the protection and preservation of the marine environment. Article 237 of the UNCLOS regulates the relation between these provisions and other multilateral environmental agreements relating to the protection and preservation

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[271] Article 288(1) UNCLOS; see also Articles 21 and 22 of the ITLOS Statute. There is a debate among scholars about the scope of jurisdiction and the relation between Articles 21 and 22 of the Statute and Article 288 of the UNCLOS, see Karg, *IGH v[ersu]s ISGH* (2005), 156 et seq.

[272] See table on state declarations regarding optional exceptions to applicability of Part XV, Section 2 under Article 298 UNCLOS at http://www.un.org/Depts/los/settlement_of_disputes/choice_procedure.htm. As regards limitations under Article 297, for example, Article 297(3)(a) UNCLOS contains a significant exception to the jurisdiction of the Tribunal with respect to the protection of fisheries in the EEZ, a zone where 90% of commercial fishing takes place. Churchill, "The Jurisprudence of the International Tribunal for the Law of the Sea Relating to Fisheries" (2007) 22 *IJMCL*, 383, 388 et seq.

[273] A list of such provisions is available at http://www.itlos.org/fileadmin/itlos/documents/basic_texts/Relevant_provisions.12.12.07.E.pdf. See also Churchill, "The Jurisprudence of the International Tribunal for the Law of the Sea Relating to Fisheries" (2007) 22 *IJMCL*, 383, 392 et seq.

[274] Articles 159(10) and 191 UNCLOS.

[275] Case No. 17, *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the International Seabed Area* (Request for Advisory Opinion submitted to the Seabed Disputes Chamber).

[276] Article 138(1) ITLOS Rules.

[277] Article 296 UNCLOS.

[278] Article 293 of the UNCLOS.

of the marine environment and states that the provisions of Part XII are without prejudice to obligations assumed under previously concluded agreements as long as they are carried out in a manner consistent with the general principles and objectives of the UNCLOS.

The Tribunal may take appropriate provisional measures to preserve rights of the parties or to prevent serious harm to the marine environment pending a final decision.[279] If authorities of a state party have detained a vessel flying the flag of another state party, the ITLOS has jurisdiction to decide on the prompt release of the vessel and crew.[280] The majority of cases brought before the ITLOS were brought under either of these two special procedures. In five cases the ITLOS prescribed provisional measures; in nine cases it ordered the prompt release of a vessel and crew.[281]

2. *Institutional Arrangements*

The UNCLOS established the International Seabed Authority (ISA) as the organization through which states parties shall organize and control activities in the Area, particularly with a view to administering the resources of the Area.[282] The International Seabed Authority is located in Kingston, Jamaica and its principal organs are an Assembly, a Council and a Secretariat.[283] Furthermore, the UNCLOS established the Enterprise as the organ through which the Authority carries out activities in the Area directly as well as the transporting, processing and marketing of minerals recovered from the Area.[284] How the Area is actually governed through the institutional, procedural and substantive setting put in place by the UNCLOS and related instruments is of special interest here because, according to Article 136 UNCLOS, "[t]he Area and its resources are the common heritage of mankind" and, thus, they are considered to be global commons.

Based on specific arrangements, the ISA consults and cooperates with international and non-governmental organizations recognized by the ECOSOC of the United Nations.[285] Designated representatives of such organizations may attend the meetings of the organs of the ISA as observers. Procedures shall be established for obtaining the views of such organizations in appropriate cases.[286] Accepted NGOs may submit reports on subjects in which they have special competences and which are related to the work of the ISA. The Secretary-General may distribute those written

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279 Article 290 UNCLOS.
280 Article 292 UNCLOS.
281 See list of cases available at http://www.itlos.org/index.php?id=35&L=0.
282 Articles 156 and 157 UNCLOS. Further details with respect to Part XI of the UNCLOS are regulated in the 1994 Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea.
283 Article 158(1) UNCLOS.
284 Article 158(2) UNCLOS.
285 Article 169 UNCLOS.
286 Article 169(2) UNCLOS.

reports to states parties.[287] For example, in April 2009 the WWF requested status as an observer at the Assembly of the ISA[288] and shortly thereafter the Assembly decided to invite the WWF to participate as an observer in its meetings.[289]

Further institutional arrangements potentially relevant for effectively dealing with international environmental law are the Chamber for Marine Environment Disputes and the Chamber for Fisheries Disputes formed by the ITLOS in 1997.[290] The Chamber for Marine Environment Disputes deals with disputes concerning the interpretation or application of any provision of the UNCLOS relating to the protection and preservation of the marine environment, special conventions and agreements relating to these matters, and any agreement relating to the protection and preservation of the marine environment which confers jurisdiction on the Tribunal. The Chamber for Fisheries Disputes is available to deal with disputes concerning the interpretation or application of any provision of the UNCLOS relating to the conservation and management of marine living resources and any other agreement relating to the conservation and management of marine living resources which confers jurisdiction on the Tribunal. Parties have to agree to submit a dispute to any of the special chambers. So far none of the 19 cases before the ITLOS has been referred to either of these chambers.

As regards the transparency of proceedings before the ITLOS, requirements vary in contentious and advisory proceedings. In contentious cases, pleadings and annexed documents are made available to the public at the latest on the opening of the oral proceedings.[291] If the Tribunal or the President, in the event that the Tribunal is not sitting, so decides after ascertaining the views of the parties, they also may be published earlier than that.[292] In advisory proceedings, the request for an advisory opinion, as well as written statements and documents annexed to it, submitted during the procedure are published as soon as possible after they have been presented to the Chamber.[293] Hearings before the Tribunal are generally open to the public, unless the Tribunal decides otherwise or the parties demand that the public is not admitted.[294] Decisions of the Tribunal are always read at a public sitting. The

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287 Article 169(3) UNCLOS.

288 Request for observer status in the Assembly, ISBA/15/A/INF/1, 24 April 2009, available at http://www.isa.org.jm/files/documents/EN/15Sess/Ass/ISBA-15A-Inf1.pdf.

289 Statement of the President of the Assembly of the ISA on the work of the Assembly at its fifteenth session, ISBA/15/A/9, 11 May 2009, available at http://www.isa.org.jm/files/documents/EN/15Sess/Ass/ISBA-15A-9.pdf. See also the related press release available at http://www.isa.org.jm/files/documents/EN/Press/Press09/SB-15–17.pdf.

290 Regarding the ITLOS's competence to form special chambers see Article 188 UNCLOS and Article 15 ITLOS Statute. The relevant resolutions and information on the members of the Tribunal serving the two mentioned Chambers is available at http://www.itlos.org/index.php?id=19&L=0.

291 Article 67(2) ITLOS Rules.

292 *Ibid.*

293 Article 134 ITLOS Rules as regards written statements and annexes.

294 Article 26(2) ITLOS Statute, Article 74 ITLOS Rules.

dates and locations of hearings are announced on the court's website and in its press releases. From Case No. 16 onwards hearings, and in Case No. 17 also the reading of the advisory opinion, have also been transmitted via a live webcast.[295]

3. *Access to the ITLOS*

Generally, only states parties to the UNCLOS have access to the ITLOS.[296] Dispute settlement procedures are open to entities other than states parties only as specifically provided for in the Convention.[297] For example, the two main organs of the International Seabed Authority may ask the Seabed Disputes Chamber for an advisory opinion. Intergovernmental organizations may submit statements to the ITLOS as amici curiae. Finally, the ITLOS may ask for expert advice. International non-governmental organizations aimed at the protection of the marine environment do not have access to the ITLOS as parties or amici curiae.[298] They might theoretically only be called as experts.

a. *Direct Access for Intergovernmental Organizations*

The Convention provides for access for intergovernmental organizations under certain conditions. According to Article 305(1) of the UNCLOS, the Convention is not only open for signature by all states, certain self-governing associated states, and territories with full internal self-government recognized by the UN, but also by international organizations in accordance with Annex IX.

Article 1 of Annex IX defines "international organization" as

> intergovernmental organizations constituted by States to which its member States have transferred competence over matter governed by this Convention, including the competence to enter into treaties in respect of those matters.

So far, only the European Union falls under this definition.[299] Non-governmental organizations or hybrid international organizations such as the IUCN cannot join the UNCLOS. Also UN organs or programs such as UNEP do not fall under this

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[295] See webcam section at ITLOS website at http://www.itlos.org/index.php?id=39&L=0.

[296] Article 291(1) UNCLOS and Article 20(1) ITLOS Statute.

[297] The respective provisions are Article 291(2) UNCLOS, Articles 20, 37 ITLOS Statute, and Article 187 UNCLOS. See also Karg, *IGH v[ersu]s ISGH* (2005), 162 et seq.; Heitmüller, *Durchsetzung von Umweltrecht im Rahmen des Seerechtsübereinkommens von 1982 durch den Internationalen Seegerichtshof in Hamburg* (2001), 63.

[298] Bartholomeusz, "The Amicus Curiae before International Courts and Tribunals" (2005) 5 *Non-St. Actors & Int'l L.*, 209, 226 et seq.

[299] Talmon, "Der Internationale Seegerichtshof in Hamburg als Mittel der friedlichen Beilegung seerechtlicher Streitigkeiten" (2001) 41 *JuS*, 550, 555; Karg, *IGH v[ersu]s ISGH* (2005), 164; Heitmüller, *Durchsetzung von Umweltrecht im Rahmen des Seerechtsübereinkommens von 1982 durch den Internationalen Seegerichtshof in Hamburg* (2001), 64. To date, the European Community has been party in one of the ITLOS cases, the *Swordfish* case initiated by Chile, case No. 7, *Case concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean* (*Chile / European Union*). The case was settled out of court.

definition.[300] Once an international governmental organization becomes a party to the UNCLOS it is free to choose its preferred forum for dispute settlement according to Article 287 of the UNCLOS, Article 7(1) of Annex XI, including the ITLOS. Part XV of the UNCLOS on the settlement of disputes applies mutatis mutandis to any dispute between parties, if one of them is an international organization.

b. *Direct Access for Non-State Entities*

Article 20(2) of the Statute provides another way for entities other than states parties to have access to the ITLOS. It states that

> [t]he Tribunal shall be open to entities other than States Parties [...] in any case submitted pursuant to any other agreement conferring jurisdiction on the Tribunal which is accepted by all the parties to that case.

There is a debate about the meaning of "any other agreement". It could be narrowly interpreted as referring only to international treaties between states. However, the broad and unspecific language could also be interpreted so as to encompass agreements between the parties to a dispute.[301] The majority of scholars seem to prefer the narrow interpretation. To date, states have not concluded such an agreement with respect to INGOs as such "other entities".[302]

Furthermore, according to Article 20(2) of the Statute

> [t]he Tribunal shall be open to entities other than States Parties in any case expressly provided for in Part XI.

Part XI regulates all UNCLOS issues with respect to the Area.[303] Section 5 of Part XI refers to the settlement of disputes and advisory opinions. According to Article 187 of the UNCLOS, certain entities other than states parties have access to the ITLOS Seabed Disputes Chamber. They may act as plaintiffs or defendants. These entities are the International Seabed Authority, the Enterprise, natural or juridical persons referred to in Article 153(2)(b) of the UNCLOS, or a state enterprise. Extension of the access provisions to these other entities is based on experience at the European Court of Justice and the growing number of arbitrations in the field of international economic law between individuals, private companies, and states.[304] The interests are comparable with those of the action for annulment under Article 263 of the

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[300] Heitmüller, *Durchsetzung von Umweltrecht im Rahmen des Seerechtsübereinkommens von 1982 durch den Internationalen Seegerichtshof in Hamburg* (2001), 71.

[301] Heitmüller, *ibid.* at 74, argues that following the broad interpretation, for example, the *Rainbow Warrior* case could have been dealt with directly between Greenpeace and France instead of New Zealand and France.

[302] *Ibid.* at 79; Riedinger, *Die Rolle nichtstaatlicher Organisationen bei der Entwicklung und Durchsetzung internationalen Umweltrechts* (2001), 225. See also Rah/Wallrabenstein, "Sustainability needs Judicial Support" in Ehlers/Lagoni (eds.), *International Maritime Organisations and their Contributions towards a Sustainable Marine Development*, 285, 310 et seq.

[303] For details see Karg, *IGH v[ersu]s ISGH* (2005), 168 et seq.

[304] *Ibid.* at 170 et seq.

Treaty on the Functioning of the European Union, where also a private entity can seek legal protection against measures taken by states or organs of international institutions.[305]

The International Seabed Authority consists ipso facto of all states parties to the UNCLOS.[306] As mentioned above, NGOs may gain observer status if they are recognized by the ECOSOC of the United Nations.[307] The Enterprise is the organ of the ISA which shall carry out activities in the Area.[308] It consists of a 15-member Governing Board, a Director-General, both elected by the Assembly, and staff.[309] Natural or juridical persons and state enterprises referred to in Article 153(2)(b) of the UNCLOS are companies and research institutes which are effectively controlled by States parties or which meet the requirements provided for in Annex III. For example, the eight investors that entered into a contract with the International Seabed Authority under the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area fall under this provision and in the event of a dispute would have access to the ITLOS.[310]

If a natural or juridical person is a party to one of those disputes under Article 187 of the UNCLOS, the sponsoring state shall be notified and has the right to participate in the proceedings by submitting written or oral statements.[311] Article 190(2) of the UNCLOS provides for special rights of a state party if an action is brought against it by a natural or juridical person sponsored by another state party.

The Assembly and the Council of the International Seabed Authority may request the Seabed Disputes Chamber to advise on legal questions arising within the scope of their activities according to Article 191 of the UNCLOS.[312]

c. *Amici Curiae*

The ITLOS Rules explicitly provide for the submission of amicus curiae briefs by intergovernmental organizations with respect to contentious cases before the ITLOS or the Seabed Disputes Chamber and advisory proceedings before the Seabed Disputes Chamber.[313] The Tribunal may request information relevant to a case before it

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[305] *Ibid*. at 171.

[306] Article 156(2) UNCLOS.

[307] See Chapter 4.I.C.2 above.

[308] Article 170 UNCLOS, Annex IV.

[309] Articles 4, 5, and 7 Annex IV.

[310] For a list of these contractors see http://www.isa.org.jm/en/scientific/exploration/contractors. Article 187(b)–(f) describes in more detail the jurisdiction of the Seabed Disputes Chamber in these cases.

[311] Article 190(1) of the UNCLOS.

[312] This happened for the first time in case No. 17, *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the International Seabed Area (Request for Advisory Opinion submitted to the Seabed Disputes Chamber)*, Advisory Opinion of 1 February 2011.

[313] Articles 84(1)(2) and (4), 107, 115, 133 ITLOS Rules; see also Bartholomeusz, "The Amicus Curiae before International Courts and Tribunals" (2005) 5 *Non-St. Actors & Int'l L.*, 209, 228.

on its own initiative or at the request of a party to a dispute. An intergovernmental organization may also submit an amicus curiae brief on its own initiative in form of a written memorandum before the closure of the written proceedings. The parties to the dispute are given the opportunity to comment on the submission. Article 84 of the ITLOS Rules is based on Article 34 of the ICJ Statute. The term "public international organization" in the initial draft was changed into "intergovernmental organization" to avoid misinterpretation. During the drafting process, no delegate suggested that the term should be broadened to include international NGOs.[314]

In the advisory opinion case No. 17 before the Seabed Disputes Chamber, intergovernmental organizations including the IUCN, as well as Greenpeace and the WWF, submitted statements.[315] The IUCN statement was issued as a statement of an intergovernmental organization. Greenpeace and the WWF requested permission to participate in the advisory proceedings as amici curiae but the Chamber did not grant the request.[316] However, the joint statement of Greenpeace and the WWF was published on the ITLOS website, with the explicit note that it is not part of the case file, and transmitted to states parties, the ISA, and IGOs that had submitted written statements.[317]

d. *Experts*

If a dispute involves scientific or technical matters, the ITLOS may, on its own initiative or at the request of a party, select experts to sit with the Tribunal but without a right to vote.[318] The Tribunal must select the experts in consultation with the parties and choose them preferably from a list of experts prepared in accordance with Annex VIII of the UNCLOS, Article 2. Another interesting requirement is that the ITLOS must choose at least two experts according to Article 289 of the UNCLOS. Thus, theoretically it is possible that representatives of environmental NGOs are heard as experts, even if a party disagrees.[319] However, as far as the author is aware, representatives of an environmental NGO have never been heard as experts in proceedings before the ITLOS.

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[314] Bartholomeusz, "The Amicus Curiae before International Courts and Tribunals" (2005) 5 *Non-St. Actors & Int'l L.*, 209, 229.

[315] Further details see below at Chapter 4.I.C.4.c.

[316] Case No. 17, *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the International Seabed Area (Request for Advisory Opinion submitted to the Seabed Disputes Chamber)*, Advisory Opinion of 1 February 2011, at 13 and 14.

[317] *Ibid.* at 13.

[318] Article 289 UNCLOS, Article 82 ITLOS Rules.

[319] Bartholomeusz, "The Amicus Curiae before International Courts and Tribunals" (2005) 5 *Non-St. Actors & Int'l L.*, 209, 232.

4. *Environmental Case Law*

As of September 2011, the ITLOS had dealt with a total of 19 cases.[320] So far it has only decided one case on the merits: the second *M/V Saiga* case.[321] The *Swordfish* case might have become the first case focused on environmental protection to be decided on the merits but it was settled out of court.[322] More than half of the ITLOS cases were somehow related to environmental issues. Nine out of the 19 cases were so-called prompt release cases, where eight of the vessels detained were alleged to have carried out illegal fishing in the detaining countries' EEZ. In four cases the ITLOS ordered provisional measures, also with a view in each case to protection of the marine environment. Cases No. 16, 18 and 19 are still pending. In case No. 17 for the first time the ITLOS Seabed Dispute Chamber was asked for an advisory opinion. The analysis below describes the types of cases and manner in which the ITLOS dealt with marine environmental issues.

a. *Prompt Release and IUU Fishing*

The prompt release procedure provided for under Articles 292 and 73 UNCLOS is the most popular type of procedure among the states approaching the ITLOS for dispute resolution. In eight out of the nine prompt release cases, the vessels were detained for alleged illegal fishing.[323] In three cases, the conditions for a prompt release procedure were not fulfilled.[324] In five cases, the ITLOS ordered the prompt release of vessel and crew upon the posting of a bond.

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[320] All decisions are available at http://www.itlos.org/index.php?id=35&L=0. For a summary of the cases related to fisheries see Churchill, "The Jurisprudence of the International Tribunal for the Law of the Sea Relating to Fisheries" (2007) 22 *IJMCL*, 383.

[321] Case No. 2, *M/V "SAIGA"* case *(Saint Vincent and the Grenadines v. Guinea)*, Judgment of 1 July 1999.

[322] Case No. 7, *Case concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile v. European Union)*, Order 2009/1 of 16 December 2009. See also Orellana, Schwertfisch in Gefahr (2000) 2 *Brücken*, 3.

[323] The only prompt release case that did not explicitly deal with marine environmental issues was the first *M/V Saiga* case of the ITLOS. It dealt with the detention of the M/V Saiga because of alleged smuggling. The M/V Saiga was a bunkering vessel supplying fuel oil to fishing and other vessels. The ITLOS decided that Guinea violated the rights of Saint Vincent and the Grenadines under the Convention in arresting the Saiga and that therefore Guinea shall pay compensation to Saint Vincent and the Grenadines in the sum of US$ 2,123,357; see decision on the merits in *M/V Saiga* case No. 2, Judgment of 1 July 1999 at 183. The case could have been argued on environmental protection grounds but it was not; see Churchill, "The Jurisprudence of the International Tribunal for the Law of the Sea Relating to Fisheries" (2007) 22 *IJMCL*, 383, 406; van Dyke, "Giving Teeth to the Environmental Obligations in the LOS Convention" in Oude Elferink/Elferink-Rothwell (eds.), *Oceans Management in the 21st Century* (2004), 167, 168.

[324] In the *Grand Prince* case the fishing vessel Grand Prince was detained by French authorities for alleged illegal fishing of toothfish in the French EEZ. However, the ITLOS found that it did not have jurisdiction over the case since the Applicant failed to establish that Belize was the flag State of the vessel; case No. 8, *Grand Prince* case (*Belize v. France*), Judgment of 20 April 2001 at 93, 95. The *Chaisiri Reefer 2* case was withdrawn by the parties shortly after its submission. The Chaisiri Reefer was also arrested for alleged violation of fisheries laws; case No. 9 (*Panama v. Yemen*), Order of 13 July 2001. In the *Tomimaru* case, the ITLOS did not order the prompt release because the

In the *Camouco* case,[325] the vessel Camouco registered in Panama was detained by French authorities for the alleged illegal fishing of Patagonian toothfish in France's EEZ of the Crozet Islands. The ITLOS held that the alleged violation of the French laws on fishery resources in its EEZ entitled the French authorities to arrest the vessel under Article 73(1) of the UNCLOS.[326] According to Article 73(2) of the UNCLOS the arrested vessel and its crew shall be promptly released upon the posting of reasonable bond or other security. In deciding on the reasonableness of a bond, the ITLOS considered the gravity of the alleged offences, the penalties imposed or imposable under the laws of the detaining State, the value of the detained vessel and of the seized cargo, the amount of the bond imposed by the detaining State and its form.[327]

The Tribunal took note of the gravity of the alleged offences. According to the procès-verbal of violation, the Camouco was observed paying out a longline within the EEZ of the Crozet Islands. Crew members were observed jettisoning 48 bags and documents. One retrieved bag contained 34 kilograms of fresh toothfish. Six tonnes of frozen toothfish were found in the holds of the Camouco.[328] The Master of the Camouco denied the allegations and stated that he intended merely to cross the EEZ, that the six tonnes of frozen toothfish were caught outside the EEZ and that there was no fresh toothfish on board the Camouco.[329] The penalty which could be imposed on the Master of the Camouco under French law was a fine of 5 million FF.[330] The value of the detained vessel assessed by expert testimony was 3,717,571 FF.[331] The Regional and Departmental Directorate of Maritime Affairs estimated the tonnage of the catch at 7,600 kilograms and its value at 380,000 FF.[332] A French court deemed a bond of 20,000,000 FF to be reasonable.[333] After considering all these issues, the ITLOS decided that a bond of 8,000,000 French Francs was reasonable.[334] The Tribunal did not need to further examine these factual issues since this is not necessary under the requirements of Articles 292 and 73 of the UNCLOS.

The *Monte Confurco* case[335] was very similar to the *Camouco* case. The fishing vessel Monte Confurco flying the flag of Seychelles was alleged to have carried out

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vessel was confiscated by the Russian authorities which eliminated the provisional character of the detention of the vessel and rendered the procedure for its prompt release without object; case No. 15, *Tomimaru* case, (*Japan v. Russian Federation*), Judgment of 6 August 2007 at 76.

[325] Case No. 5, *Camacou* case (*Panama vs. France*), Prompt Release, Judgment of 7 February 2000.

[326] *Ibid*. at 61.

[327] *Ibid*. at 67.

[328] *Ibid*. at 29.

[329] *Ibid*. at 32.

[330] *Ibid*. at 68.

[331] *Ibid*. at 69.

[332] *Ibid*. at 33.

[333] *Ibid*. at 64, 70.

[334] *Ibid*. at 78(4).

[335] Case No. 6, *Monte Confurco* case (*Seychelles v. France*), Prompt Release, Judgment of 18 December 2000.

IUU (illegal, unreported and unregulated) fishing in the French EEZ and detained by French authorities who seized 158 tonnes of fish. The French court considered a bond of 56,400,000 FF to be reasonable. The Tribunal did not agree and determined that the bond should consist of an amount of 9,000,000 FF as the monetary equivalent of the 158 tonnes of seized fish and, additionally, a bond in the amount of 9,000,000 FF.[336] In the *Juno Trader* case[337] the refrigerated cargo vessel Juno Trader flying the flag of Saint Vincent and the Grenadines was alleged to have engaged in illegal fishing and therefore detained. The respondent argued that the bond should be no less than 1,227,214.00 Euros. The ITLOS ordered the prompt release of vessel and crew upon the posting of a 300,000 Euro bond.[338] In the *Hoshinmaru* case,[339] similarly, a fishing vessel flying the flag of Japan was detained by Russian authorities for allegedly fishing other or more fish than allowed for according to their fishing licenses. The respondent considered a bond of 22,000,000 roubles (approximately US$ 862,000) reasonable. The Tribunal held that the vessel had to be promptly released upon the payment of a bond of 10,000,000 roubles.[340]

In the *Volga Case*, again a vessel was arrested for the illegal fishing of toothfish in the Southern Ocean.[341] The fishing vessel Volga flying the flag of the Russian Federation was arrested by Australian authorities because of IUU fishing as part of a bigger fleet in Australia's EEZ. The case was especially interesting because for the first time the bond set by the arresting state included a non-financial requirement, namely the obligation to carry a fully operational vessel monitoring system (VMS).[342] The Tribunal, however, interpreted Article 73(2) of the UNCLOS narrowly and stated that such a requirement is not encompassed by "reasonable bond or other security".[343] The Tribunal also rejected Australia's request for a 'good behavior bond' of one million dollars as part of the bond in order to guarantee the carriage of a fully operational VMS and the Volga's compliance with the conservation measures of the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR).[344]

With respect to Australia's efforts to combat IUU fishing, the Tribunal stated that it:

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[336] *Ibid*. at 96(6).

[337] Case No. 13, *Juno Trader* case (*Saint Vincent and the Grenadines v. Guinea-Bissau*), Prompt Release, Judgment of 18 December 2004.

[338] *Ibid*. at 104.

[339] Case No. 14, *Hoshinmaru* case (*Japan v. Russian Federation*), Prompt Release, Judgment of 6 August 2007.

[340] *Ibid*. at 102(5).

[341] Case No. 11, *Volga* case (*Russian Federation v. Australia*), Prompt Release, Judgment of 23 December 2002.

[342] *Ibid*. at 72.

[343] *Ibid*. at 75–77, 95(3). The Tribunal left open whether a coastal state might impose such conditions in the exercise of its sovereign rights under the Convention when granting foreign vessels the right to fish in its EEZ; *ibid*. at 76.

[344] *Ibid*. at 53, 72, 78–80.

> understands the international concerns about illegal, unregulated and unreported fishing and appreciates the objectives behind the measures taken by States [...] to deal with the problem.[345]

19 of the 21 judges of the ITLOS in this case concurred with this decision. However, the dissenting opinions of *Judge Anderson* and *Judge ad hoc Shearer* point out convincingly that there would have been room and important reasons for a broader interpretation of Article 73(2) of the UNCLOS and thus the reasonableness of the obligation to carry a VMS as part of a bond.[346] *Judge ad hoc Shearer* comes to the conclusion that

> [s]uch a narrow interpretation of the provisions of articles 73, paragraph 2, and 292 cannot, in my opinion, be supported. In the short period since the conclusion of the Convention in 1982, and in the even shorter period since its entry into force in 1994, there have been catastrophic declines in the stocks of many fish species throughout the world. The words "bond" and "financial security" should be given a liberal and purposive interpretation in order to enable the Tribunal to take full account of the measures – including those made possible by modern technology – found necessary by many coastal States (and mandated by regional and sub-regional fisheries organizations) to deter by way of judicial and administrative orders the plundering of the living resources of the sea.[347]

b. *Provisional Measures to Protect the Marine Environment*

For the first time the ITLOS prescribed provisional measures to prevent serious harm to the marine environment as provided for in Article 290(1) UNCLOS in the *Southern Bluefin Tuna* cases.[348] It has to be noted, however, that the provisional measure was overturned by a later decision because of lack of jurisdiction.[349] The Tribunal ordered that Japan had to "refrain from conducting an experimental fishing programme involving the taking of a catch of southern bluefin tuna",[350] unless the catch is deducted from Japan's annual national allocation. The Tribunal used language that basically defines the precautionary approach without mentioning the term itself:[351]

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[345] Case No. 11, *Volga* case (*Russian Federation v. Australia*), Prompt Release, Judgment of 23 December 2002, at 68.

[346] Dissenting opinion *Judge Anderson* at 24; Dissenting opinion *Judge Ad hoc Shearer* at 16. See also Churchill, "The Jurisprudence of the International Tribunal for the Law of the Sea Relating to Fisheries" (2007) 22 *IJMCL*, 383, 410 et seq.

[347] Dissenting opinion *Judge Ad hoc Shearer* at 17.

[348] Cases No. 3 and 4, *Southern Bluefin Tuna* cases (*New Zealand v. Japan; Australia v. Japan*), Provisional Measures, Order of 27 August 1999.

[349] *Southern Bluefin Tuna* cases (*Australia and New Zealand v. Japan*), Award on Jurisdiction and Admissibility, 4 August 2000. See also van Dyke, "Giving Teeth to the Environmental Obligations in the LOS Convention" in Oude Elferink/Elferink-Rothwell (eds.), *Oceans Management in the 21st Century* (2004), 167, 169.

[350] Cases No. 3 and 4, *Southern Bluefin Tuna* cases (*New Zealand v. Japan; Australia v. Japan*), Provisional Measures, Order of 27 August 1999, at 90(1)(d).

[351] See also Churchill, "The Jurisprudence of the International Tribunal for the Law of the Sea Relating to Fisheries" (2007) 22 *IJMCL*, 383, 414.

> [p]arties should in the circumstances act with prudence and caution to ensure that effective conservation measures are taken to prevent serious harm to the stock of southern bluefin tuna; [...] parties should intensify their efforts to cooperate with other participants in the fishery for southern bluefin tuna with a view to ensuring conservation and promoting the objective of optimum utilization of the stock; [...] there is scientific uncertainty regarding measures to be taken to conserve the stock of southern bluefin tuna and [...] there is no agreement among the parties as to whether the conservation measures taken so far have led to the improvement in the stock of southern bluefin tuna;
>
> [...] although the Tribunal cannot conclusively assess the scientific evidence presented by the parties, it finds that measures should be taken as a matter of urgency to preserve the rights of the parties and to avert further deterioration of the southern bluefin tuna stock.[352]

In the *MOX Plant* case,[353] the Tribunal prescribed provisional measures under Article 290(5) UNCLOS pending a decision by the Annex VII arbitral tribunal. It ordered that the parties should enter into consultations in order to exchange further information with regard to possible consequences for the Irish Sea arising out of the commissioning of the MOX plant; to monitor risks or the effects of the operation of the MOX plant for the Irish Sea; and devise, as appropriate, measures to prevent pollution of the marine environment which might result from the operation of the MOX plant.[354] The Annex VII arbitral tribunal suspended the proceedings on jurisdiction and merits until the ECJ delivered its judgment on the Community law issues.[355] The ECJ held that Ireland breached EU law by initiating proceedings against the United Kingdom before the Annex VII tribunal in the MOX Plant case[356] and as a consequence, Ireland withdrew its claim against the United Kingdom before the arbitral tribunal.[357]

In the *Case concerning Land Reclamation by Singapore in and around the Straits of Johor*,[358] also pending a decision by the Annex VII arbitral tribunal, the ITLOS prescribed provisional measures under Article 290(5) of the Convention: The parties should enter into consultations to establish promptly a group of independent experts to conduct a study on the effects of Singapore's land reclamation and to

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[352] Cases No. 3 and 4, *Southern Bluefin Tuna* cases (*New Zealand v. Japan; Australia v. Japan*), Provisional Measures, Order of 27 August 1999, at 77–80.

[353] Case No. 10, *MOX Plant* case (*Ireland v. United Kingdom*), Provisional Measures, Order of 3 December 2006.

[354] *Ibid*. at 89.

[355] On jurisdictional issues see Boyle, *The Making of International Law* (2007b), 274 et seq. See also Chapter 2.III.D.2.

[356] Case C-459/03 *Commission v. Ireland* [2006] ECR I-4634, Grand Chamber decision; Ireland's submission of the case to the Annex VII tribunal did not comply with the obligation of EU Member States under Articles 292 EC and 193 EA to respect the exclusive nature of the Court's jurisdiction to resolve disputes concerning the interpretation and application of provisions of Community law.

[357] Permanent Court of Arbitration, *MOX Plant* Case, Order No. 6, termination of proceedings, 6 June 2008; available at http://www.pca-cpa.org/upload/files/MOX%20Plant%20Order%20No.%206.pdf.

[358] Case No. 12, *Case concerning Land Reclamation by Singapore in and around the Straits of Johor* (*Malaysia* v. *Singapore*), Order of 8 October 2003.

prepare an interim report on infilling works in a certain area; exchange, on a regular basis information on, and assess risks or effects of, Singapore's land reclamation works; and implement the commitments noted and avoid any action incompatible with their effective implementation. The Tribunal also directed Singapore not to conduct its land reclamation in ways that might cause irreparable prejudice to the rights of Malaysia or serious harm to the marine environment, taking especially into account the reports of the group of independent experts.[359]

c. *Activities in the International Seabed Area*

On 1 February 2011, the Seabed Disputes Chamber of the ITLOS issued the first advisory opinion of the ITLOS. The advisory opinion on activities in the international seabed area can be considered the clearest and most important contribution of the ITLOS to date to the application and development of international environmental law.[360] It is also the most recent decision of an international court with major relevance for international environmental law examined in this study. Furthermore, the advisory opinion is concerned with balancing environmental protection and resource exploitation interests, as well as the promotion of effective participation of developing countries in the Area and thus a global commons. For all these reasons, the advisory opinion in case No. 17 of the ITLOS is considered in more detail.

i. Background

In May 2010, the Council of the International Seabed Authority requested the Seabed Disputes Chamber of the ITLOS to render an advisory opinion in accordance with Article 191 of the UNCLOS.[361] The request for an advisory opinion arose from the system put in place by the UNCLOS and related instruments to govern the exploration for and exploitation of minerals in the Area. In putting into practice the notion of the Area as the common heritage of humankind, the UNCLOS and related instruments aim to promote the effective participation and special consideration of developing countries in the exploration for and exploitation of minerals in the Area. When a state or a private entity applies to the ISA for approval of a plan or work for exploration and licenses for exploitation, the application has to encompass a total area "sufficiently large and of sufficient estimated commercial value to allow two mining operations".[362] Under the so-called "parallel system", one part of this total area is subject to the approval of a plan of work or license for the applicant and the

[359] *Ibid*. at 106.

[360] Case No. 17, *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the International Seabed Area (Request for Advisory Opinion submitted to the Seabed Disputes Chamber)*, Advisory Opinion of 1 February 2011.

[361] Decision ISBA/16/C/13 of 6 May 2010 of the Council of the International Seabed Authority, 16th session.

[362] Article 8 Annex III to UNCLOS.

other part of the total area subject to this plan is reserved for activities by the ISA in association with developing states ("reserved areas").[363]

In 2008, two corporations sponsored by Nauru and Tonga, the Nauru Ocean Resources Inc. and Tonga Offshore Mining Ltd., applied to the ISA for approval of plans of work for exploration in a reserved area. Subsequently, Nauru became aware that, as a sponsoring state, it might be exposed to responsibilities and liabilities for damages occurring from the corporation's exploration activities in the Area which would exceed its financial capabilities.[364] To clarify the legal situation it proposed to seek an advisory opinion from the Seabed Dispute Chamber of the ITLOS on the responsibility and liability of states sponsoring corporations' exploration and exploitation activities in the Area.[365]

The Council of the International Seabed Authority followed Nauru's proposal and submitted a request to the Seabed Disputes Chamber of the ITLOS to render an advisory opinion; it posed three questions.[366] The first one regards the legal responsibilities and obligations of states parties to the UNCLOS, in particular arising from Part XI concerning the Area and the 1994 Agreement relating to the Implementation of Part XI with respect to the sponsorship of activities in the Area. The second question deals with the extent of liability of a state party for any failure to comply with the relevant provisions by an entity which it has sponsored under Article 153(2)(b) of the Convention. The third question asks about the necessary and appropriate measures that a sponsoring State must take in order to fulfill its responsibility under the UNCLOS.

ii. Procedure and Participation

The procedure is laid out in Articles 130 to 137 of the ITLOS Rules and includes a written phase and optional public hearings. States parties and intergovernmental organizations may present statements. Twelve states parties to the UNCLOS and three intergovernmental organizations filed written statements within the time-limit. The three intergovernmental organizations are the Interoceanmetal Joint Organization, the IUCN, and the International Seabed Authority itself. The intergovernmental organizations were invited by the President of the Seabed Dispute Chamber to submit statements concerning the questions because they participate as observers in the Assembly of the ISA and were considered likely to be able to furnish information. The UNEP also submitted a written statement but not within the time-limit.

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363 *Ibid.*

364 Proposal ISBA/16/C/6 of 5 March 2010 to seek an advisory opinion from the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea on matters regarding sponsoring State responsibility and liability; submitted by the delegation of Nauru, at 1.

365 *Ibid.* in general.

366 Decision ISBA/16/C/13 of 6 May 2010 of the Council of the International Seabed Authority, 16th session.

The environmental NGOs Greenpeace International and the World Wide Fund for Nature also handed in a joint statement within the time limit. It is published on the ITLOS website but with the explicit note that it is not part of the case file. The statement was also distributed to the states parties and IGOs that also had submitted statements to the Chamber. The request for permission to participate as amici curiae was denied by the Chamber.[367] In its advisory opinion the Chamber mentions that the two NGOs have submitted a joint statement and a request to participate as amicus curiae, that the latter request had been denied and that the statement has been distributed.[368] Apart from this procedural statement, there is no further explicit reference in the advisory opinion, i.e. to the content of the submission and its relevance for the Chamber's decision. The public hearings of the Seabed Dispute Chamber of the ITLOS opened on 14 September 2010 and were the first hearings to be transmitted live on the Tribunal's website. Nine States and the three intergovernmental organizations that made timely submissions presented oral statements.

iii. Advisory Opinion

The Seabed Disputes Chamber of the ITLOS issued its unanimous decision on 1 February 2011. This summary focuses on the answer given by the Chamber to the first question. As regards the first question, it held that sponsoring states have two kinds of obligations under the UNCLOS and related instruments: an obligation to ensure compliance by sponsored contractors with the terms of contract and the obligations set out in the Convention and related instruments (1), as well as a number of direct obligations with which sponsoring states must comply independently of their obligation to ensure a certain conduct on the part of the sponsored contractors (2).[369] The first type of obligation, the "obligation to ensure" is understood as an obligation of conduct and not of result and as an obligation of "due diligence".[370] More concretely, this means that the sponsoring state has to take measures within its legal system such as adopting regulatory and administrative measures.[371] The sponsoring state is obliged to make best possible efforts to ensure that sponsored contractors comply with their obligations. As regards the content of due diligence obligations, the Tribunal held that the standard of due diligence is not fixed but that it may vary over time and that it is dependent on the level of risk and on the activities

[367] Case No. 17, *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the International Seabed Area (Request for Advisory Opinion submitted to the Seabed Disputes Chamber)*, Advisory Opinion of 1 February 2011, at 13 and 14.

[368] *Ibid.*

[369] *Ibid.* at 242 no. 3 lit. A and B.

[370] *Ibid.* at 110, 242 no. 3 lit A.

[371] *Ibid.* at 111, 118, 242 no. 3 lit A. To clarify the meaning of "to ensure" and "due diligence" the Chamber explicitly referred to the *Pulp Mills* judgment of the ICJ, the ILC Articles on State Responsibility and the ILC Articles on Prevention of Transboundary Harm from Hazardous Activities, *ibid.* at 111, 112, 115, 116.

involved.[372] The measures taken within the national legal system must be "reasonably appropriate".[373]

The second type of obligations of sponsoring states are so-called "direct obligations".[374] The Tribunal summarizes these kinds of obligations as follows:

> Among the most important of these direct obligations incumbent on sponsoring States are: the obligation to assist the Authority in the exercise of control over activities in the Area; the obligation to apply a precautionary approach; the obligation to apply best environmental practices; the obligation to take measures to ensure the provision of guarantees in the event of an emergency order by the Authority for protection of the marine environment; the obligation to ensure the availability of recourse for compensation in respect of damage caused by pollution; and the obligation to conduct environmental impact assessments.[375]

The Tribunal's findings with regard to the precautionary approach, the application of best environmental practices and the conduct of an EIA are especially relevant in the context of this study and are therefore examined more closely.

The Nodules Regulation and the Sulphides Regulation require the sponsoring state to apply a precautionary approach, as reflected in Principle 15 of the Rio Declaration, to ensure effective protection for the marine environment from harmful effects when they sponsor activities or prospecting and exploration for polymetallic nodules and polymetallic sulphides in the Area.[376] Thus, the explicit language of the regulations turns the non-binding precautionary approach of Principle 15 of the Rio Declaration into a legally binding obligation for sponsoring states.[377] This obligation of sponsoring states to apply the precautionary approach may apply differently to different states according to their respective capabilities.[378] All other obligations referred to here apply equally to developed and developing countries.[379] In addition, the Tribunal points out that the precautionary approach is also an integral part of the general obligation of due diligence of sponsoring states and thus applicable also outside the scope of the two regulations.[380]

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372 *Ibid.* at 117, 242 no. 3 lit A.
373 *Ibid.* at 120, 242 no. 3 lit A.
374 *Ibid.* at 121, 242 no. 3 lit B.
375 *Ibid.* at 122, 242 no. 3 lit B.
376 *Ibid.* at 125, 130. Principle 15 of the Rio Declaration reads as follows: "In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."
377 *Ibid.* at 127.
378 *Ibid.* at 129, 151–163; this is a consequence of the reference to Principle 15 of the Rio Declaration and its wording that "the precautionary approach shall be widely applied by States according to their capabilities."
379 *Ibid.* at 242 no. 3 lit B.
380 *Ibid.* at 131. To support its finding the Tribunal refers to the *Southern Bluefin Tuna* orders of 27 August 1999 and also to the contractual obligation in the Sulphides Regulations Annex 4, section 5.1, *ibid.* at 132, 133.

As regards the status of the precautionary approach in international law, the Chamber explicitly observes that

> the precautionary approach has been incorporated into a growing number of international treaties and other instruments, many of which reflect the formulation of Principle 15 of the Rio Declaration. In the view of the Chamber, this has initiated a trend towards making this approach part of customary international law.[381]

Citing paragraph 164 of the ICJ Judgment in the *Pulp Mills* case that "a precautionary approach may be relevant in the interpretation and application of the provisions of the Statute" (the bilateral treaty at the heart of the dispute, which also contained environmental protection obligations), the Chamber notes that this statement of the ICJ

> may be read in light of article 31, paragraph 3(c), of the Vienna Convention, according to which the interpretation of a treaty should take into account not only the context but 'any relevant rules of international law applicable in the relations between the parties'.[382]

In addition to the precautionary approach, the Chamber finds that the application of best environmental practices is part of the direct obligations of sponsoring states. Best environmental practices are understood as a concept including the use of BAT but going further than that.[383] Furthermore, the conduct of an environmental impact assessment poses a direct obligation for sponsoring states. With respect to the EIA, the Chamber explicitly stresses

> that the obligation to conduct an environmental impact assessment is a direct obligation under the Convention and a general obligation under customary international law.[384]

With regard to question two, the Chamber held that liability of a sponsoring state arises from its failure to fulfill its obligations under the Convention and related instruments, the occurrence of damage, and a causal link between the failure to comply with the obligations and the occurrence of the damage.[385]

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[381] *Ibid*. at 135.

[382] *Ibid*. For more details on the ICJ judgment in the *Pulp Mills* case see Chapter 4.I.A.4.e above.

[383] Advisory Opinion, *ibid*. at 136.

[384] *Ibid*. at 145. Giving reasons for its opinion, the Chamber again refers to the *Pulp Mill* judgment of the ICJ; it considers it appropriate to apply the ICJ's opinion on the status of the EIA, which was focused on the role of an EIA in the context of industrial activities likely to cause transboundary pollution of shared natural resources, to the case at hand regarding resource exploitation in an area beyond national jurisdiction and space and resources that are considered the common heritage of humankind, *ibid*. at 147, 148. In contrast to the ICJ in the *Pulp Mill* case, the Chamber is in a position to further clarify the scope and content of an EIA referring to Article 206 of the Convention, the Mining Regulations and, most importantly, to the Recommendations for the Guidance of the Contractors for the Assessment of the Possible Environmental Impacts Arising from Exploration for Polymetallic Nodules in the Area, issued by the Authority's Legal and Technical Commission in 2002 pursuant to regulation 38 of the Nodules Regulations (ISBA/7/LTC/1/Rev.1 of 13 February 2002), *ibid*. at 149, 144.

[385] *Ibid*. at 242, no. 4.

5. *Evaluation*

Few states have as yet referred cases to the ITLOS. With an average of 1.2 cases per year, the number of cases before the Tribunal is even lower than the average number of cases dealt with by the ICJ. However, it has to be acknowledged that the ITLOS is a very young institution and that it is only concerned with a special area of international law. In the majority of its cases, the Tribunal has had to deal directly or indirectly with issues regarding the protection of the marine environment. There is substantive law in the UNCLOS and there are institutional arrangements especially designed to further the protection of the marine environment. Nevertheless, the practice of the Tribunal reveals that protection interests are not yet sufficiently safeguarded within the judicial review procedure. A positive exception is the first advisory opinion issued by the Seabed Disputes Chamber of the ITLOS.

a. *Jurisdiction and Applicable Law*

Generally the scope of jurisdiction seems to be appropriate. It encompasses all disputes concerning the interpretation and application of the Convention, as well as disputes under related agreements that confer jurisdiction on the Tribunal. However, as the decisions in the *Southern Bluefin Tuna* cases and the *MOX Plant* case showed, complex jurisdictional questions can arise and the articles of the Convention do not provide for a clear answer. Also the exceptions to the general scope of jurisdiction are very far-reaching. The compromises agreed upon to accommodate the interests of flag states and coastal states in fisheries cases, for example, mean that the jurisdictional scope of the ITLOS with respect to fisheries is very limited.[386]

The majority of the cases reached the ITLOS under the prompt release procedure. In this procedure, one state can trigger the procedure alone. In nearly all other cases both parties have to agree to submit the dispute to the ITLOS and, as the case law shows in these cases, it is much less likely that parties will refer a case to the binding third party jurisdiction of the ITLOS. If states want to broaden the activity of the ITLOS, they should introduce more procedures that can be initiated by one state party only. The prompt release procedure might serve as a helpful tool to resolve disputes over a detained vessel in a short time. The procedure, however, is not designed to appropriately scrutinize and safeguard other interests protected by the Convention and relevant to these cases, especially fisheries protection interests.[387] The second most popular procedure of the ITLOS is the one for the prescription of provisional measures. It explicitly also serves to prevent serious harm from the environment and in all provisional measures cases the Tribunal ordered measures with

[386] Churchill, "The Jurisprudence of the International Tribunal for the Law of the Sea Relating to Fisheries" (2007) 22 *IJMCL*, 383, 387 et seq.

[387] For more details see below Chapter 4.I.C.5.c.

a view to protection of the marine environment. However, jurisdictional questions have so far limited the effectiveness of this procedure.

The advisory proceedings before the Seabed Disputes Chamber might prove to be an important instrument to ensure an appropriate balance between exploitation and protection of the deep seabed. Since these can be triggered, inter alia, by an administrative authority it is more likely that they can contribute to the appropriate consideration of protection and preservation interests with respect to activities in the deep seabed area than normal contentious procedures that may only be initiated by states parties or enterprises usually interested in exploitation. Case No. 17 served as a first positive example of such advisory proceedings triggered by an administration.

With regard to the substance of applicable law, it has to be noted that the UNCLOS itself and related instruments, for example the Straddling Fishstocks Agreement or the Mining Regulations contain various provisions for conservation measures, protection of the marine environment, and sustainable use of resources.[388] Especially in its first advisory opinion, the ITLOS has shown that the substantive law of the UNCLOS and the related instruments governing the Area is able to accommodate environmental protection interests. It is much more a procedural problem that, for example, cases aiming at the protection of fisheries do not reach the ITLOS and that, consequently, the substantive law on fisheries cannot be enforced through the Tribunal.

b. *Institutional Arrangements and Access to the Tribunal*

Establishing a Chamber for Marine Environment Disputes and for Fisheries Disputes can be seen as positive steps by the Tribunal to highlight these issues and underline the competence of the Tribunal to deal with them. The fact that not a single case was referred to either of these chambers shows that, similar to the Environmental Chamber of the ICJ, the mere establishment of such specialized chambers does not induce parties to submit relevant cases. Instead, the scope of applicable law, the interests of the states parties and, most importantly, the access provisions are more likely to influence the types of cases heard by the Tribunal.[389]

With the International Seabed Authority, the UNCLOS set up an institution exclusively responsible for the control of activities in the Area. The ISA is to govern the Area as a global common good and ensure fair exploitation as well as marine

[388] Nevertheless, from an environmental protection perspective the body of substantive law of the UNCLOS regime could of course be improved. For an overview of suggested improvements with respect to implementation and compliance in the area beyond national jurisdiction see IUCN, *Elements of a Possible Implementation Agreement to UNCLOS for the Conservation and Sustainable Use of Marine Biodiversity in Areas beyond National Jurisdiction*, Marine Series No. 4, 2008; available at http://data.iucn.org/dbtw-wpd/edocs/EPLP-MS-4.pdf.

[389] See also Rah/Wallrabenstein, "Sustainability Needs Judicial Support" in Ehlers/Lagoni (eds.), *International Maritime Organisations and their Contributions towards a Sustainable Marine Development*, 285, 313.

environmental protection. NGOs recognized at the ECOSOC of the United Nations can consult and cooperate with the ISA. In case of legal uncertainties about the activities carried out in the Area, the Council or the Assembly of the ISA can ask the Seabed Disputes Chamber to render an advisory opinion. Thus, the UNCLOS installed a strong institutional framework to govern the Area as a global common good. It remains to be seen how strong this mechanism will prove to be with the growing number of activities in the Area.

The Seabed Disputes Chamber is also interesting because not only the ISA but also the Enterprise and natural or juridical persons, for example companies and research institutes, which are effectively controlled by the states parties or which meet the requirements provided for in Annex III, may act as plaintiffs or defendants before it. Environmental NGOs may not initiate proceedings at the Seabed Disputes Chamber but it seems possible that they can approach the ISA and try to convince it to initiate contentious or advisory proceedings before the Chamber in a case of conflict. The right of the ISA to bring a case to the Seabed Disputes Chamber is a first step towards ensuring that judicial proceedings can also be initiated to secure protection interests. All other entities that have access to the Seabed Dispute Chamber are more likely to initiate proceedings to secure their exploitation interests in the Area.

According to *Karg* by opening the Seabed Disputes Chamber to other entities than states, the ITLOS and UNCLOS cope more appropriately with current realities in international relations, characterized by the economic use and exploitation of oceans and the seabed, than the ICJ does.[390] This is certainly an important point to make but does not go far enough. A complete regime for the governance of an area beyond national jurisdiction which is of economic importance needs appropriate procedural safeguards to secure the protection, preservation, and fair and equitable-use interests also laid out in the substantive law of the Convention. Allowing environmental NGOs to trigger advisory procedures at the Seabed Disputes Chamber would be the strongest procedural instrument to do so. Giving them an amici curiae status would be a first step towards a more inclusive and therefore probably more balanced governance of the deep seabed area.[391]

In none of the chambers of the ITLOS environmental do NGOs have the right to submit amici curiae statements. Only intergovernmental organizations can do so.

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[390] Karg, *IGH v[ersu]s ISGH* (2005), 237.

[391] *Bartholomeusz* argues against broader access for environmental NGOs referring to Article 49 of the ITLOS Rules which states that ITLOS proceedings "shall be conducted without unnecessary delay or expense" Bartholomeusz, "The Amicus Curiae before International Courts and Tribunals" (2005) 5 *Non-St. Actors & Int'l L.*, 209, 232. This is not a convincing argument against greater participation by environmental NGOs. The Tribunal can ensure an effective procedure by setting appropriate deadlines. Furthermore, the consideration of protection interests secured by UNCLOS provisions or other applicable international law is not "unnecessary" under the rule of law.

In the first advisory proceeding (case No. 17) regarding the responsibilities and obligations of states sponsoring persons and entities with respect to activities in the International Seabed Area, Greenpeace International and the WWF handed in a joint statement within the time-limit of the written proceedings. For the first time in the history of the ITLOS, a statement from an NGO was published on the case's webpage and for the first time it was distributed to participating states parties and IGOs.[392] This can be seen as a positive step towards recognizing environmental NGOs as supportive participants in environmental cases. However, they have not so far acquired any official status.

Proceedings before the ITLOS are largely transparent. It has to be welcomed that from case no. 16 onwards oral hearings, and in case no. 17 also the reading of the advisory opinion, were transmitted via life webcast. This makes ITLOS proceedings a lot more accessible to the interested public and positively contributes to the accountability of the Tribunal and its work. It does not, however, substitute for the effective participation of environmental NGOs whenever environmental interests are affected. If they were to gain an amici curiae status at some point, it would be important to give them access to pleadings and further documents early on, not only in advisory proceedings but also in contentious cases in order to enable them to submit well-founded amicus briefs.

c. *Environmental Case Law*

The survey above described ten cases in which the protection of the marine environment was an important issue. In all cases the Tribunal explicitly dealt with these interests and underlined their importance as recognized by UNCLOS and the related agreements. More concretely, the Tribunal dealt with questions regarding the precautionary principle, environmental impact assessments, environmental co-operation, and jurisdiction in marine environmental disputes.[393] However, with the exception of its first advisory opinion in case no. 17, the Tribunal did not further develop or further interpret these matters but in many cases preferred to use broad language in its decisions. In addition, the outcomes of the cases did not appropriately reflect protection and preservation interests, which is partly due to weak substantive law in the UNCLOS and mainly due to the lack of will of the Tribunal to use interpretative discretion to come to more environmentally friendly solutions. Considering that it is one of the purposes of the UNCLOS dispute settlement system to enforce provisions

[392] See also Anton/Makgill et al., "Seabed Mining" (2011) 41 *Environ Pol Law*, 60, 60.

[393] For an in depth analysis of the jurisprudence in these regards see Boyle, "The Environmental Jurisprudence of the International Tribunal for the Law of the Sea" (2007a) 22 *IJMCL*, 369, 373 et seq.

on the protection and preservation of the marine environment,[394] it is fair to conclude that the Tribunal is not yet completely fulfilling its function.[395]

In five cases, the ITLOS ordered the prompt release of the vessel and crew pending payment of a bond. The prompt release procedure does not allow for an appropriate consideration of the damage done to the marine environment and does not effectively discourage IUU fishing. One gets the impression that it mainly serves the states and actually the private companies engaged in IUU fishing to obtain fast and cheap release of their vessels and crews after a cursory assessment of the alleged violation of the UNCLOS. The actual damage done to the marine environment can neither be appropriately assessed nor remedied in this form of procedure. The bonds set by the Tribunal do not have a sufficiently deterrent effect to appropriately serve the conservation goals of the UNCLOS; they do not sufficiently support coastal states in protecting their EEZs.[396]

The prompt release procedure as set out in Articles 73 and 292 of the UNCLOS aims to strike a balance mainly between the interests of flag states of fishing vessels and coastal states responsible for the management of their EEZs.[397] This balance does not fit the actual fishing industry of today.[398] Most of the fishing vessels are currently not state but privately owned and usually operate in big fleets. IUU fishing takes place in areas where detection is difficult. The flag state is responsible for effective control of its vessels but this is often difficult due to frequent changes of the

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394 Oxman, "A Tribute to Louis Sohn – Is the Dispute Settlement System Under the Law of the Sea Convention Working?" (2007) 39 *Geo. Wash. Int'l L. Rev.*, 655, 659; Schwarte, "Environmental Concerns in the Adjudication of the International Tribunal for the Law of the Sea" (2003) 16 *Geo. Int'l Envtl. L. Rev.*, 421, 428 et seq.

395 Schwarte, "Environmental Concerns in the Adjudication of the International Tribunal for the Law of the Sea" (2003) 16 *Geo. Int'l Envtl. L. Rev.*, 421, 439. See also Gillroy, "Adjudication Norms, Dispute Settlement Regimes and International Tribunals: The Status of Environmental Sustainability in International Jurisprudence" (2006) 42 *Stan. J. Int'l L.*, 1, 47, highlightling jurisdictional constraints and the complex institutional set up of the UNCLOS dispute settlement. With respect to fisheries disputes, *Churchill* points to the "modest" jurisprudence of the ITLOS mainly because of the lack of fisheries cases referred to the Tribunal. However, he concludes that this is not a matter of regret and that it is not pressing or essential that the ITLOS or any other international court develops fisheries jurisprudence; Churchill, "The Jurisprudence of the International Tribunal for the Law of the Sea Relating to Fisheries" (2007) 22 *IJMCL*, 383, 417,424. This view is not shared here. In order to reach a sustainable governance of the seas, the judiciary has to be in a position to safeguard all objectives laid down in the substantive law of the UNCLOS.

396 Reacting to the reluctant jurisprudence of the Tribunal, Australia suggested modifying Article 73(2) UNCLOS so as to allow a coastal state to set a bond likely to deter further illegal fishing. The suggestion was not sufficiently supported by other states; Churchill, *ibid.* at 411. On the other hand, it should also be noted in this context, that the detention of crew and the amount of a bail set by coastal states has already given rise to severe human rights claims; see ECtHR, *Mangouras v. Spain* (application no. 12050/04) judgment 28 October 2010; for a brief summary of the case see Chapter 3.I.C.1. See also Churchill, *ibid.* at 408.

397 Rothwell/Stephens, "Illegal Southern Ocean Fishing and Prompt Release: Balancing Coastal and Flag State Rights and Interests" (2004) 53 *Int'l & Comp. L.Q.*, 171, 180.

398 See also critique of *Judge ad hoc Shearer* in his dissenting opinion in the *Volga* case at 19, case no. 11, *Volga* case (*Russian Federation v. Australia*), Prompt Release, Judgment of 23 December 2002.

name and flag of vessels. In the ITLOS cases, the main part of the applicant's presentation is handled by the vessel owner's private lawyers and not the state agent. The prompt release procedure should be redesigned and strike a new balance between the interests of vessel owners, operators and fishing companies on the one hand, and coastal states on the other.[399] For the time being, the ITLOS should use its interpretative space to give more weight to fisheries protection interests as argued by the coastal states.[400] ITLOS jurisprudence and especially the prompt release procedure are of course not the main instruments to combat IUU fishing but, given the seriousness of the problem and the substantive international environmental law aimed at the protection of fisheries, it can be said that the Tribunal does not yet appropriately contribute to the enforcement of these standards under the given legal framework.[401]

In four cases the Tribunal ordered provisional measures to protect the marine environment. The two *Southern Bluefin Tuna* cases were later overturned for lack of jurisdiction. In these cases alone, the ITLOS ordered that Japan had to refrain from conducting its experimental fishing programme under certain conditions. In the other two cases it encouraged further negotiation and information exchange between the parties, highlighting the importance of the protection of the marine environment. It did not, however, order a preliminary building freeze as claimed by the plaintiffs. Nevertheless, especially as seen in the *Land Reclamation* case, the procedure, which allows for the setting of provisional measures to protect the marine environment, seems to be a helpful instrument for the support of environmental protection interests.[402]

To date there have been four ad hoc arbitrations. The *Southern Bluefin Tuna* and *MOX Plant* arbitrations did not result in awards on the merits. Both underlined the complexity of jurisdictional questions.[403] The *OSPAR* case[404] was confined to a very narrow question about access to commercially sensitive information. The decision in *Land Reclamation*[405] merely endorses a settlement agreement between the parties. According to *Boyle*, all of these arbitrations are more interesting for what they

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399 *Ibid*.

400 Rothwell/Stephens, "Illegal Southern Ocean Fishing and Prompt Release: Balancing Coastal and Flag State Rights and Interests" (2004) 53 *Int'l & Comp. L.Q.*, 171, 183 et seq.

401 See also Rothwell/Stephens, *ibid*. at 184, 185, 187 highlighting the limited design of the prompt release procedure and other important instruments to combat IUU fishing. With a focus on West African Seas, see also Zengerling, "NGOs versus European Pirates: Fisheries Agreements, IUU Fishing and the ITLOS in West African Seas" in Couzens/Honkonen (eds.), *International Environmental Law-making and Diplomacy Review 2008* (2009), 107 et seq.

402 See also van Dyke, "Giving Teeth to the Environmental Obligations in the LOS Convention" in Oude Elferink/Elferink-Rothwell (eds.), *Oceans Management in the 21st Century* (2004), 167, 172; Boyle, "The Environmental Jurisprudence of the International Tribunal for the Law of the Sea" (2007a) 22 *IJMCL*, 369, 380.

403 Boyle, *ibid*. at 371. See also especially with regard to environmental matters Shany, "The First MOX Plant Award: The Need to Harmonize Competing Environmental Regimes and Dispute Settlement Procedures" (2004) 17 *LJIL*, 815.

404 Permanent Court of Arbitration, *Ireland v. UK*, 2003.

405 Permanent Court of Arbitration, *Malaysia v. Singapore*, 2005.

do not decide with regard to international environmental law than for what they do decide.[406] They all posed a challenge to the coherence of international law.[407]

The first advisory opinion issued by the ITLOS Seabed Disputes Chamber in February 2011 can be seen as a landmark decision of the ITLOS in the field of international environmental law.[408] It is of special concern here because it is located at the intersection between environmental protection and fair and equitable resource exploitation, or, in other words, it is about the sustainable development of a global commons. From an environmental protection perspective, the case is highly interesting because it concerned the exploitation of the resources of the deep seabed which affects vulnerable, unusual and diverse ecosystems. An effective liability regime is crucial to ensuring that the marine environment is appropriately protected and that the activities in the Area are carried out for the benefit of all of humankind as regulated in Articles 145 and 140 of the UNCLOS.[409] At the same time, the effective participation and special consideration of developing countries in the exploration for and exploitation of minerals in the Area has to be safeguarded.

The advisory opinion is 'historical' in various ways from a procedural point of view: it is the first advisory opinion issued by the ITLOS, it is the first unanimous ruling of the ITLOS, for the first time oral proceedings and also reading of the advisory opinion had been webcast live, and for the first time an NGO statement was published on the ITLOS website and transmitted to states parties and INGOs that also had submitted statements.[410] Also with regard to the content, the advisory opinion can be considered a landmark decision of the ITLOS in the field of international environmental law. The Chamber developed in a well-reasoned manner concrete obligations and liabilities of states that sponsor exploration and exploitation activities in the Area. Giving reasons for its opinion, the Chamber clarified the meaning of the precautionary approach, best environmental practices, environmental impact assessment, and state responsibility drawing on the language of the UNCLOS and related instruments as well as customary international law. It referred, inter alia,

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406 Boyle, "The Environmental Jurisprudence of the International Tribunal for the Law of the Sea" (2007a) 22 *IJMCL*, 369, 371.

407 *Ibid*.

408 See also Anton/Makgill et al., "Seabed Mining" (2011) 41 *Environ Pol Law*, 60, 60; Freestone, "Advisory Opinion of the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea on 'Responsibilities and Obligations of States Sponsoring Persons and Entities With Respect to Activities in the Area'" (2011) 15 *ASIL Insights*.

409 See also written statement of the International Union for Conservation of Nature and the joint statement of Greenpeace International and the World Wide Fund for Nature; especially focused on the likely impact of exploration and mining activities for nodules in the marine environment, see the relevant note from the legal counsel of 26 August 2010; all documents are available on the ITLOS webpage at case No. 17.

410 Anton/Makgill et al., "Seabed Mining" (2011) 41 *Environ Pol Law*, 60, 60; Freestone, "Advisory Opinion of the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea on 'Responsibilities and Obligations of States Sponsoring Persons and Entities With Respect to Activities in the Area'" (2011) 15 *ASIL Insights*.

to former decisions of ITLOS, to decisions of the ICJ, mainly its recent *Pulp Mills* judgment, and to the work of the International Law Commission as reasons for its opinion. The decision is therefore an important contribution to and good example of the coherent further development of international (environmental) law. The unanimity of the decision is a further strength in this regard; for the first time there are no concurring or dissenting opinions based on different rationales.

6. *Conclusions and Recommendations*

Although the UNCLOS and its related agreements provide for a rather holistic regime largely oriented at what is now called sustainable development, the International Tribunal for the Law of the Sea does not yet mirror this balanced approach sufficiently in its jurisprudence. A positive exception is its most recently issued first advisory opinion.

The procedure most often invoked before the ITLOS is the prompt release procedure. It can be triggered by one state alone. Although it has proven to be an effective instrument to obtain the release of a detained vessel and crew, it is not able to deal with the damage done to the marine environment. In all but one prompt release procedures, the vessel was detained for alleged IUU fishing but this actual root of the problem cannot be appropriately addressed or remedied by the prompt release procedure. It is also doubtful whether the procedure has a deterrent effect for companies engaged in IUU fishing. The prompt release procedure should therefore be redesigned to include more environmental protection interests. IUU fishing is a serious threat to the world's fisheries and the ITLOS should be in a position not only to facilitate the release of detained vessels but also to hold responsible companies and states accountable for their breach of law and damage to fisheries. As long as there is no change in substantive law, the ITLOS should make better use of its interpretative space and, for example, accept a vessel monitoring system as part of a bond.

NGOs should be strengthened in their role as watchdogs. If they detect IUU fishing activities, they could give notice to the responsible coastal or flag state but also to the institution serving as a secretariat to the UNCLOS, the Division for Ocean Affairs and the Law of the Sea, for example. There could also be principal proceedings following the prompt release procedure with fact-finding, a decision on the merits, compensation and a sufficiently deterrent penalty payment. As far as fishing in the high seas and the EEZs is concerned, a global common good is affected and therefore environmental NGOs and/or a more neutral review body established under the UNCLOS should be able to trigger a review procedure at the ITLOS, if there is sufficient proof for a case of IUU fishing. If NGOs can positively contribute to fact-finding, the decision on the merits, or appropriate compensation measures, they should be allowed to submit amici curiae statements.

As regards the ad hoc arbitrations under UNCLOS, it must be noted that they could not contribute to the enforcement of international environmental law. Rather

they pose a challenge to the coherence of international law. Most of the interests safeguarded in the UNCLOS and especially the protection of the marine environment and fair and equitable use of marine resources are public interests that should not be dealt with in arbitral proceedings. Proceedings before the ITLOS are significantly more transparent and accessible to the public. 30 states have already accepted the jurisdiction of ITLOS; more states should consider doing so. This would also safeguard a more coherent development of international law.

Provisions on the jurisdiction of the ITLOS have proven to be somewhat complex. It therefore seems recommendable to clarify the scope of jurisdiction. Furthermore, states should consider deleting the far-reaching exceptions to jurisdiction in the field of protection of fisheries resources in the EEZ.[411]

If states want to put the ITLOS in a better position to safeguard the marine environmental protection interests provided for in the UNCLOS and related instruments, they should give environmental NGOs the right to initiate advisory and maybe even contentious proceedings against states or, as far as they can be held accountable, against private polluters. NGOs could trigger such an ITLOS procedure either directly or indirectly through a more neutral review body established under the UNCLOS. Articles 20 and 21 of the Statute of the Tribunal indicate the Tribunal's potential accessibility for non-state actors.[412]

Environmental NGOs with an interest in the protection of the marine environment should be given the right to submit amici curiae statements in all proceedings before the Tribunal. The case law has shown that marine environmental protection interests safeguarded in the UNCLOS and related instruments are, with the exception of the recently issued first advisory opinion, not sufficiently reflected in the ITLOS decisions. Environmental NGOs can give such interests a voice in proceedings before the ITLOS, support the Tribunal as amici with their factual and legal expertise regarding marine environmental matters, and therefore contribute to putting the Tribunal into a position also to accommodate environmental protection interests in its decision-making.

II. Arbitration

Arbitration is offered by a range of different fora worldwide. The three arbitration facilities chosen here work on a potentially universal scale and each have a special significance for environmental cases. The Permanent Court of Arbitration has been proposed as a suitable framework for an international environmental court and the International Center for Settlement of Investment Disputes mainly facilitates

411 See Article 297(3)(a) UNCLOS.

412 See Rah/Wallrabenstein, "Sustainability Needs Judicial Support" in Ehlers/Lagoni (eds.), *International Maritime Organisations and their Contributions towards a Sustainable Marine Development*, 311 et seq.

arbitration between private investors and states. The International Court of Environmental Arbitration and Conciliation is a non-governmental grassroots initiative for an international environmental court. It is important to bear in mind that these fora are not actual institutions. They only provide framework sets of rules for the composition and work of ad hoc arbitral tribunals.

A. *Permanent Court of Arbitration*

The Permanent Court of Arbitration is the oldest forum for the settlement of interstate disputes. It was established in 1899 during the first Hague Peace Conference by the 1899 Convention for the Pacific Settlement of International Disputes (1899 Hague Convention).[413] Currently, the PCA as an international organization has 111 member states. It is located, like the ICJ, in the Peace Palace in The Hague, Netherlands.

To date, a total of 57 cases have been dealt with under the auspices of the PCA or with the cooperation of the international bureau.[414] This amounts to a rough average of 0.5 cases per year or one case every two years. Whereas at the very beginning the PCA, the caseload averaged of about one case per year, there were only four cases between 1940 and 1995. During the last 16 years, 29 cases have come before the PCA.[415]

In the context of this study, the PCA is of special interest because it has been suggested as the appropriate forum for an international environmental court.[416]

1. *Jurisdiction and Applicable Law*

The basis for arbitral jurisdiction is usually agreement of the parties in form of a case-specific arbitration agreement or a more general treaty clause. Several bilateral and multilateral environmental agreements stipulate the jurisdiction of the PCA in their dispute settlement clauses.[417] According to Article 42 of the 1907 Hague

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[413] The 1899 Convention was replaced by the revised 1907 Convention for the Pacific Settlement of International Disputes (1907 Hague Convention).

[414] Annex II of the 109th Annual Report of 2009; available at http://www.pca-cpa.org/showpage.asp?pag_id=1069.

[415] *Ibid.*

[416] Rest, "The Indispensability of an International Environmental Court" (1998) 7 *RECIEL*, 63; Rest, "Enhanced Implementation of the Biological Diversity Convention by Judicial Control" (1999) 29 *Environ Pol Law*, 32; Vespa, "An Alternative to an International Environmental Court?" (2003) 2 *Law & Prac. Int'l Cts. & Tribunals*, 295, 331.

[417] For example, Article XVIII(2) of the 1973 CITES; Article XIII(2) of the 1979 Convention on the Conservation of Migratory Species of Wild Animals; Annex 1(3) of the Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean; Article 1(2) of the Schedule to the 1991 Protocol to the Antarctic Treaty on Environmental Protection; Article 14 of the 2003 Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters to the 1992 Conventions on the Protection and Use of Transboundary Watercourses and International Lakes and on the Transboundary Effects of Industrial Accidents (not yet in force). See "Treaties and other Instruments referring to the PCA" available at http://www.pca-cpa.org/showpage.asp?pag_id=1068.

Convention, the PCA is competent to hear all arbitration cases unless parties agree to institute a special tribunal. Article 39 of the 1907 Hague Convention more generally states that it embraces any dispute or only disputes of a certain category. Thus, potentially the subject matter jurisdiction of the PCA is unlimited. Arbitral awards are usually final and binding. In addition to arbitration, the PCA also offers non-binding forms of dispute resolution such as mediation, conciliation, and inquiry or fact-finding.

Article 37 of the 1907 Hague Convention stipulates that international arbitration settles disputes "on the basis of respect for law". Other than that the procedural and substantive law applicable to arbitration is chosen by agreement between the parties. The PCA has developed various optional rules of procedure which may be further modified by the parties.[418] If there is no agreement between the parties as to the applicable substantive law, the tribunal will apply general international law or the relevant law according to choice of law rules. Only if the parties so agree, the tribunal may decide the dispute *ex aequo et bono*.[419]

2. *Environmental Rules*

The PCA provides for a number of services when it comes to environmental dispute resolution.[420] Most importantly, in 2001 94 member states adopted the PCA's Optional Rules of Procedure for Arbitration of Disputes Relating to Natural Resources and/or the Environment (Environmental Arbitration Rules).[421] With regard to conciliation, in 2002 member states adopted the PCA's Optional Rules of Procedure for Conciliation of Disputes Relating to Natural Resources and/or the Environment (Environmental Conciliation Rules). Both sets of rules are based on the UNCITRAL Arbitration Rules but tailored to the specific needs of environmental dispute resolution.[422]

Furthermore, Article 69(2) of the Draft International Covenant on Environment and Development explicitly mentions the PCA as one possible forum for dispute settlement next to other arbitral tribunals and fora for judicial settlement such as the ICJ and the ITLOS. The Covenant was drafted by the Environmental Law Programme of the International Union for the Conservation of Nature and Natural Resources (IUCN) in cooperation with the International Council of Environmental Law (ICEL), 4th edition, 2010.

[418] For an overview on the optional rules see http://www.pca-cpa.org/showpage.asp?pag_id=1188. For example, the PCA drafted some model clauses to introduce into, among others, MEAs to refer cases to the PCA. It promotes the use of such clauses in MEAs and, for example in the field of climate change, in emissions trading contracts.

[419] See for example Article 33(2) of the Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two States.

[420] For an overview see PCA Services at http://www.pca-cpa.org/showpage.asp?pag_id=1058.

[421] Kiss, "Environmental Disputes and the Permanent Court of Arbitration" (2003) 16 *Hague YIL*, 41, 43. For an in depth analysis of the Environmental Arbitration Rules and recommendations for improvement see Vespa, "An Alternative to an International Environmental Court?" (2003) 2 *Law & Prac. Int'l Cts. & Tribunals*, 295.

[422] See "introduction" of the respective PCA Environmental Arbitration and Conciliation Rules.

For example, the Environmental Arbitration Rules provide that the Secretary-General makes available a list of persons with special expertise in international environmental law respectively for the choice of arbitrators,[423] and for the choice of experts.[424]

With respect to remedies, the arbitral tribunal may take interim measures of protection and is also entitled to make interim, interlocutory, or partial awards.[425] The final award is binding and there is no right of appeal. Through the choice of arbitration under PCA Rules, parties agreed to carry out the award without delay.[426] These latter rules of procedure are included in all optional arbitration rules of the PCA; they are not specifically elaborated for environmental disputes.

To date, it is only in Article 14 of the Protocol on Civil Liability to the 1992 UNECE Industrial Accidents Convention that states parties have explicitly agreed that disputes may be submitted to arbitration in accordance with the Environmental Arbitration Rules. The Protocol was adopted in 2003 but it is not yet in force. The Environmental Rules have not as yet been applied to any case before the PCA.[427]

3. *Access*

Originally, the PCA was founded as an institution for the settlement of disputes between states. However, in the 1930s the PCA for the first time provided its services in respect of a dispute between a state and a private party and continued doing so in certain commercial and investment disputes.[428] In 1962, the PCA elaborated optional "Rules of Arbitration and Conciliation for Settlement of International Disputes between Two Parties of Which Only One Is a State".[429] The 2001 Environmental Arbitration Rules also underline party autonomy and explicitly state that

> [t]he Rules, and the services of the Secretary-General and the International Bureau of the PCA, are available to States, international organizations, and private parties.[430]

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[423] Article 8(3) of the Environmental Arbitration Rules.

[424] Article 27(5) of the Environmental Arbitration Rules.

[425] Articles 26 and 32(1) of the Environmental Arbitration Rules.

[426] Article 32(2) of the Environmental Arbitration Rules. Agreement to arbitration under PCA rules entails a waiver of jurisdictional immunity by states and intergovernmental organizations, Article 1(2) PCA rules. However, this does not constitute a waiver of immunity from execution.

[427] Stephens, *International Courts and Environmental Protection* (2009), 32. The pending PCA arbitration *Naftrac v. Ukraine* might be the first known case dealt with under the Environmental Arbitration Rules. It also appears to be the first known investor-state dispute that involves a Joint Implementation Project under the Kyoto Protocol. There is no information about the case publicly available, which underlines that transparency is a serious problem in arbitral proceedings involving public interests; Tienhaara, "International Economy and the Environment" (2010) 21 *YbIEL*, 321 et seq.

[428] *Radio Corporation of America vs. China*, Award of 13 April 1935; Kiss, "Environmental Disputes and the Permanent Court of Arbitration" (2003) 16 *Hague YIL*, 41, 42.

[429] According to *Kiss*, 9 cases out of 40 submitted to the PCA between 1902 and 2000 involved non-state entities, Kiss, *ibid.*

[430] Introduction Environmental Arbitration Rules.

Thus, provided that all parties to a dispute agree, NGOs could initiate arbitration against a state under the PCA Environmental Arbitration Rules. In practice, this has not happened as yet.

There is no explicit rule for third-party intervention included in the PCA optional rules; the procedure depends on agreement between the parties. The PCA provides guidelines for adapting the PCA optional rules to disputes arising under multilateral agreements and multiparty contracts.[431]

Amicus curiae briefs are also not addressed in the PCA optional rules in general or the Environmental Arbitration Rules. According to the general rules of arbitration, an arbitral tribunal would probably accept amicus curiae submissions only with the express consent of the parties to the dispute. There is no record of amici curiae documents in the environmental cases described below.

As is typical for arbitration and also according to the Environmental Arbitration Rules, the proceedings and the award are confidential unless the parties agree otherwise.[432] In some cases, parties have agreed to publish the award and in two recent cases the hearings were also held in public.[433] Thus, in the majority of the cases dealt with by the PCA, confidentiality of the pleadings and hearings would also make it difficult to act as amicus curiae.

4. *Environmental Case Law*

In five cases on which some information is publicly available on the PCA's website, environmental issues played a major role.[434] The *North Atlantic Coast Fisheries* case was decided in 1910 and dealt with the question of whether Great Britain, pursuant to a treaty with the United States, was allowed to regulate fishing by United States vessels in Canadian waters.[435] Almost ninety years later, in 1999 the Netherlands sent a request for arbitration to France in application of the Convention of December 3, 1976 on the Protection of the Rhine against Pollution by Chlorides and the Additional Protocol of September 25, 1991.[436]

The following two environmental cases concerned the MOX plant at Sellafield and were initiated by Ireland against the United Kingdom in 2001. Focusing on different legal aspects, Ireland also submitted the case to the ITLOS and finally the ECJ decided on it.[437] In June 2001, Ireland initiated the *OSPAR Arbitration* proceedings

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[431] These guidelines are available at the PCA's website.

[432] For proceedings in general see Article 15(4)-(6), for in camera hearings see Article 25(4), and for the award see Article 32(6) of the Environmental Arbitration Rules. See also Stephens, *International Courts and Environmental Protection* (2009), 33.

[433] Information on some cases is available on the PCA website at http://www.pca-cpa.org/showpage.asp?pag_id=1029.

[434] *Ibid*. No public information is available on the majority of the cases.

[435] *United States/Great Britain (North Atlantic Coast Fisheries)*; award of 7 September 1910, available on the PCA website.

[436] *Netherlands/France*; award of 12 March 2004, available on the PCA website.

[437] See above at Chapter 2.III.D.2.

against the United Kingdom pursuant to the 1992 Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention).[438] Ireland requested access to information about a mixed oxide ("MOX") fuel plant located at the Sellafield nuclear power plant in the UK under Article 9(2) of the OSPAR Convention. The United Kingdom declined to provide the information based on, inter alia, commercial confidentiality reasons. In its final award, the arbitral tribunal found, inter alia, that it had jurisdiction over the case and that the claims were admissible but that the claim for information did not fall within the scope of Article 9(2) of the OSPAR Convention.[439] In October 2001, Ireland brought arbitral proceedings against the United Kingdom in the same *MOX Plant* case under Annex VII of the 1982 UNCLOS, arguing that discharges from the MOX plant and related movements of radioactive material through the Irish Sea were inconsistent with UNCLOS law.[440] The arbitral proceedings were suspended until the ECJ issued its judgment in a related case concerning EU law issues. In June 2008 the tribunal ordered the termination of the proceedings following Ireland's withdrawal of its claims.

Another environmental arbitration dealt with by the PCA is the *Iron Rhine Arbitration* which Belgium initiated against the Netherlands.[441] It concerned the reactivation of the Iron Rhine railway which connects the port of Antwerp, Belgium, with the Rhine basin in Germany and crosses the Dutch provinces of Noord-Brabant and Limburg. One of the main legal issues was how current Dutch legislation and Belgium's right of transit originating from several treaties dating from the 19th century could be reconciled with environmental protection measures.

The newest known environmentally relevant PCA arbitration is *Naftrac v. Ukraine*. However, there is hardly any information publicly available on the case. The investor-state dispute involves a Joint Implementation Project and related CO2 Emission Reduction Units under the Kyoto Protocol.[442]

5. *Evaluation*

The caseload dealt with within the PCA framework on average is rather low although it has been rising again in recent years. Over the last ten years, at least four cases which involved environmental matters were decided by arbitral tribunals under the PCA. All of these disputes have been inter-state disputes. The pending *Naftrac v. Ukraine* arbitration seems to be the first known investor-state dispute under PCA rules which involves environmental interests.

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[438] *Ireland/United Kingdom (OSPAR Arbitration)*, award of 2 July 2003, available on the PCA website.

[439] See award *OSPAR Arbitration* at 185.

[440] *Ireland/United Kingdom (MOX Plant Case)*, documents on the proceedings are available on the PCA website.

[441] *Belgium/Netherlands*, award of 24 May 2005, available at PCA website.

[442] Tienhaara, "International Economy and the Environment" (2010) 21 *YbIEL*, 321 et seq.

a. *Jurisdiction, Applicable Law, and Environmental Rules*

The subject matter jurisdiction of the PCA is very broad, as is the scope of applicable law. However, both depend on the details of the arbitration agreement between the parties to a dispute. Except for the two arbitrations dealing with the MOX plant, no case has yet been referred to the PCA on the basis of one of the dispute settlement clauses of the MEAs that explicitly provide for its jurisdiction. There is no official record of any non-binding form of dispute resolution such as mediation, conciliation or inquiry or fact-finding in environmental matters before the PCA. Thus, despite the PCA's potential of the PCA to contribute to environmental dispute resolution, the role of the PCA in practice is limited to two occasions so far from which only one led to an arbitral award.

The mere existence of the Environmental Arbitration Rules and the Environmental Conciliation Rules shows the PCA's willingness to contribute to environmental dispute resolution.[443] A list of arbitrators and experts specializing in environmental law is a helpful service offered by the PCA. Nevertheless, the Environmental Rules are still too closely aligned to the UNCITRAL Rules and the necessities of commercial and investment disputes. They are not yet sufficiently tailored to environmental disputes. For example, given the public nature of environmental disputes, as a rule, written pleadings, hearings, and the award should be publicly accessible and not confidential.[444]

b. *Access*

Although it is an advantage of the PCA that there is a long tradition of access of non-state parties to arbitration proceedings, in practice these cases have so far been limited to investment and commercial disputes. In these cases economic interests seem to give states sufficient incentive to agree to arbitral proceedings initiated by a non-state party. This has not been the case yet in disputes over environmental interests. There is no official record if and in how many cases non-state parties have tried to institute arbitral proceedings against a state in environmental matters before the PCA. The fact that there are no cases in environmental matters between non-state parties and states also indicates that states are unwilling to voluntarily enter into dispute settlement.[445] This is a general weakness of arbitral proceedings with regard to environmental dispute resolution, which by its public and general interest nature usually lacks economic interests inherent in investment and commercial cases.

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[443] See also George Washington University Law School, "Conference on International Environmental Dispute Resolutions" (1999–2000) *George Wash J Int Law Econ*, 325, 329.

[444] See also Vespa, "An Alternative to an International Environmental Court?" (2003) 2 *Law & Prac. Int'l Cts. & Tribunals*, 295, 319 et seq.

[445] The basis of the pending investor-state arbitration *Naftrac v. Ukraine* is unclear.

To strengthen the voices of public interest in environmental cases, the PCA should consider adopting rules that allow for amicus curiae statements.[446]

c. *Environmental Case Law*

The vast majority of cases dealt with by the PCA are commercial and investment disputes. In the five environmental cases described in brief above, the arbitral tribunal mainly interpreted bilateral treaty law between the parties. Both the *North Atlantic Coast Fisheries* arbitration and the *Iron Rhine Arbitration* dealt with the question how much legislative room was left to the defendant to regulate on, inter alia, environmental safeguard measures pursuant to a bilateral agreement conferring exploitation or transit rights on the plaintiff. The environmental protection interest was in both cases on the defendant's side. Thus, both cases were originally initiated to prevent costly or prohibitive environmental protection measures being imposed on the defendant. In both cases the tribunal awarded a compromise solution tailored to the specific questions submitted by the parties to the dispute, based on their arbitration agreement.

Only in the two cases regarding the MOX plant did the tribunal consider two "wider" multilateral agreements which include a number of environmental protection measures, OSPAR and UNCLOS. However, in the *OSPAR Arbitration* the tribunal decided that Ireland could not successfully claim environmental information on the MOX plant via Article 9 of the OSPAR Agreement and the *MOX Plant* case under the UNCLOS was withdrawn by Ireland. Thus, in practice, the PCA has not yet been able to contribute to safeguarding environmental protection interests laid down in MEAs.

With regard to confidentiality and the five environmental arbitrations dealt with by the PCA, it should be noted that in all of these cases the final award is published on the PCA website. In case of the *Iron Rhine Arbitration*, in addition to the award the arbitration agreement and the written pleadings are also published. As regards the *OSPAR* and the *MOX Plant Arbitration* award, written pleadings, transcripts of hearings and rules of procedure are publicly available. However, there is no record of amici curiae involvement in any of these cases. No information is available on the pending arbitration *Naftrac v. Ukraine* involving a Joint Implementation project under the Kyoto Protocol.

6. *Conclusions and Recommendations*

On the one hand, it seems that the PCA is a forum with a high potential to contribute to safeguarding environmental interests laid down in international environmental law, because of its long tradition of access for non-state parties to its dispute

[446] See also Vespa, "An Alternative to an International Environmental Court?" (2003) 2 *Law & Prac. Int'l Cts. & Tribunals*, 295, 321.

resolution mechanisms, as well as its broad jurisdiction and scope of applicable law. Furthermore, the PCA is already financed through the UN budget and offers flexibility with regard to where the arbitration takes place.[447]

On the other hand, the very nature of arbitration is the main argument against its practical ability to actually use these strengths with regard to environmental protection interests.[448] Arbitral proceedings are almost entirely based on consent of the parties, including the institution of arbitral proceedings, rules of procedure and scope of applicable law. The will of the parties is at the center of arbitral proceedings, not the application of public international law. The general confidentiality of arbitral proceedings and absence of amici curiae rules is part of this "private" nature of arbitration. The Environmental Arbitration Rules of the PCA do not currently make reference to these concerns. Ad hoc arbitral tribunals such as those provided for by the PCA do not have the same authority and independence in applying, interpreting and developing international public law as permanent courts such as the ICJ, especially when the consideration of public interests is at stake.[449]

These weaknesses are underlined by PCA practice in environmental matters. There has been hardly any environmental case law and in only one of them, a pending investor-state dispute, is a non-state actor involved. There is no record of any amicus curiae participation. The pending dispute *Naftrac v. Ukraine* might be the first case to which the Environmental Arbitration Rules are applied. In two out of the four environmental disputes submitted to dispute resolution in the last 12 years, the cases were instituted to prevent or minimize, inter alia, environmental protection measures imposed on the defendant. One case was withdrawn and in the remaining *OSPAR Arbitration* the tribunal did not decide in favor of the environmental information interests. No information on the exact content of the *Naftrac v. Ukraine* arbitration is available.

Therefore, all in all, the PCA does not seem able to act as the current or future international environmental court as argued by some scholars.[450] Nevertheless the

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[447] See also Rest, "Enhanced Implementation of the Biological Diversity Convention by Judicial Control" (1999) 29 *Environ Pol Law*, 32, 40.

[448] See also Stephens, *International Courts and Environmental Protection* (2009), 34 et seq.; Karg, *IGH v[ersu]s ISGH* (2005), 70.

[449] See also Craik, "Recalcitrant Reality and Chosen Ideals: The Public Function of Dispute Settlement in International Environmental Law" (1997–1998) 10 *Geo. Int'l Envtl. L. Rev.*, 551, 562 et seq.; Stephens, *International Courts and Environmental Protection* (2009), 36; Helfer/Slaughter, "Why States Create International Tribunals: A Response to Professors Posner and Yoo" (2005) 93 *Cal. L. Rev*., 899, 938 et seq., 955 et seq.; Brus, *Third Party Dispute Settlement in an Interdependent World* (1995), 191. With regard to human rights and good practice of the ECJ and ECtHR in supranational adjudication, Helfer/Anne-Marie Slaughter, "Toward a Theory of Effective Supranational Adjudication" (1997) 107 *Yale L.J.*, 273, 386 et seq.

[450] Arguing in favor of the PCA as a forum for an international environmental court Rest, "Enhanced Implementation of the Biological Diversity Convention by Judicial Control" (1999) 29 *Environ Pol Law*, 32, 40; Vespa, "An Alternative to an International Environmental Court?" (2003) 2 *Law & Prac. Int'l Cts. & Tribunals*, 295, 331.

PCA should continue to tailor its Environmental Rules to the needs of environmental litigation and implement the changes suggested above, most importantly removing the confidentiality rules and reporting transparently on cases that involve public interests.

B. *International Centre for Settlement of Investment Disputes*

The International Centre for Settlement of Investment Disputes (ICSID) is of special interest here because in its arbitration facilities non-state actors, private investors, institute arbitral proceedings against states. Furthermore, on several occasions ICSID facilities have had to balance investment protection and environmental protection interests.

The ICSID was established under the auspices of the International Bank for Reconstruction and Development (World Bank) through the 1956 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID or Washington Convention) which entered into force in October 1966. It is located in Washington D.C., U.S.A. Currently the ICSID Convention has 146 member states.[451] The purpose of the ICSID Convention is to remove non-commercial barriers to free international flows of private investment. It therefore provides facilities for conciliation and arbitration of investment disputes between member states and nationals of other member states.[452]

By the end of 2010, ICSID had registered 331 cases.[453] This amounts to a rough average of seven cases per year. It has to be noted though that until 1996 only a very few cases were submitted to dispute settlement at the ICSID. From 1997 onwards, each year 10 or more cases, with a peak of 37 in 2007, were registered with the ICSID with an upward trend.[454] 98% of the cases are arbitration cases, 2% conciliation cases.[455] There are no statistics as to how many cases were initiated by states and how many by private investors. A review of the lists of pending and concluded cases, however, reveals that in all but one of the total of 349 cases registered by 9 March 2011 arbitral proceedings were initiated by private investors against states.[456]

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[451] List of member states is available at ICSID website at http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ContractingStates&ReqFrom=Main.

[452] Article 1(2) ICSID Convention.

[453] The ICSID Caseload – Statistics, Issue 2011–1, at 7; available at http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=CaseLoadStatistics. By 8 March 2011 121 cases were pending at ICSID and 218 had been concluded; See lists of pending and concluded cases at http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ListCases.

[454] The ICSID Caseload – Statistics, Issue 2011–1, at 7; available at http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=CaseLoadStatistics.

[455] *Ibid.* at 8.

[456] Lists of pending and concluded cases, available at http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ListCases. The one case, in which a governmental authority tried to institute proceedings against a private investor, was *Government of the Province of East Kalimantan v. PT Kaltim Prima Coal and others*; ICSID Case No. ARB/07/3. The ICSID tribunal denied access to arbitration because of lack of jurisdiction.

According to ICSID statistics on the geographic distribution of state parties, private investors initiated proceedings in 38% of all ICSID cases against Latin American countries (excluding Mexico), in 30% of those against Eastern European and Asian countries, and in 26% of those against Middle Eastern and African countries; in only 6% of the cases were North American (including Mexico) and Western European countries defendants in the dispute.[457] ICSID statistics do not provide an overview of geographic distribution of the private investors involved in the proceedings. With respect to distribution of all ICSID cases by economic sector, the statistics show that 25% of the cases arise in the oil, gas and mining sector, 14% in the electric power and other energy sector, and 11% in the transportation sector.[458]

The ICSID award is binding pursuant to Article 53 ICSID Convention. Article 54(1) ICSID Convention provides for a unique procedure of enforcement compared to other foreign or international arbitral awards. Accordingly, states should enforce the pecuniary obligations imposed by an award within its territories as if it were a final judgment of a court in that state. Thus, enforcement is not subject to any other review of the award.[459] Compliance with ICSID awards is ensured by a strong institutional link to the World Bank.

l. *Jurisdiction, Applicable Law, and Special Rules*

According to Article 25 of the ICSID Convention the jurisdiction of the ICSID comprises

> any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre.

Thus, the ICSID has jurisdiction to deal with disputes between private investors and states. It has no jurisdiction to arbitrate disputes between two private investors or two states.

There are two other important aspects of ICSID jurisdiction. Article 26 of the ICSID Convention contains an "exclusive remedy rule". This means that a party consenting to ICSID arbitration may not seek a remedy in another forum and cannot, for example, take the case to a domestic court. It is also not necessary to exhaust local remedies before instituting a case before the ICSID. This principle has been abandoned in favor of direct access to ICSID arbitration.[460] Parties may agree to depart

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457 The ICSID Caseload – Statistics, Issue 2011–1, at 11; available at http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=CaseLoadStatistics.

458 *Ibid.* at 12, also with regard to other economic sectors with smaller share.

459 Schreuer, *The ICSID Convention: A Commentary*, Article 54 at 3.

460 *Ibid.*, Article 26 at 4 and 5.

from these two rules, but this hardly ever happens. Thus, domestic courts cannot interfere in ICSID arbitration.

As is typical for arbitration, the rules of law agreed to by the parties apply.[461] In the absence of such agreement, the national law of the state party to the dispute and international law as appropriate shall be applied.[462] The tribunal may decide a dispute ex aequo a bono if the parties so agree.[463]

The ICSID has no special provisions or institutional arrangements for disputes involving environmental interests. In general, the ICSID consists of an Administrative Council and a Secretariat and maintains a Panel of Conciliators and a Panel of Arbitrators.[464]

Thus, from a procedural point of view, ICSID arbitration has been called "entirely self-contained and independent of national law".[465]

2. *Access*

Pursuant to the ICSID Convention, private investors and states may be parties to ICSID arbitration. ICSID case law and a 2006 change in the ICSID Arbitration Rules recognize access of third parties at the discretion of the tribunal and subject to confidentiality provisions.

a. *Private Investors and States*

Any member state or national investor of member state may send a request for arbitration under ICSID facilities to the Secretary-General of the ICSID.[466] National investors of member states comprise natural and juridical persons.[467] Institution of an arbitration procedure requires mutual consent of the parties to a dispute.[468] Consent can be given through a consent clause in a direct agreement between the parties to the dispute, by a dispute settlement clause in a contract between an investor and a state, or through an investment treaty between the host state and the investor's state of nationality.[469] Over 2,000 bilateral and multilateral treaties are currently in force in which such consent is expressed.[470] According to ICSID statistics, the basis of consent invoked to establish ICISD jurisdiction in registered ICSID cases divides as follows: 62% Bilateral Investment Treaties (BITs) between states, 22% investment contracts between investor and host-state, 6% investment law of the host-state,

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461 Article 42(1) ICSID Convention.
462 *Ibid.*
463 Article 42(3) ICSID Convention.
464 Article 3 ICSID Convention.
465 Schreuer, *The World Bank/ICSID Dispute Settlement Procedures*, at 3. See also Schreuer, *The ICSID Convention: A Commentary*, Article 26 at 1.
466 Article 36(1) ICSID Convention.
467 Article 36(2) ICSID Convention.
468 Article 36(2), Article 25 ICSID Convention.
469 Schreuer, *The ICSID Convention: A Commentary*, Article 25 at 285 et seq, 309 et seq.
470 Orrego Vicuña, *International Dispute Settlement in an Evolving Global Society* (2006), 66.

4% Energy Charter Treaty, 4% NAFTA, 1% Treaty of Amity and Cooperation in Southeast Asia (ASEAN), 1% Dominican Republic-United States-Central American Free Trade Agreement (DR-CAFTA).[471] Having agreed to arbitration, no party may withdraw its consent unilaterally.[472]

b. *Amici Curiae in ICSID Case Law*

With respect to amicus curiae submissions of NGOs, arbitral tribunals established under the ICSID decided differently in two cases in 2002 and 2005, which led to clarifying amendments to ICSID Arbitration Rules 32 and 37 in April 2006.[473] Three cases are briefly discussed below, all dealing with issues of water privatization.

In *Aguas del Tunari, S.A. v. Republic of Bolivia*, a dispute arising out of Bolivia's privatization of water and sewage services, the arbitral tribunal unanimously decided in 2002 that it was beyond its power or authority to grant the requests of several environmental NGOs and individuals to submit amicus curiae briefs.[474] In *Suez, Sociedad General de Aguas de Barcelona, S.A., and Vivendi Universal S.A. v. The Argentine Republic* (Suez/Vivendi case),[475] five NGOs filed two "Petitions for Transparency and Participation as *Amicus Curiae*".[476] In the first petition, submitted in 2005, they argued that the case involved matters of basic public interests and the fundamental rights of people living in the area. They requested the tribunal to grant them (a) access to the hearings in the case; (b) the opportunity to present legal arguments as amicus curiae; and (c) timely, sufficient, and unrestricted access to all of the documents in the case. In response to this first petition, the tribunal issued a "First Order on Amici", concluding that under Article 44 of the ICSID Convention it has the power to admit amicus curiae briefs from suitable nonparties in appropriate cases, that it does not grant access to the hearings, and that it defers the decision

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[471] The ICSID Caseload – Statistics, Issue 2011–1, at 10; available at http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=CaseLoadStatistics.

[472] Article 25(2) ICSID Convention.

[473] Ishikawa, "NGO Participation in Investment Treaty Arbitration" in Vemuri (ed.), *Connected Accountabilities* (2009), 101, 106 et seq.; Tienhaara, "Third Party Participation in Investment Environment Disputes: Recent Developments" (2007) 16 *RECIEL*, 230, 233 et seq.

[474] ICSID Case No. ARB/03/2. More details on the case and the request for third party participation are available in the "introductory note" published on the ICSID website at http://icsid.worldbank.org/ICSID/FrontServlet. The parties settled the case and proceedings were discontinued at the request of the Respondent (Order taking note of the discontinuance pursuant to ICSID Arbitration Rule 44 issued by the Tribunal on 28 March 2006). The settlement is not publicly available.

[475] ICSID Case No. ARB/03/19; the case is still pending.

[476] The NGOs were Asociación Civil por la Igualdad y la Justicia (ACIJ), Centro de Estudios Legales y Sociales (CELS), Center for International Environmental Law (CIEL), Consumidores Libres Cooperativa Ltda. de Provisión de Servicios de Acción Comunitaria, and Unión de Usuarios y Consumidores.

on access to documents until it granted leave for an amicus brief.[477] In giving the reasons for its decision it stated explicitly that

> [t]he acceptance of *amicus* submissions would have the additional desirable consequence of increasing the transparency of investor-state arbitration. Public acceptance of the legitimacy of international arbitral processes, particularly when they involve states and matters of public interest, is strengthened by increased openness and increased knowledge as to how these processes function. It is this imperative that has led to increased transparency in the arbitral processes of the World Trade Organization and the North American Free Trade Agreement. Through the participation of appropriate representatives of civil society in appropriate cases, the public will gain increased understanding of ICSID processes.[478]

With respect to the requirements of such an acceptance it stated:

> The purpose of *amicus* submissions is to help the Tribunal arrive at a correct decision by providing it with arguments, expertise, and perspectives that the parties may not have provided. The Tribunal will therefore only accept *amicus* submissions from persons who establish to the Tribunal's satisfaction that they have the expertise, experience, and independence to be of assistance in this case. In order for the Tribunal to make that determination, each nonparty wishing to submit an *amicus curiae* brief must first apply to the Tribunal for leave to make an *amicus* submission.[479]

In December 2006, the five NGOs filed a second "Petition for Permission to Make an Amicus Curiae Submission" and requested that they be granted the opportunity to submit a single, joint amicus curiae submission and be given access to the documents of the arbitration.[480] In its second "Order in Response to a Petition by Five Non-Governmental Organizations for Permission to Make an Amicus Curiae Submission", the tribunal discussed in detail the arguments brought forward by the claimant against the acceptance of such a submission, rejected them, and concluded that amicus briefs are admissible in this case.[481] It dispensed with resolving the question of access to the documents because in this specific case it deemed that the NGOs already had sufficient information to submit a meaningful amicus brief.[482]

c. *Amici Curiae in ICSID Arbitration Rules*

In 2006, the ICSID Arbitration Rules were amended in response to this case law.[483] According to Rule 37(2) of the Arbitration Rules, the tribunal may allow a person or entity that is not a party to the dispute ("non-disputing party") to file a submission

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[477] For more details see Order in Response to a Petition for Transparency and Participation as Amicus Curiae, 19 May 2005, at 33, available at http://icsid.worldbank.org.

[478] *Ibid*. at 22.

[479] *Ibid*. at 24.

[480] Order in Response to a Petition by Five Non-Governmental Organizations for Permission to Make an Amicus Curiae Submission, 12 February 2007, at 7, available at http://icsid.worldbank.org.

[481] *Ibid*. at 22.

[482] *Ibid*. at 24.

[483] See also Tienhaara, "Third Party Participation in Investment Environment Disputes: Recent Developments" (2007) 16 *RECIEL*, 230, 233.

regarding a matter within the scope of the dispute after consulting both parties. In determining whether to allow such a submission, the tribunal shall consider, inter alia, whether the non-disputing party has a significant interest in the proceedings. Thus, it is at the discretion of the arbitral tribunal to allow amicus curiae submissions, but certain rules have to be taken into consideration in the decision-making. The amicus briefs submitted are not published on the ICSID website.

With respect to access to the hearings, Rule 32(2) of the Arbitration Rules provides that unless either party objects and after consultation with the Secretary-General, the Tribunal may allow other persons to attend or observe all or part of the hearings, subject to appropriate logistical arrangements. Thus, the explicit consent of both parties is no longer necessary for the tribunal to allow third party access to the hearings.

The rules on access to the documents of the arbitration have not been changed. Records of the proceedings and the arbitral award are confidential unless parties mutually agreed to publication.[484]

In *Biwater Gauff Ltd v. United Republic of Tanzania* the dispute again concerned water supply services.[485] In 2005 the Tanzanian government terminated a contract with City Water arguing that the company had not fulfilled its obligation under the contract to provide clean drinking water to millions of people in Dar es Salaam. Biwater Gauff Ltd., a UK-based investor, demanded compensation under the UK-Tanzania Bilateral Investment Treaty. In November 2006, five NGOs filed a petition for amicus curiae status.[486] The tribunal applied the procedure as set out by Rules 37(2) and 32(2) of the ICSID Arbitration Rules and in its Procedural Order No. 5 of 2 February 2007 granted the petitioners the opportunity to file a single joint written submission no later than 26 March 2007.[487] The application for access to the documents was not granted.[488] Due to the objection of the claimant to the presence of the petitioners at the hearing, the tribunal also rejected this request.[489] On 26 March 2007 the petitioners filed a joint amicus brief to which the parties responded on 10 April 2007.[490] The joint amicus submission refers to the responsibilities of foreign investors under international investment agreements, especially with regard

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[484] Article 48(5) ICSID Convention, Regulation 22(2) of Administration and Financial Regulations.

[485] ICSID Case No. ARB/05/22; award rendered on 24 July 2008. An introduction note, several procedural orders and the award are published on the ICSID website at http://icsid.worldbank.org.

[486] The NGOs were the Lawyers' Environmental Action Team (LEAT), the Legal and Human Rights Centre (LHRC), the Tanzania Gender Networking Programme (TGNP), CIEL, and the IISD. See also Tienhaara, "Third Party Participation in Investment Environment Disputes: Recent Developments" (2007) 16 *RECIEL*, 230, 235.

[487] Award of 24 July 2008, ICSID Case No. ARB/05/22, at 59–63, 356 et seq.

[488] *Ibid*. at 64.

[489] *Ibid*. at 65.

[490] *Ibid*. at 67.

to human rights and sustainable development objectives. The brief was opposed by Biwater, but supported by the Tanzanian government. The content of the amici brief is summarized in the award[491] and the tribunal explicitly underlined the relevance of it:

> As noted earlier, the Arbitral Tribunal has found the *Amici's* observations useful. Their submissions have informed the analysis of claims set out below, and where relevant, specific points arising from the *Amici's* submissions are returned to in that context.[492]

3. *Environmental Case Law*

About nine cases with environmental interests at stake which have been decided by arbitral tribunals at the ICSID are discussed in literature.[493] Some of them have already been mentioned above with regard to the development of admitting amicus briefs in ICSID arbitral proceedings. The cases explained in more detail here are chosen because they highlight how differently arbitral tribunals dealt with international and domestic environmental law relevant to the investment disputes before them.

The setting of all environmental cases dealt with under ICSID arbitration is comparable insofar as in all cases a private investor instituted proceedings against a state, based on an alleged violation of a bi- or multilateral investment protection treaty. In all cases the defendant state and/or a third party tried to justify its measures against the investor by drawing on international and/or domestic environmental law.[494] Thus, environmental protection arguments were exclusively invoked by the defendant or by a third party.

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[491] *Ibid*. at 370–391.

[492] *Ibid*. at 392.

[493] *Compañía del Desarrollo de Santa Fe SA v. Costa Rica*, ICSID Case No. ARB/96/1, Award of 17 February 2000; *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award of 25 August 2000; *Técnicas Medioambientales TECMED S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award of 29 May 2003. *MTD Equity Sdn Bhd and MTD Chile S.A. v. Chile*, ICSID Case No. ARB/01/7, Award of 25 May 2004 and Decision on Annulment of 16 February 2007; *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/08, Award of 11 September 2007; *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award of 24 July 2008; *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability of 30 July 2010; *Suez, Sociedad General de Aguas de Barcelona, S.A. and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Liability of 30 July 2010; *Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v. Federal Republic of Germany*; ICSID Case No. ARB/09/6; award embodying the parties' settlement agreement rendered on March 11, 2011. For an in-depth analysis of investor-state arbitration in different arbitration fora with environmental relevance see Vinuales/Langer, "Managing Conflicts between Environmental and Investment Norms in International Law", Kerbrat Y., Maljean-Dubois S. (eds.), *The Transformation of International Environmental Law*, Oxford, Hart Publishing (2011).

[494] See for example table 1 in Vinuales/Langer, "Managing Conflicts between Environmental and Investment Norms in International Law", Kerbrat Y., Maljean-Dubois S. (eds.), *The Transformation of International Environmental Law* (2011), Nr. B.

a. *Metalclad/Mexico*

In *Metalclad Corporation v. United Mexican States* the dispute arose from a hazardous waste landfill in Guadalacazar, Mexico, constructed by an enterprise owned by the Canadian corporation Metalclad.[495] The construction of the landfill was completed in March 1995 and based on federal and state permits. A permit had not been issued by the municipality by that time but it had been requested. Demonstrations of the local community prevented the landfill from opening. In November 1995, Metalclad concluded an agreement with the Mexican federal environmental agencies on the conditions for the operation of the landfill. In December 1995, the local municipality refused the construction permit on the basis of the adverse environmental effects of the hazardous waste landfill and the geological unsuitability of the landfill site. It also challenged the agreement between Metalclad and the federal environmental agencies in local courts. A judicial injunction halted the operation of the landfill until May 1999. In January 1997, Metalclad instituted arbitral proceedings under NAFTA/ICSID against Mexico claiming a violation of NAFTA's investment protection clauses and damages.

The ICSID tribunal held Mexico to be responsible for all measures of its three levels of government and found it in violation of NAFTA Articles 1105(1) ("fair and equitable treatment" clause) and 1110(1) (expropriation clause). It ordered Mexico to pay the amount of some US$ 16.6 million plus interest to Metalclad.[496] With respect to its finding under the "fair and equitable treatment" clause the tribunal found it a central issue whether a municipal permit for the construction of a hazardous landfill was required or not.[497] It considered Mexican state and constitutional law in detail and came to the conclusion that it is within the power of Mexican federal level of government to issue construction and operation permits for hazardous waste landfills.[498] With respect to the process and concluding on the "fair and equitable treatment" clause, the tribunal stated:

> Mexico failed to ensure a transparent and predictable framework for Metalclad's business planning and investment. The totality of these circumstances demonstrates a lack of orderly process and timely disposition in relation to an investor of a Party acting in the expectation that it would be treated fairly and justly in accordance with the NAFTA.[499]

Regarding the expropriation clause the tribunal found that

> [b]y permitting or tolerating the conduct of Guadalcazar in relation to Metalclad which the Tribunal has already held amounts to unfair and inequitable treatment breaching Article 1105 and by thus participating or acquiescing in the denial to Metalclad of the right to operate the landfill, notwithstanding the fact that the project was fully approved and endorsed by the

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495 ICSID Case No. ARB(AF)/97/1; award of 30 August 2000.
496 *Ibid*. at 131.
497 *Ibid*. at 79.
498 *Ibid*. at 81–83, 86.
499 *Ibid*. at 99.

> federal government, Mexico must be held to have taken a measure tantamount to expropriation in violation of NAFTA Article 1110(1).[500]

In an obiter dictum, the tribunal identified an Ecological Decree issued by the state level on September 1997 as a further ground for a finding of expropriation.[501] The Ecological Decree created an ecological reserve in an area that completely enclosed the landfill site, with the effect that its operation could never be granted. The award was partly set aside through a judgment of the Supreme Court of British Columbia, Canada.[502]

b. *Tecmed/Mexico*

The ICSID arbitration *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States* also concerned a hazardous waste landfill in Mexico.[503] In August 2000, the Spanish corporation Tecmed instituted arbitral proceedings against Mexico under a BIT between Spain and Mexico[504] claiming compensation of US$ 52 billion. Following a bid procedure, Tecmed had bought land, buildings and other assets to operate a hazardous waste landfill in Hermosillo, Sonora, Mexico. In November 1998, Mexico refused renewal of the operation license arguing, inter alia, that the landfill received types of hazardous wastes which were outside its license, that the amount of waste already exceeded the landfill size, and that it functioned as a transfer center for hazardous wastes for which it was not authorized.[505]

As in *Metalclad* the tribunal found a violation of the expropriation clause and the fair and equitable treatment clause of the BIT.[506] It ordered Mexico to pay some US$ 5.5 billion plus interest to Tecmed and thus only about a tenth of what Tecmed had claimed. Furthermore, it ordered Tecmed to transfer the assets of the landfill to the respondent after receipt of full payment. With regard to the expropriation clause, the tribunal based its findings on a balancing of sociopolitical circumstances and the economic or commercial value of the claimant's investment.[507] According to the tribunal's opinion, the relevant events

> [...]which constitute material evidence of the opposition put up by community entities and associations to the Landfill or its operation by Cytrar, do not give rise, in the opinion of the Arbitral Tribunal, to a serious urgent situation, crisis, need or social emergency that, weighed against the deprivation or neutralization of the economic or commercial value of the

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[500] *Ibid.* at 104.

[501] *Ibid.* at 109.

[502] Supreme Court of British Columbia, Reasons for Judgment of May 2, 2001, *The United Mexican States v. Metalclad Corporation*, available at http://ita.law.uvic.ca/documents/Metalclad-BCSCReview.pdf.

[503] ICSID Case No. ARB(AF)/00/2; award of 29 May 2003.

[504] Agreement on the Reciprocal Promotion and Protection of Investments signed by the Kingdom of Spain and the United Mexican States; in force since December 1996.

[505] ICSID Case No. ARB(AF)/00/2; award of 29 May 2003, at 99.

[506] *Ibid.* at 201.

[507] *Ibid.* at 132–139.

> Claimant's investment, permits reaching the conclusion that the Resolution did not amount to an expropriation under the Agreement and international law.[508]

c. *Biwater/Tanzania*

In *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, the ICSID tribunal found Tanzania in breach of the expropriation and the fair and equitable treatment clause of a BIT between the U.K. and Tanzania.[509] However, it dismissed Biwater's claim for damages because of lack of causation.[510] Biwater, incorporated in England and Wales and established by a British-German joint venture, founded a local Tanzanian Company, City Water Services Limited, to implement a water and sewerage infrastructure project in Dar es Salaam. When implementation of the project failed and, according to the respondent, City Water had created a real threat to public health and welfare,[511] the Tanzanian authorities, inter alia, seized the assets of City Water and deported its management in June 2005.

In November 2005, the claimant instituted arbitral proceedings against Tanzania. From a procedural point of view, the decision is noteworthy because it contains an order on amici curiae participation as already outlined above. From a substantive perspective it is worth mentioning that the subject of the public health effects of the claimant's activities is not addressed in the tribunal's findings.

d. *Vattenfall/Germany*

In April 2009, for the first and so far only time, ICSID arbitral proceedings were instituted against Germany. The Swedish energy corporation Vattenfall, owned by the Swedish state, initiated the proceedings because of a dispute regarding the construction of a coal-fired power plant in Hamburg, Germany, claiming 1.4 billion Euros of damages.[512] There is no official information available as to the details of the arbitration. The ICSID website only states that proceedings were initiated in April 17, 2009, that the tribunal held a first session in Paris in March 2009, that the proceedings have been suspended twice, and that at request of the parties, the Tribunal rendered its award on 11 March 2011, embodying the parties' settlement agreement, pursuant to ICSID Arbitration Rule 43(2).

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[508] *Ibid*. at 139.

[509] ICSID Case No. ARB/05/22; award of 24 July 2008, at 814 (attached to the award is a concurring and dissenting opinion by one of the arbitrators). The BIT at stake was the Agreement between the United Kingdom of Great Britain and Northern Ireland and the United Republic of Tanzania for the Promotion and Protection of Investments of 1994 and the Tanzanian Investment Act of 1997.

[510] *Ibid*. award at 807, 814(e).

[511] *Ibid*. at 436.

[512] *Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v. Federal Republic of Germany*; ICSID Case No. ARB/09/6; award of 11 March 2011, embodying the parties' settlement agreement.

Media information, Greenpeace and two minor interpellations in the German federal parliament revealed some more details.[513] The arbitration was brought under the 1994 Energy Charter Treaty (ECT), a multilateral investment protection treaty, which currently has 46 member states.[514] Like other investment treaties, this also includes a clause on expropriation (Article 13(1) ECT) and a clause on fair and equitable treatment (Article 10(1) ECT). Vattenfall argued that the permit process for its coal-fired power plant in Hamburg violated these clauses. At the center of the dispute are expensive environmental protection measures ordered by the Hamburg administration in its permit conditions. The Hamburg state government argued that such conditions are required by German water law, especially implementing European environmental law.[515] Vattenfall argued that such permit conditions rendered the power plant uneconomic and meant such a significant loss in value of the plant, that they amounted to an expropriation and a violation of the fair and equitable treatment clause.

According to media information, the German branch of Friends of the Earth, Bund für Umwelt und Naturschutz Deutschland (BUND), submitted a request for leave with the ICSID tribunal to be admitted as a third party to the dispute.[516] There is no official information available on how the tribunal dealt with this request. Greenpeace Germany initiated a procedure under the OECD Guidelines against Vattenfall.[517]

4. *Evaluation*

The evaluation highlights several limitations on the ability of ICSID tribunals to appropriately deal with public interest cases.[518]

a. *Jurisdiction, Applicable Law, and Special Rules*

ICSID jurisdiction is limited to investor-state disputes. The analysis of the case law, however, has shown that the interests with which investments often collide are public interests. Thus, by conveying jurisdiction over investment activities to ICSID

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513 Sebastian Knauer, "Vattenfall vs. Deutschland, Machtkampf um Moorburg", Spiegel-online article of 11 July 2009, available at http://www.spiegel.de/wirtschaft/0,1518,635520,00.html; see also two minor interpellations (Kleine Anfragen), Bundestagsdrucksachen 17/510 and 17/971; most detailed information available at Greenpeace website http://www.greenpeace.de/themen/klima/nachrichten/artikel/vattenfall_will_sparen_wir_sollen_zahlen/ansicht/bild/.

514 An overview of member states is available at http://www.encharter.org/index.php?id=61&L=0. So far 27 investor-state cases have been brought pursuant to the Energy Charter Treaty, see http://www.encharter.org/index.php?id=213&L=1%27.

515 Sebastian Knauer, "Vattenfall vs. Deutschland, Machtkampf um Moorburg", Spiegel-online article of 11 July 2009, available at http://www.spiegel.de/wirtschaft/0,1518,635520,00.html.

516 Martin Kopp, "Weltbank-Tribunal berät in Paris über Kraftwerk Moorburg", welt-online of 25 September 2009, available at http://www.welt.de/die-welt/wirtschaft/article4617505/Weltbank-Tribunal-beraet-in-Paris-ueber-Kraftwerk-Moorburg.html.

517 For more details on this procedure see Chapter 3.IV.A.3.c.

518 For a comprehensive analysis of the influence of investor-state disputes on environmental policy see Tienhaara, *The Expropriation of Environmental Governance* (2009).

tribunals, states implicitly put them in a position to have a final or at least very influential say in what is a proper balance between investment and other interests such as labor conditions or environmental protection.

The scope of applicable law can exclusively be determined by party agreement.[519] This is problematic especially with a view to the public interests at stake. Investment disputes are often different from "purely" commercial disputes dealt with in international arbitration. The system of dispute resolution put in place here does not generate a balanced development of international law but is focused on dispute resolution only, although the types of disputes dealt with do not have the same "private" characteristics as many commercial arbitration procedures.[520] Thus, the private determination of applicable law stands in stark contrast to the often public nature of investment disputes.

Neither the ICSID Convention nor investment agreements do provide for institutional arrangements at the ICSID to deal professionally with environmental or other public interests involved. Although the case law has shown that both factual environmental degradation as well as the application of domestic environmental law has been key to solving the dispute, the tribunal did not hear experts on these issues.[521]

b. *Access*

Literature on the ICSID often highlights that mutual consent is required to institute proceedings. This is true but at first sight this implies that access rules might be limited in a similar way to those of the ICJ. However, this is not the case. In the vast majority of the cases brought to the ICSID, states had given their prior consent to ICSID arbitration in a bi- or multilateral investment agreement and thus not on a case-by-case base. This is unique in international law enforcement. The broad "acceptance" and "success" of investment treaties is probably due to the considerable incentives or in other terms the considerable pressure, to which developing countries are exposed if they want more (World Bank supported) development.

In all but one out of the total of 349 ICSID cases to date, a private investor sued a state. The geographic distribution of defendants shows that in 94% of the ICSID cases private investors sued Latin American, Eastern European, Asian, Middle Eastern and African countries. In only 6% of all ICSID cases was the defendant a North American or a Western European country. A significant share of this 6% is probably due to the fact that Mexico counts as a North American country in ICSID statistics. This gives some idea of the interests the ICSID mainly serves in practice.

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519 See also Ishikawa, "NGO Participation in Investment Treaty Arbitration" in Vemuri (ed.), *Connected Accountabilities* (2009), 101, 102.

520 See also *ibid.* at 102 et seq.

521 See also Krajewski/Ceyssens, "Internationaler Investitionsschutz und innerstaatliche Regulierung. Eine Untersuchung anhand der bilateralen Investitionsabkommen Deutschlands" (2007) 45 *AVR*, 180, 208.

With regard to the participation of third parties, including amicus curiae, there was a positive change in the case law in 2003 and in the ICSID Arbitration Rules in 2006. Now non-disputing parties can request permission from the tribunal to submit amicus briefs. However, it remains at the discretion of the tribunal to grant the submission. In the *Suez/Vivendi* and the *Biwater* cases, the tribunals showed their openness to such amici curiae participation and underlined the importance of more transparency in investment disputes where public interests are at stake. This has to be welcomed. However, since tribunals are set up differently for each arbitration and might use their discretion differently, this cannot be seen as a reliable advance in the ICSID arbitration system. To further enhance the transparency of ICSID disputes, amici curiae submission requests and briefs could be published as part of the case file on the ICSID website.

Access to hearings has also been widened with the change in the Arbitration Rules in 2006. However, if one party to a case objects, hearings remain confidential. There are no statistics available on how often this happens. Access to documents is still dependent on the mutual consent of the parties. If amicus curiae participation is to be meaningful, at least in cases where their submission is granted, they should have access to hearings and all documents relating to the case.

c. *Environmental Case Law*

The review of the environmental case law has produced several interesting results. Firstly, although all four cases arose under different investment treaties, the substantive law invoked by the claimant was similar. The investor mainly claimed a violation of the expropriation and the fair and equitable treatment clause. The defendant state argued that the measures at issue were required by national planning or environmental law. Secondly, the approaches taken by the arbitral tribunals for dealing with colliding public/environmental interests are neither coherent nor appropriate.[522] The investment treaties also do not include conflict clauses such as, for example, Art. XX GATT in WTO law.[523] Thus, because of a lack of such conflict clauses and the generally privately determined, case-specific law applicable in arbitral proceedings, there is no clear guidance as to how tribunals should deal with such conflicts.

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[522] With regard to *Metalclad*, Sands, *Litigating Environmental Disputes: Courts, Tribunals and the Progressive Development of International Environmental Law*, OECD Global Forum on International Investment – 27–28 March 2008 (2008), 10. See also Vinuales/Langer, "Managing Conflicts between Environmental and Investment Norms in International Law" in Kerbrat Y., Maljean-Dubois S. (eds.), *The Transformation of International Environmental Law* (2011), Nr. B and C.1. which differentiates between "normative conflicts" and "legitimacy conflicts" in analyzing the impact of environmental norms on investment norms.

[523] See also Krajewski/Ceyssens, "Internationaler Investitionsschutz und innerstaatliche Regulierung. Eine Untersuchung anhand der bilateralen Investitionsabkommen Deutschlands" (2007) 45 *AVR*, 180, 200; Supnik, "Making Amends: Amending the ICSID Convention to Reconcile Competing Interests in International Investment Law" (2009) 59 *Duke L.J.*, 343.

Furthermore, the case law shows the conflict between the confidential, privately determined proceedings and public interest issues at the center of a dispute. These two things do usually not go together in democratic legal orders.

i. Metalclad and Tecmed/Mexico

As seen in *Metalclad* and *Tecmed*, the tribunals approached the cases quite differently although in both cases the tribunal had to determine whether the expropriation and the fair and equitable treatment clauses were violated. In *Metalclad*, the arbitral tribunal based its decision on a very detailed interpretation of Mexican planning, environmental and even constitutional law, very similar to the approach a domestic court would have taken. In *Tecmed*, the ICSID tribunal asked whether there is "a serious urgent situation, crisis, need or social emergency" severe enough to justify the "deprivation or neutralization of the economic or commercial value of the claimant's investment". It did not refer to domestic laws relevant to the question of whether Mexican authorities acted lawfully in refusing the renewal of the operation permit for the landfill. Apart from being very different from the standard used in *Metalclad*, the standard applied by the tribunal in *Tecmed* to determine whether the defendant's measures amounted to an expropriation seems to be randomly chosen. Both approaches are highly problematic, especially considering the serious public health and safety and environmental issues at stake.[524]

Other arbitral tribunals and some legal scholars have argued that in applying the expropriation clause a tribunal has to ask whether the state measure serves a legitimate purpose and how it was applied. They argue that there is no expropriation if a state measure serves a public purpose, if it results from due process and if it is applied in a non-discriminatory manner.[525] This interpretation resembles the so-called police powers doctrine and would be one way of including environmental protection arguments in an investment dispute.[526]

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[524] With respect to *Metalclad* see Krajewski/Ceyssens, "Internationaler Investitionsschutz und innerstaatliche Regulierung. Eine Untersuchung anhand der bilateralen Investitionsabkommen Deutschlands" (2007) 45 *AVR*, 180, 196.

[525] *Methanex Corporation v. The United States of America*, NAFTA Arbitration (UNCITRAL rules), Award of 3 August 2005. The tribunal stated:

> In the Tribunal's view, Methanex is correct that an intentionally discriminatory regulation against a foreign investor fulfills a key requirement for establishing expropriation. But as a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alios, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation.

Ibid. at part IV, chapter D, 7. See Krajewski/Ceyssens *ibid.* at 194 et seq. citing similar decisions from further arbitral tribunals.

[526] Krajewski/Ceyssens, *ibid.* at 194.

With respect to the final awards, it should be noted that the damages awarded in *Tecmed* were much lower than the damages initially claimed; in *Biwater* the tribunal found a violation of the investment treaty but refused the claim for damages.

ii. Vattenfall/Germany

The *Vattenfall* case was concluded in March 2011 with an award which embodied the parties' settlement agreement. Other than that, there is very little official information available, although important public interests are at stake. During the permit procedure, the government in Hamburg changed due to the elections in 2008. The new government was a coalition between the conservative Christian Democratic Union (CDU) and the Green Alternative List (GAL). The administration under this new government including the Green party was responsible for issuing the water permit. The Vattenfall power-plant "Moorburg" was an important issue in the election campaign. There was a legal argument about whether the water permit could be issued at all or whether European and German water law required a denial of the permit. Hamburg authorities, partly reacting to a national court order, issued the water permit with a number of expensive conditions.

ICSID arbitration is completely independent of domestic courts. Representatives of the Federal Ministry of Economics and Technology negotiated the case on behalf of Germany. It is not clear how the Hamburg authorities in charge of enforcing water law and responsible for the water permit at issue were involved. Although Hamburg citizens and NGOs have a high level of public interest in the Moorburg project, there is no way to gain official information on the ICSID case or even participate in it. This stands in stark contrast to the administrative and judicial procedures required by domestic and European law, which provide for much broader information and participation.

The ICSID *Vattenfall* case is a clear example of how a confidential powerful international investment protection regime interferes with an arguably more legitimate democratically safeguarded domestic permit procedure in a manner utterly beyond proper legal standards of a democratic constitutional (state and supranational) order.[527] The ICSID procedure was abused by Vattenfall to enhance its negotiating power and thus completely undermines and weakens the positive aspects investment treaties and the ICSID procedure may have when they actually do safeguard development. The case must have been initiated by an irresponsible Vattenfall management and legal counsel blind to or ignorant of the damage they were doing to a domestic, a European and an international legal order.

[527] See also two minor interpellations (Kleine Anfragen), Bundestagsdrucksachen 17/510 and 17/971.

5. *Conclusions and Recommendations*

With direct investor access, the exclusive remedy rule, no requirement for exhaustion of local remedies, independence of interference from domestic courts and the enforceability of awards as domestic judgments, states bundled a number of enforcement tools rendering the ICSID regime a uniquely powerful international enforcement mechanism.[528] There is no other international compliance control mechanism which is comparably well equipped to secure international interests.

It is notable that the regime is not set up by one big multilateral treaty but based on many bi- and small multilateral investment agreements. OECD and WTO initiatives to establish a bigger multilateral investment protection treaty have so far failed. Arguably, the negotiation position of pro-investment protection countries is better in bilateral negotiations than in a universal forum such as the WTO. On the other hand, supporters highlight that the "role of FDI [foreign direct investment] for development is practically uncontested today and has been recognized by nearly all developing countries."[529] For them "the [ICSID] Convention's original idea, the promotion of economic development through FDI, has turned out to be a clear success."[530] From this point of view, ICSID dispute settlement effectively secures foreign investment. It thereby globally improves the conditions for FDI and thus generates economic growth and higher living standards.[531]

The largest flows in foreign investment occur between industrialized countries. The United States receives the highest amount of FDI worldwide.[532] FDI flows to developing countries are constantly rising. Supporters argue that they contribute to the transfer of skills and technology and create job opportunities. However, critics argue that often foreign investors increase corruption and exploit rather than benefit the host-countries' economies through very low standards of environmental and labor protection.[533]

The regional distribution of ICSID cases has shown that the majority of cases at the ICSID were instituted against developing countries or against countries with economies in transition. In the cases discussed above, the protection of health and

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[528] See also Krajewski/Ceyssens, "Internationaler Investitionsschutz und innerstaatliche Regulierung. Eine Untersuchung anhand der bilateralen Investitionsabkommen Deutschlands" (2007) 45 *AVR*, 180, 211.

[529] Christoph Schreuer, *The World Bank/ICSID Dispute Settlement Procedures*, 5; available at http://www.oecd.org/dataoecd/47/25/2758044.pdf.

[530] *Ibid.*

[531] For a short overview see list of benefits of FDI of the U.S. International Trade Administration, available at http://www.investamerica.gov/home/iia_main_001154.asp. With a focus on investment in a low-carbon economy see UNCTAD, *World Investment Report 2010*, UNCTAD (ed.) (2010), XIV et seq.

[532] See UNCTAD, *World Investment Report 2010*, UNCTAD (ed.) (2010). Annex table 3, FDI inward stock by region and economy, 1990–2009; available at http://www.unctad.org/sections/dite_dir/docs/wir2010_anxtab_3.pdf.

[533] See for example the debate on sweatshops or cases before the IACtHR and the AfComHPR.

the environment was adduced by the defendants. The situation at issue was arguably the same as that described by FDI critics describe when they highlight the downsides of FDI. Neither the procedural nor the substantive law applicable in ICSID cases appropriately accommodates such cases.[534] The system works in a one-sided way in favor of the investors.

Furthermore, ICSID arbitration raises difficulties because its mere existence and, even more so, its awards deter local governments from enforcing often expensive health and environmental protection standards against foreign investors. This is even more problematic if the local government structure is rather weak and the local economy highly dependent on the foreign investment. The fact that in some cases, as in two of those discussed above, the damages payment ordered by the ICSID tribunal was significantly lower than that requested by the investor, does not significantly mitigate this deterrent effect. Even in industrialized countries, the environmental administration is often in too weak a position politally to enforce environmental standards properly. What is needed here is not an additional political pressure but a rather support for the administration in acting according to environmental laws.

The same is true of the domestic judiciary. Since domestic courts cannot interfere in the ICSID procedure, they cannot fulfill their crucial domestic function within the system of the separation of powers and secure that environmental laws are appropriately enforced. The domestic judiciary is completely deprived of its power over such cases. The ICSID mechanism interferes with and significantly disturbs domestic law enforcement within a balanced system of separation of powers. As argued throughout this book, the judiciary needs to be strengthened rather than weakened, in order to contribute better to environmental law enforcement, for example through standing for environmental NGOs in environmental matters.

This leads to the legitimacy issue. The failure of the OECD and WTO initiatives to come up with a bigger multilateral investment protection treaty has shown that there is significant resistance to such an instrument on a worldwide scale. Furthermore, the legitimacy concerns raised with regard to the WTO apply even more strongly here. Within the ICSID system there is no international legislative organ at all, whereas in the WTO system there is at least the DSB. Thus, the influential ICSID tribunal seriously lacks political control.[535]

In addition, arbitration itself is a questionable procedure when it comes to the further development of international law where important public interests are at stake.[536] As demonstrated in the case law analysis, there is no coherent approach as

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[534] For a concrete proposal for a new type of investment treaty with procedural and substantive norms aiming to safeguard sustainable development, see Mann/von Moltke/Peterson et al., *IISD Model International Agreement on Investment for Sustainable Development*, IISD (2005).

[535] See arguments brought forward by *Bogdandy* and others with regard to the WTO in Chapter 4.I.B.5.a.

[536] See also Ishikawa, "NGO Participation in Investment Treaty Arbitration" in Vemuri (ed.), *Connected Accountabilities* (2009), 101, 102.

to how tribunals manage conflicts between investment protection and local public interests.[537] The confidentiality, free choice of applicable law, and changing tribunal composition are other factors that hinder the development of an international legal order that provides for legal certainty, which makes legal decisions predictable and thereby fulfills a function which is at the heart of any legal order.

In response to the identified weaknesses, a number of changes are to be recommended with regard to the ICSID mechanism.[538] Firstly, the substantive law of investment treaties should be further developed and impose obligations on foreign investors to adhere to certain social and environmental standards.[539] Also the "legitimate purpose" test should be applied by all arbitral tribunals in determining whether expropriation has occurred.[540] Furthermore, conflict clauses such as Art. XX GATT should be introduced to recognize the existence of colliding public interests and render the justification and balancing of colliding interests possible.[541]

From a procedural point of view, the exhaustion of local remedies should be required before cases become admissible at the ICSID.[542] To accommodate investors' interests in being protected against arbitrary measures by local administrations and courts, an exception to the rule of exhaustion of local remedies might be made in cases where there is evidence of seriously arbitrary behavior and abuse of legal rights by local authorities.

At least in cases where public interests are involved, the ICSID should provide for a standing body with jurisdiction and rules of procedures similar to those of international courts to achieve more consistency and predictability with respect to

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[537] See also Vinuales/Langer, "Managing Conflicts between Environmental and Investment Norms in International Law" in Kerbrat Y., Maljean-Dubois S. (eds.), *The Transformation of International Environmental Law* (2011), Nr. B.

[538] One fundamental idea could be to abolish an institution like the ICSID altogether. However, foreign direct investments can be very beneficial for host-countries if they actually contribute to sustainable development. The author is not in a position to determine if the overall effects of FDI and its protection through a mechanism like the ICSID have more positive or negative effects on people's living standard on this planet. The former Secretary General of the ICSID, *Ibrahim F. I. Shihata*, has even highlighted the ICSID's potential to safeguard international environmental law, Shihata, "Implementation, Enforcement, and Compliance with International Environmental Agreements-Practical Suggestions in the Light of the World Bank's Experience" (1996) 9 *Geo. Int'l Envtl. L. Rev.*, 37, 51.

[539] See also Krajewski/Ceyssens, "Internationaler Investitionsschutz und innerstaatliche Regulierung. Eine Untersuchung anhand der bilateralen Investitionsabkommen Deutschlands" (2007) 45 *AVR*, 180, 215.

[540] See argument at Chapter 4.II.B.4.c.i and Krajewski/Ceyssens, "Internationaler Investitionsschutz und innerstaatliche Regulierung. Eine Untersuchung anhand der bilateralen Investitionsabkommen Deutschlands" (2007) 45 *AVR*, 180, 195.

[541] See also Supnik, "Making Amends: Amending the ICSID Convention to Reconcile Competing Interests in International Investment Law" (2009) 59 *Duke L.J.*, 343, 376.

[542] See also Krajewski/Ceyssens, "Internationaler Investitionsschutz und innerstaatliche Regulierung. Eine Untersuchung anhand der bilateralen Investitionsabkommen Deutschlands" (2007) 45 *AVR*, 180, 213.

its decisions.[543] In cases of public interest the procedure should be transparent and all documents in the case should be published online.[544] NGOs should be allowed to submit amicus curiae briefs which are also published as part of the official case file.[545] Hearings should be held in public.

Finally, a right to appeal in cases with significant public interests at issue might be an option to ensure appropriately balanced decision-making.[546] The appellate body could, for example, be a newly to be created 'chamber for sustainable development' at the ICJ. Alternatively, with regard to environmental cases, a new international environmental court could provide for such an appeal procedure. Rules of procedure should ensure that investment and environmental experts or specialists in other fields of commercial law or public interest law contribute to a high quality of dispute settlement. All documents relating to the proceedings should be publicly accessible. Hearings should be public and amici curiae participation possible. Alternatively, ICSID should not deal at all with cases that involve public interests.

C. *International Court of Environmental Arbitration and Conciliation*

The International Court of Environmental Arbitration and Conciliation (ICEAC) is a grassroots initiative to establish an international environmental court. It was established in 1994 by 28 lawyers from 22 different countries as a civil association under Mexican law.[547] Originally, the administrative office of the court was located in Mexico, but it has since moved to San Sebastian, Spain.[548] Because of its non-governmental character it does not fall under the definition of international courts and tribunals of PICT which serves as a basis for this research. However, it can be

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[543] Similarly Vinuales/Langer, "Managing Conflicts between Environmental and Investment Norms in International Law" in Kerbrat Y., Maljean-Dubois S. (eds.), *The Transformation of International Environmental Law* (2011), Conclusion.

[544] See also Krajewski/Ceyssens, "Internationaler Investitionsschutz und innerstaatliche Regulierung. Eine Untersuchung anhand der bilateralen Investitionsabkommen Deutschlands" (2007) 45 *AVR*, 180, 212; OECD, T*ransparency and Third Party Participation in Investor-State Dispute Settlement Procedures*, Working Papers on International Investment (June 2005).

[545] Supporting amici curiae access Ishikawa, "NGO Participation in Investment Treaty Arbitration" in Vemuri (ed.), *Connected Accountabilities* (2009), 101, 115 et seq.; Tienhaara, "Third Party Participation in Investment Environment Disputes: Recent Developments" (2007) 16 *RECIEL*, 230, 241 et seq.; Vinuales/Langer, "Managing Conflicts between Environmental and Investment Norms in International Law" in Kerbrat Y., Maljean-Dubois S. (eds.), *The Transformation of International Environmental Law* (2011), Nr. B.; Bartholomeusz, "The Amicus Curiae before International Courts and Tribunals" (2005) 5 *Non-St. Actors & Int'l L.*, 209, 272.

[546] See also Krajewski/Ceyssens, "Internationaler Investitionsschutz und innerstaatliche Regulierung. Eine Untersuchung anhand der bilateralen Investitionsabkommen Deutschlands" (2007) 45 *AVR*, 180, 213.

[547] Rehbinder/Loperena, "Legal Protection of Environmental Rights – The Role and Experience of the International Court of Environmental Arbitration and Conciliation" (2001) 31 *Environ Pol Law*, 282, 287 and ICEAC website at http://iceac.sarenet.es/Ingles/fore.html.

[548] Rehbinder/Loperena, *ibid.*

seen as an important bottom-up initiative in the field of international environmental deliberation and is therefore described in brief here.

Pursuant to its statutes, the ICEAC offers three legal services: arbitration, conciliation, and consultative opinions.[549] Jurisdiction and access to the court are not limited. Thus, private citizens and environmental NGOs can also institute proceedings at the ICEAC. Conciliation and arbitration require an agreement between the parties; consultative opinions may be issued upon a unilateral request by one party.[550] So far the ICEAC has dealt with 13 cases.[551] None of these has been an arbitration case as yet; in four cases petitioners – individuals, municipalities, and an NGO – requested conciliation with public authorities but all requests were rejected by the public authorities.[552] In three cases consultative opinions were requested but the procedure lapsed.[553] In the following six cases the ICEAC issued consultative opinions.

In 1998 the ICEAC received a petition on behalf of the Sonora Academy for Human Rights (Mexico) to issue a consultative opinion on the transport and spill of toxic

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[549] Article 2 of the Statutes of the ICEAC, available at http://iceac.sarenet.es/Ingles/Stat.html.

[550] Rehbinder/Loperena, "Legal Protection of Environmental Rights – The Role and Experience of the International Court of Environmental Arbitration and Conciliation" (2001) 31 *Environ Pol Law*, 282, 287.

[551] For a list of cases see http://iceac.sarenet.es/Ingles/cases/cases.html and Rehbinder/Loperena, *ibid*. at 288 et seq. The enumeration of the ICEAC decisions indicates that there must have been 15 cases before it but the author has been unable to find the two proceedings that are apparently missing.

[552] In 1995, in the *Itzoid* case, affected inhabitants requested conciliation regarding a damn project in Navarre province, Spain, but it was rejected by the Spanish Ministry of Civil Works and Environment. The case *Enlargement Barajas Airport* (Madrid, Spain) was initiated before the ICEAC in 1997 by the legal representative of 14 affected towns; they requested conciliation with the Ministry of Development, Ministry of Environment and the Public Corporation Spanish Airports and Air Transport but the defendants refused to accept the conciliation. The *Hidalgo* case dealt with a cross-border road infrastructure project in Mexico and Guatemala. An association of people from Mexico and Guatemala petitioned for conciliation; the petition was presented to the mayor of Tecún Uman municipality (Guatemala), the Governor of Chiapas State (Mexico), and to the Secretary of Communications and Transport of Mexico but rejected. In 2000, in the *Ranita Meridional* case, the conservation association Haritzalde presented a request for conciliation with the Basque Government and the Provincial Government of Gipuzkoa because of an alteration to a management plan for a frog species; both authorities rejected the petition. Following the rejection the association requested a consultative opinion which was issued in December 2000, Rehbinder/Loperena, "Legal Protection of Environmental Rights – The Role and Experience of the International Court of Environmental Arbitration and Conciliation" (2001) 31 *Environ Pol Law*, 282, 288 et seq.

[553] *Cerro Largo* case (1996) regarding emissions from a Brazilian power plant, initiated by a municipal authority in Uruguay; *Zaga Vaca* case (1996) dealt with a petition from a Mexican citizen regarding a patent for biologically infected hospital waste; in the *Sierra Blanca* case (1998) the Mexican Commission on Human Rights of the National Political Council of the PRI requested a consultative opinion on the construction of a radioactive waste deposit in Sierra Blanca (Texas, United States) but petitioners withdrew the petition due to the lack of funds. In response to the latter case, the ICEAC instituted a brief procedure of free justice for petitioners with no lucrative aim Rehbinder/Loperena, "Legal Protection of Environmental Rights – The Role and Experience of the International Court of Environmental Arbitration and Conciliation" (2001) 31 *Environ Pol Law*, 282, 290.

wastes on the border between Mexico and the United States (*Sonora* case).[554] The panel issued its consultative opinion in April 1999. It found no breach of the Basel Convention because it was not applicable between the parties. However, it found that the U.S. must take back the waste at its cost under doctrines and principles accepted by the international community. It is not clear from the information available on the ICEAC website if the decision had any practical consequences.

In the *Ranita Meridional* case, instituted by the Spanish/Basque conservation association Haritzalde, the ICEAC panel found the alterations to the frog management plan to be in breach of the Berne Convention and the Convention on Biological Diversity.[555] It seems that the consultative opinion helped to find a settlement between the NGO and the public authorities with respect to several pending national law suits.[556] The *Community Fisheries Policy and Selective Traditional Means of Fishing* case was initiated by the chairmen of the Fishermen's Guild of Hondarribia (Spain) and the Association Itsas Geroa (Future of the Sea, France). It concerned the question of whether certain EC fishing policies were compatible with international and Community environmental law regarding the conservation of living marine resources.[557]

In February 2000, the Spanish NGO Ecologistas en Acción submitted a request for a consultative opinion in the *TRIPs* case that was endorsed by several other NGOs (Plataforma Rural, Madrid; Comitato Scientifico Antivivisezionista; European Network for Ecological Action).[558] The question at issue was whether certain requirements of Article 27 of the WTO Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs) violated Article 8(j) of the CBD (protection of traditional knowledge). The ICEAC panel concluded that there is no inherent contradiction between the CBD and the TRIPs Agreement, since they serve different purposes. Furthermore, the panel found that nothing in Article 27(3)(b) of the TRIPs Agreement requires any party to violate any obligation pursuant to Article 8(j) or any other provision of the CBD. Nevertheless, thirdly, the panel found that

> [a]n effort must be made, however, that national patent laws and other laws relating to intellectual property are designed and applied in a way which takes duly into account the objectives of CBD, in particular the principle of equitable benefit sharing.[559]

In 2004, a private citizen requested the ICEAC to issue a consultative opinion regarding the liability of public and private actors for the genetic contamination of

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554 ICEAC, EAS 1/99, 7 April 1999.

555 ICEAC, EAS CC 9/00, 21 December 2000.

556 Rehbinder/Loperena, "Legal Protection of Environmental Rights – The Role and Experience of the International Court of Environmental Arbitration and Conciliation" (2001) 31 *Environ Pol Law*, 282, 291.

557 ICEAC, EAS OC 10/00, 5 November 2001.

558 ICEAC, EAS OC 8/03, 19 November 2003.

559 *Ibid*. at 6.3.

non-GM crops, *GMO* case.[560] Within the procedure, the applicant focused its question on (a) Brazil and Pakistan where cases of smuggling of GM seeds have occurred despite a national moratorium on GMOs and (b) the liability regime regarding GM contamination in a certain country proceeding from Food Aid agencies.[561]

In the *Ayamonte* case the Spanish NGO Asociación para la Protección del Patrimonio Histórico y Paisajístico de Ayamonte (ALMACAL) requested the ICEAC to issue a consultative opinion regarding the question whether an urbanization project in the zone "Los cabezos de la Rodadera" near Huelva is compatible with the obligations of international and Spanish nature conservation law, especially with regard to the plant Picris Willkommii.[562]

A brief analysis of the case law shows that there is no official governmental recognition of the ICEAC apart from at municipal level. All requests for conciliation with public authorities were rejected. It is doubtful whether the consultative opinions had much influence on governmental decision-making processes. The analysis also shows that most of the cases were initiated by individuals, NGOs or municipalities of countries with active members of the ICEAC, namely Spain (7 cases) and Mexico (4 cases).[563] The petitions concerned a broad range of environmental issues addressed in national, EU and international environmental law (biodiversity, GMOs, fisheries, toxic wastes, cross-border air pollution, urban developments in ecologically sensitive areas and big infrastructure projects). Insofar they exemplify the variety of legal questions that may arise under nowadays complex multilevel environmental legislation and also the difficulties of proper implementation. They also highlight the limited options the petitioners have to successfully introduce their arguments in national court procedures.

III. Compliance Committee of the Kyoto Protocol

As regards the non-compliance procedures with a universal scope, the one established under the 1997 Kyoto Protocol (KP) is chosen for this study. It is said to be the most progressive international non-compliance procedure and seen as a testing ground for compliance theory in general.[564] It is a unique example of combining facilitation, promotion, and enforcement and therefore combining elements of both the managerial and the enforcement approach as advocated in compliance theory.

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[560] ICEAC, EAS OC 13/04, 17 June 2005.

[561] Conclusion of the consultative opinion *ibid*. at 53.

[562] ICEAC, EAS OC 15/05, 25 May 2007.

[563] See also Rehbinder/Loperena, "Legal Protection of Environmental Rights – The Role and Experience of the International Court of Environmental Arbitration and Conciliation" (2001) 31 *Environ Pol Law*, 282, 288.

[564] Brunnée, "The Kyoto Protocol: Testing Ground for Compliance Theories?" (2003) 63 *ZaöRV*, 255, 280.

Furthermore, it is noteworthy in this context because compliance review can be triggered not only by parties but also by expert review teams (ERTs).

As at March 2011, the Kyoto Protocol had 193 parties, 192 states and the European Union, and thus an almost global membership.[565] Based on the mandate in Article 18 KP, in December 2005, the Conference of the Parties serving as the meeting of the Parties to the Protocol (CMP) established a non-compliance mechanism to facilitate the successful implementation of the commitments under the Kyoto Protocol, in particular to support the credibility of the carbon market and the transparency of accounting by parties.[566] The Compliance Committee (Committee) comprises a facilitative branch (FB) and an enforcement branch (EB). The facilitative branch advises and assists parties in complying with their commitments; the enforcement branch identifies cases of non-compliance and determines the consequences.

The Committee took up its work in 2006. As at March 2011, the facilitative branch of the compliance committee had met nine and the enforcement branch twelve times. Meetings usually take place in Bonn, Germany. Reports of the meetings and webcasts are available on the UNFCCC website.[567] The Committee annually reports on its work to the CMP.[568] So far the facilitative branch has dealt with one and the enforcement branch with six cases, three of which are still pending. Compliance with the recommendations issued by the branches is monitored by the branches themselves.

A. *Function and Scope of Review*

Pursuant to Article 18 KP, the compliance mechanism is established to address cases of non-compliance with the provisions of the Kyoto Protocol. The Compliance Procedures approved and adopted by CMP-1 state as their objective to facilitate,

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[565] Annex I parties' emissions amount to a total of 63.7%. See status of ratification at http://unfccc.int/kyoto_protocol/status_of_ratification/items/2613.php.

[566] Procedures and mechanism relating to compliance under the Kyoto Protocol, Decision 27/CMP.1, FCCC/KP/CMP/2005/8/Add.3, 9–10 December 2005 (Compliance Procedures); Rules of procedure of the Compliance Committee. Decision 4/CMP.2, FCCC/KP/CMP/2006/10/Add.1, 17 November 2006; Amendments to the rules of procedure of the Compliance Committee of the Kyoto Protocol, Decision 4/CMP.4, FCCC/KP/CMP/2008/11/Add.1, 12 December 2008; Consolidated rules of procedure of the Compliance Committee (Rules of Procedure); all documents are available at http://unfccc.int/kyoto_protocol/compliance/items/2875.php. See also Oberthür/Lefeber, "Holding Countries to Account: The Kyoto Protocol's Compliance System Revisited after four Years of Experience" (2010) 1 *Climate Law*, 133, 133. For a comparison between the Kyoto compliance mechanism and compliance review of the Kyoto obligations within the European Union see Tabau/Maljean-Dubois, "Non-compliance Mechanisms: Interaction between the Kyoto Protocol System and the European Union" (2010) 21 *EJIL*, 749. For a comparative study on compliance enforcement systems in the three cap-and-trade programs established under the Kyoto Protocol, the EU Emission Trading Scheme and the U.S. SO2 emission trading program see Aakre/Hovi, "Emission Trading: Participation Enforcement Determines the Need for Compliance Enforcement" (2010) 11 *European Union Politics*, 427.

[567] See http://unfccc.int/kyoto_protocol/compliance/enforcement_branch/items/3785.php.

[568] The annual reports of the compliance committee are available at http://unfccc.int/kyoto_protocol/compliance/items/2875.php.

promote and enforce compliance with the commitments under the Protocol.[569] The responsibilities for overseeing concrete commitments under the KP are addressed in detail separately for the facilitative branch and the enforcement branch in the Compliance Procedures.[570]

The focus here is on the enforcement branch.[571] It is responsible for determining whether Annex I parties are not in compliance with their emission reduction targets under Article 3(1) KP; the methodological and reporting requirements under Article 5(1) and (2) and 7(1) and (4) KP; the eligibility requirements under Articles 6 (Joint Implementation), 12 (Clean Development Mechanism), and 17 (international emissions trading).[572] Furthermore, the enforcement branch shall determine, in event of a disagreement between the expert review team and the party involved, whether to apply adjustments to inventories under Article 5(2) KP (national system for the estimation of anthropogenic emissions). It shall also determine whether to apply a correction to the compilation and accounting database for the accounting of assigned amounts under Article 7(4) KP (annual inventory of anthropogenic emissions).[573] It is important to note that the EB will not review compliance with the parties' emission reduction commitments under Article 3(1) KP before the second half of 2015.[574] The first commitment period ends in 2012; the last inventories are due in April 2014. The ERTs must review the inventories within one year and then parties may transfer emission units during a additional period of 100 days in order to meet their emission reduction targets.[575]

The enforcement branch is responsible for applying "consequences" aimed at the restoration of compliance to ensure environmental integrity and to provide for an incentive to comply.[576] Depending on the type of non-compliance, the enforcement branch shall apply different consequences outlined in detail in the Compliance Procedures.[577] In cases of non-compliance with methodological and reporting requirements, the EB has to issue a declaration of non-compliance and request the

[569] Compliance Procedures at I.

[570] *Ibid.* at IV (Facilitative Branch) and V (Enforcement Branch).

[571] For a detailed description of responsibilities of both branches see Oberthür/Lefeber, "Holding Countries to Account: The Kyoto Protocol's Compliance System Revisited after four Years of Experience" (2010) 1 *Climate Law*, 133.

[572] Compliance Procedures at V(4).

[573] *Ibid.* at V(5a) and (5b).

[574] Oberthür/Lefeber, "Holding Countries to Account: The Kyoto Protocol's Compliance System Revisited after four Years of Experience" (2010) 1 *Climate Law*, 133, 149; Doelle, "Early Experience with the Kyoto Compliance System: Possible Lessons for MEA Compliance System Design" (2010) 1 *Climate Law*, 237, 238.

[575] Compliance Procedures at XIII.

[576] *Ibid.* at V(6). Thus, the "consequences" are not meant to be punitive, see Oberthür/Lefeber, "Holding Countries to Account: The Kyoto Protocol's Compliance System Revisited after four Years of Experience" (2010) 1 *Climate Law*, 133, 150.

[577] Compliance Procedures at XV.

development of a plan for coming back into compliance.[578] Where the EB has found a party in non-compliance with the eligibility requirements, it shall suspend the eligibility of that party.[579] Where the EB has identified non-compliance with a party's emission target, it shall declare the party's non-compliance, deduct from the party's assigned amount for the second commitment period of a number of tonnes equal to 1.3 times the amount in tonnes of excess emissions, request the development of a compliance action plan, and suspend the party's eligibility to sell emission units.[580]

Article 18 of the Kyoto Protocol states that "[a]ny procedures and mechanisms [...] entailing binding consequences shall be adopted by means of an amendment to [the] Protocol". The Compliance Procedures establishing the Kyoto compliance mechanism have not been adopted in the form of an amendment to the Kyoto Protocol. Consequently, decisions of the compliance committee under the Kyoto Protocol are not legally binding.[581]

B. *Institutional Arrangements*

The compliance committee consists of twenty members elected by the CMP and functions through four bodies: the plenary, the bureau, the facilitative branch, and the enforcement branch.[582] The compliance mechanism under the Kyoto Protocol is the first one under an MEA that established two different branches with different responsibilities. This structure aims to reflect the principle of common but differentiated responsibilities.[583] Only Annex I parties – developed countries with emission reduction commitments under Annex I – can be subject to a compliance review procedure before the EB. Non-Annex I parties may only be subject to a compliance review procedure before the facilitative branch. The idea of establishing two branches within the compliance committee was introduced, in preparation for a workshop on compliance in Vienna in 1999, by the U.S. delegation, at that time still

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[578] *Ibid.* at XV(1a) and (1b). A timeline and more detailed requirements regarding the content of such a plan and progress reports are set out at XV(2) and (3).

[579] *Ibid.* at XV(4).

[580] *Ibid.* at XV(5). The content and timeline for the compliance action plan and progress reports are regulated in more detail at XV(6) and (7).

[581] For a more detailed discussion see Brunnée, "The Kyoto Protocol: Testing Ground for Compliance Theories?" (2003) 63 *ZaöRV*, 255, 277 et seq.; Oberthür/Lefeber, "Holding Countries to Account: The Kyoto Protocol's Compliance System Revisited after four Years of Experience" (2010) 1 *Climate Law*, 133, 151.

[582] Compliance Procedures at II(2) and (3). An instructive chart of the KP compliance mechanism is available at http://unfccc.int/files/kyoto_mechanisms/compliance/application/pdf/comp_schematic.pdf. For an overview see also Oberthür/Lefeber, "Holding Countries to Account: The Kyoto Protocol's Compliance System Revisited after four Years of Experience" (2010) 1 *Climate Law*, 133, 135 et seq.

[583] Lefeber, "The Practice of the Compliance Committee under the Kyoto Protocol to the United Nations Framework Convention on Climate Change (2006–2007)" in Treves/Pineschi et al. (eds.), *Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements* (2009), 303, 304.

under the Clinton administration, and later on, independently of the U.S. proposal, jointly by CIEL and the WWF.[584]

Each branch comprises ten members and elects a chairperson and a vice-chairperson from among its members. Together the chairpersons and the vice-chairpersons form the bureau.[585] The members of the facilitative branch and the enforcement branch form the plenary; the chairpersons are the co-chairpersons of the plenary.[586] For each member of the Committee the CMP elects an alternate member. Members of the Committee and their alternates serve in their individual capacity and shall have recognized competence relating to climate change, for example in scientific, socio-economic, or legal fields.[587] Each member and alternate member of the CC takes an oath of service prior to joining the Committee.[588]

The Compliance Procedures provide for a fair distribution of decision-making power within the Committee. Each branch is composed of one representative from each of the five official UN regions (Africa, Asia, Latin America and the Caribbean, Central and Eastern Europe, and Western Europe and Others), one from the small island developing States, as well as two each from Annex I and non-Annex I countries.[589] Every effort shall be made to adopt any decision by consensus; only as a last resort decisions may be adopted by a three-quarters majority of the members present and voting.[590] In addition, decisions of the enforcement branch require a double majority of members present and voting of both Annex I and non-Annex I parties.[591] This special voting rule for the enforcement branch was introduced by developed countries as a trade-off for agreeing to the limited mandate of the EB in order to increase their influence in the decision-making of the EB.[592] As a consequence, a decision of the EB can be blocked by two members nominated by developed countries.[593]

The Compliance Committee works according to strict timelines. The Compliance Procedures provide timelines for a 36-week standard procedure as well as a

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584 Gulbrandsen/Andresen, "NGO Influence in the Implementation of the Kyoto Protocol: Compliance, Flexibility Mechanisms, and Sinks" (2004) 4 *GEP*, 54, 62.

585 Compliance Procedures at II(3) and (4).

586 *Ibid.* at III(1).

587 *Ibid.* at II(5) and (6).

588 Rules of Procedure, Rule 4.

589 Compliance Procedures at IV(1) and V(1).

590 *Ibid.* at II(9).

591 *Ibid.*

592 Lefeber, "The Practice of the Compliance Committee under the Kyoto Protocol to the United Nations Framework Convention on Climate Change (2006–2007)" in Treves/Pineschi et al. (eds.), *Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements* (2009), 303, 304.

593 Oberthür/Lefeber, "Holding Countries to Account: The Kyoto Protocol's Compliance System Revisited after four Years of Experience" (2010) 1 *Climate Law*, 133, 138.

17-week expedited procedure from receipt of the question of implementation up to the final decision.[594]

Furthermore, expert review teams play a decisive role in the compliance mechanism. They are responsible for reviewing the information submitted by Annex I parties pursuant to their obligations under Article 7 of the KP regarding their annual inventory of anthropogenic emissions and supplementary information.[595] The ERTs are coordinated by the secretariat and composed of experts, which may be nominated by parties to the Convention and intergovernmental organizations and which are drawn from the UNFCCC's roster of experts.[596] The main task of the ERTs is to provide a thorough and comprehensive technical assessment of all aspects of implementation by the parties to the KP and identify any potential problems in the fulfillment of commitments.[597]

The Compliance Procedures also encompass a limited right to appeal to the CMP against a decision of the enforcement branch. However, only the party concerned, thus the party in respect of which a final decision has been taken, may appeal to the CMP if the decision related to Article 3(1) of the KP (emission targets).[598] The CMP overrides the decision of the enforcement branch with a three-quarters majority vote of the parties present and voting.[599] The decision of the enforcement branch becomes definitive if it has not been appealed within 45 days.[600] It stands pending the decision on appeal.[601]

C. *Access*

Questions of implementation can be submitted to the Committee in three ways: by any party with respect to itself (self trigger), by any party with respect to another party (party-to-party trigger), or, and in this context most importantly, the Committee also receives, through the secretariat, questions of implementation as indicated by the expert review teams in their reports under Article 8 of the KP.[602] The bureau allocates cases to the appropriate branch.[603] Thus, NGOs cannot trigger a compliance review procedure under the Kyoto Protocol.

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[594] Compliance Procedures at XI and X. See Oberthür/Lefeber, *ibid*. at 142, 146 et seq.

[595] Article 8(1) KP. For an overview of the reporting and review mechanism and relevant documents see http://unfccc.int/national_reports/reporting_and_review_for_annex_i_parties/items/5689.php.

[596] Oberthür/Lefeber, "Holding Countries to Account: The Kyoto Protocol's Compliance System Revisited after four Years of Experience" (2010) 1 *Climate Law*, 133, 153.

[597] Article 8(3) KP.

[598] *Ibid*. at XI. The appeal shall be lodged within 45 days after the party has been informed of the decision of the EB, *ibid*. at XI(2).

[599] *Ibid*. at XI(3).

[600] *Ibid*. at XI(4).

[601] *Ibid*.

[602] *Ibid*. at VI(1).

[603] *Ibid*. at VII(1).

As regards amici curiae submissions, section VIII(4) of the Compliance Procedures states that

> [c]ompetent intergovernmental and non-governmental organizations may submit relevant factual and technical information to the relevant branch.

Rule 20(1) of the Rules of Procedure further regulates that such submissions shall be done in writing and made following the preliminary examination. There is no further specification yet with regard to the meaning of "competent". Information on legal aspects does not seem to be included; nevertheless factual and technical information will only be decisive if it is legally relevant and insofar references to legal questions may be coveredTo date, no NGO has tried to participate in a proceeding before the facilitative or the enforcement branch.

Both branches may also seek expert advice and have done so in all cases submitted up to March 2011.[604] Rule 21 of the Rules of Procedures further clarifies that the branches shall define the question on which expert opinion is sought, identify the experts to be consulted, and lay down the procedure when they decide to seek expert advice.

According to Rule 9(1) of the Rules of Procedure meetings of the plenary and the branches are held in public, unless the plenary or branch decides that part of or all of the meeting is to be held in private.[605] Such a decision can be made at the plenary's or branches' own discretion or at the request of the party concerned. However, the elaboration and adoption of a decision of a branch may only be attended by members and alternate members of the Committee and secretariat officials.[606] In the case of public hearings, members of the public may observe the hearing but not interfere with the procedure in any way.[607]

In September 2007, at its fourth meeting, the plenary of the Committee agreed on working arrangements with regard to public participation in meetings of the Compliance Committee.[608] It agreed that public meetings of the plenary and the branches should continue to be broadcast on the UNFCCC website and requested the secretariat to announce the dates and venue of the meetings on the UNFCCC

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[604] Compliance Procedures at XIII(5).

[605] See also Lefeber, "The Practice of the Compliance Committee under the Kyoto Protocol to the United Nations Framework Convention on Climate Change (2006–2007)" in Treves/Pineschi et al. (eds.), *Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements* (2009), 303, 305.

[606] Rule 9(2) Rules of Procedure.

[607] Lefeber, "The Practice of the Compliance Committee under the Kyoto Protocol to the United Nations Framework Convention on Climate Change (2006–2007)" in Treves/Pineschi et al. (eds.), *Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements* (2009), 303, 305.

[608] Based on the mandate in section III(2)(d) of the Compliance Procedures. The working arrangements can be found in the 2007 annual report of the Compliance Committee to the CMP, FCCC/KP/CMP/2007/6, at 15–18.

website and establish a simple system of registration for observers on a first come first served basis.[609]

Furthermore, any information considered by the branches and the final decisions are made available to the public. The information considered by the branches may not be published until the decision has become final, if a branch decides so of its own accord or at the request of the party concerned.[610] As of March 2011, no party concerned has invoked any confidentiality rules. Decisions include conclusions and reasons. The party concerned may comment in writing on any decision.[611] To date, only Croatia has made use of this provision.

D. *Questions of Implementation*

The facilitative branch has dealt with one case of non-compliance so far, the enforcement branch with six cases.

1. *Facilitative Branch*

The case before the facilitative branch was filed by South Africa on 25 May 2006 on behalf of the Group of 77 and China with respect to "those parties who have not provided their reports demonstrating progress, even after a period of nearly 6 months from the 1 January deadline".[612] These countries were by that time Austria, Bulgaria, Canada, France, Germany, Ireland, Italy, Latvia, Liechtenstein, Luxembourg, Poland, Portugal, Russia, Slovenia, and Ukraine. The submission alleged that these fifteen developed countries failed to comply with their reporting obligations under Article 3(2) of the Kyoto Protocol. The facilitative branch decided not to proceed against Latvia and Slovenia because they had submitted their reports in the meantime.[613] With respect to the other countries, the facilitative branch failed to reach an agreement during the three-week preliminary examination period.[614]

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609 *Ibid*. at 16.

610 Compliance Procedures at XIII(6) and (7).

611 *Ibid*. at XIII(8).

612 Communication CC-2006-1-1/FB, available at http://unfccc.int/files/kyoto_mechanisms/compliance/application/pdf/cc-2006-1-1-fb.pdf. For a summary of this question of implementation see also Lefeber, "The Practice of the Compliance Committee under the Kyoto Protocol to the United Nations Framework Convention on Climate Change (2006–2007)" in Treves/Pineschi et al. (eds.), *Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements* (2009), 303, 314 et seq.; Doelle, "Early Experience with the Kyoto Compliance System: Possible Lessons for MEA Compliance System Design" (2010) 1 *Climate Law*, 237, 240 et seq.

613 Report on the third meeting of the Facilitative Branch, CC/FB/3/2006/2, 6 September 2006, at 6; available at http://unfccc.int/files/kyoto_mechanisms/compliance/application/pdf/cc-fb-3-2006-2.pdf.

614 *Ibid*. at 5 and Annex I "Report to the Compliance Committee on the deliberations in the facilitative branch relating to the submission entitled 'Compliance with Article 3.1 of the Kyoto Protocol'" (CC/3/2006/5).

One critical issue was whether such a submission by a party not on its own behalf but on behalf of a group of parties was in accordance with section VI(1) of the Annex to decision 27/CMP.1. Furthermore, the submission did not explicitly name the parties alleged to be in non-compliance but initiated the procedure against "those parties who have not provided their reports demonstrating progress, even after a period of nearly 6 months from the 1 January deadline". The facilitative branch questioned whether a submission that does not clearly and individually name the parties which it alleges to be in non-compliance is admissible. Finally, the submission did not contain any further information or substantiation of the allegation.[615] As a result of this stalemate experience, the Rules of Procedure have been amended and now provide for certain standards for submissions. A similar situation could not subsequently arise; the majority of decisions could be adopted by consensus.[616] No further case has as yet been submitted to the facilitative branch.

2. *Enforcement Branch*

Questions of implementation have been submitted to the enforcement branch with respect to six countries: Greece, Canada, Croatia, Bulgaria, Romania, and Ukraine.[617] All questions of implementation dealt with by the EB have been submitted by the ERT through the secretariat. The question of implementation regarding Greece is outlined in greater detail. Special aspects of the procedures regarding the compliance of Canada and Croatia are also discussed.

a. *Greece*

The ERT initiated the first case before the enforcement branch because, in reviewing the initial report of Greece and considering information it had gained during an in-country review, it found that the national system of Greece was not in full compliance with the guidelines for national systems under Article 5(1) of the Kyoto Protocol and the guidelines for the preparation of the information required under Article 7 of the Kyoto Protocol.[618]

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[615] *Ibid.* at Annex I at 4. For a more detailed analysis of this case see Doelle, "Early Experience with the Kyoto Compliance System: Possible Lessons for MEA Compliance System Design" (2010) 1 *Climate Law*, 237, 240; Oberthür/Lefeber, "Holding Countries to Account: The Kyoto Protocol's Compliance System Revisited after four Years of Experience" (2010) 1 *Climate Law*, 133, 138 et seq.

[616] Oberthür/Lefeber, *ibid.* at 133, 139.

[617] The procedures are documented online at http://unfccc.int/kyoto_protocol/compliance/questions_of_implementation/items/5451.php. The procedures regarding Bulgaria, Romania, and Ukraine are not discussed in this study but detailed information is available on the above website. The procedures against Romania and Ukraine are still pending at the time of writing. For a summary of the case law see also Doelle, "Early Experience with the Kyoto Compliance System: Possible Lessons for MEA Compliance System Design" (2010) 1 *Climate Law*, 237, 242 et seq. which in particular provides a detailed review of the procedure regarding Greece.

[618] Report of the review of the initial report of Greece, FCCC/IRR/2007/GRC, 28 December 2007, at 244.

> In particular, the ERT concludes that the maintenance of the institutional and procedural arrangements; the arrangements for the technical competence of the staff; and the capacity for timely performance of Greece's national system is an unresolved problem, and therefore lists it as a question of implementation.[619]

The secretariat referred the report of the ERT to the bureau of the Compliance Committee on 31 December 2007 and the bureau allocated the question of implementation to the enforcement branch on 7 January 2008.[620] On 22 January 2008, the enforcement branch issued its Preliminary Examination in which it decided to proceed with the question of implementation and requested expert advice in the matter.[621] In a separate document issued on 8 February, the enforcement branch outlined more specifically which experts the branch invites to its hearings and which questions it aims to deal with.[622] The EB invited four experts on national systems. Two of them were part of the expert review team that reviewed the initial report and two were drawn from the UNFCCC roster of experts.[623] On 11 and 26 February 2008 respectively, Greece requested a hearing and filed a written submission.[624] The hearing was held on 4 and 5 March 2008 with representatives of Greece and the four invited experts. No IGO or NGO provided further information.[625] On 6 March 2008 the EB adopted by consensus its preliminary finding and determined that

> Greece is not in compliance with the guidelines for national systems under Article 5, paragraph 1, of the Kyoto Protocol (decision 19/CMP.1) and the guidelines for the preparation of the information required under Article 7 of the Kyoto Protocol (decision 15/CMP.1). Hence, Greece does not yet meet the eligibility requirement under Articles 6, 12 and 17 of the Kyoto Protocol to have in place a national system in accordance with Article 5, paragraph 1, of the Kyoto Protocol and the requirements in the guidelines decided thereunder.[626]

Furthermore, the EB applied three consequences: it declared Greece to be in non-compliance, it ordered that Greece shall develop a plan to come back into compliance within three months, and it stated that Greece was not eligible to participate in the three Kyoto mechanisms, which are emissions trading, joint implementation, and the clean development mechanism.[627] Such preliminary findings only become effective, when the EB confirms them in a final decision.[628]

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619 *Ibid*. See also table "Summary of the reporting on mandatory elements in the initial report", *ibid*. at 5.

620 Decision on Preliminary Examination, CC-2007-1-2/Greece/EB, 22 January 2008, at 1 and 2.

621 *Ibid*. at 6 and 7.

622 Expert Advice: Greece, CC-2007-1-3/Greece/EB, 8 February 2008, at 3 and 4.

623 Preliminary Finding, CC-2007-1-6/Greece/EB, 6 March 2008, at 7.

624 *Ibid*. at 7. For more details on the hearing see Doelle, "Early Experience with the Kyoto Compliance System: Possible Lessons for MEA Compliance System Design" (2010) 1 *Climate Law*, 237, 244 et seq.

625 Preliminary Finding, *ibid*. at 10.

626 *Ibid*. at 17.

627 *Ibid*. at 18.

628 *Ibid*. at 19.

On 8 April 2008, Greece filed a response to the preliminary finding; on April 16 and 17 the EB conducted a second hearing and on 17 April 2008 fully confirmed the preliminary finding.[629] The EB did not adopt its final decision unanimously but with one dissenting vote.[630] Greece submitted its first compliance plan on 16 July 2008[631] and, pursuant to a finding of the EB that this plan does not contain sufficient information to enable the branch to assess Greece's state of compliance, Greece submitted a revised compliance plan on 27 October 2008.[632] On the same date, Greece requested the reinstatement of eligibility under the three Kyoto mechanisms.[633] On 13 November 2008, the EB decided by consensus that Greece is no longer in non-compliance with the Kyoto Protocol and that it is now fully eligible to participate in the Kyoto mechanisms.[634]

b. *Canada*

Reviewing Canada's initial report the ERT identified a question of implementation regarding Canada's national registry in April 2008.[635] In May 2008, in its decision on preliminary examination, the EB decided to proceed furtherand requested further advice from four experts.[636] Canada submitted further information, and a hearing was held in June 2008. No IGO or NGO participated in the procedure.[637] Based on the review report, Canada's submissions, expert advice, and an independent assessment report by the national registry of Canada, the EB decided in June 2008 not to proceed further against Canada.[638] The EB concluded that, although Canada's national registry was not in compliance with the guidelines and the modalities on the publication date of the review report, at the time of issuing the decision, thus in June 2008, there was a sufficient factual basis to avert a finding of non-compliance.[639]

Canada was satisfied with the overall decision not to proceed further. However, it requested the EB to partly delete and partly substitute the conclusion of the EB that Canada originally was in non-compliance with the Kyoto Protocol, arguing that the EB overstepped its competence in this respect.[640] The EB did not alter its decision

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629 Final Decision, CC-2007-1-8/Greece/EB, 17 April 2008, at 4 and 5.
630 *Ibid*. below 5.
631 Plan pursuant to final decision, CC-2007-1-9/Greece/EB/ 17 July 2008.
632 Revised plan pursuant to final decision, CC-2007-1-11/Greece/EB/, 27 October 2008.
633 Request for reinstatement of eligibility, CC-2007-1-12/Greece/EB, 27 October 2008.
634 Decision under paragraph 2 of section X, CC-2007-1-13/Greece/EB, 13 November 2008, at 13.
635 Report of the review of the initial report of Canada, DCCC/IRR/2007/CAN, 11 April 2008, at 139 and 140.
636 All documents regarding this question of implementation regarding Canada are available at http://unfccc.int/kyoto_protocol/compliance/enforcement_branch/items/5298.php.
637 Decision not to proceed further, CC-2008-1-6/Canada/EB, 15 June 2008, at 10.
638 *Ibid*. at 18.
639 *Ibid*. at 17.
640 Further Written Submission of Canada, CC-2008-1-7/Canada/EB, 14 July 2011.

but offered Canada that it would annex its communication to the annual report of the Compliance Committee to the CMP.[641]

c. *Croatia*

The question of implementation regarding Croatia is of special interest because it deals with the base line of Croatia's emission reduction target and it is the first case in which a country lodged an appeal to the CMP.

In August 2009, the ERT again raised this question of implementation as a result of the review of the initial report of Croatia. Croatia added 3.5 million t CO2 eq to its 1990 base year level. It did so following a COP decision of 2006. Decision 7/CP.12 states that

> Croatia, having invoked Article 4, paragraph 6, of the Convention, shall be allowed to add 3.5 Mt CO2 equivalent to its 1990 level of greenhouse gas emissions not controlled by the Montreal Protocol for the purpose of establishing the level of emissions for the base year for implementation of its commitments under Article 4, paragraph 2, of the Convention.[642]

According to the ERT, the calculation of Croatia's assigned amount through this adding of 3.5 million t CO2 eq is, inter alia, not in accordance with Article 3(7) and (8) Kyoto Protocol and the modalities for accounting assigned amounts under Article 7(4) of the Kyoto Protocol.[643] The ERT states that it considers that the calculation of Croatia's assigned amount is an unresolved problem and therefore a question of implementation.[644]

In November 2009, the EB issued its final decision and decided that Croatia is not in compliance with Articles 3(7) and (8) and 7(4) of the Kyoto Protocol.[645] It applied the same consequences as in the other cases.[646] One of the central reasons for the decision is that the EB does not consider the COP decision 7/CP.12, taken under the UN Framework Convention on Climate Change, binding for the Kyoto regime.[647]

In January 2010, Croatia appealed the decision to the CMP under section XI(2) of the Compliance Procedures. In accordance with these rules the CMP considered the appeal at its next session at CMP 6 in Cancún, Mexico in December 2010. The CMP could not resolve the issue but initiated its consideration and put it on the agenda for the seventh session of the CMP.[648] It noted the importance of reaching

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641 Information Note, Ref: CC-2008-1/Canada/EB, 1 August 2008.

642 Decision 7/CP.12, FCCC/CP/2006/5/Add.1, 17 November 2006.

643 Report of the review of the initial report of Croatia, FCCC/IRR/2008/HRV, 26 August 2009, at 157.

644 *Ibid.*

645 Final Decision, CC-2009-1-8/Croatia/EB, 26 November 2009, at 5 and 6.

646 *Ibid.*

647 *Ibid*. at 3c.

648 Report of the Conference of Parties serving as the meeting of the Parties to the Kyoto Protocol on its sixth session, held in Cancun from 29 November to 10 December 2010, FCCC/KP/CMP/2010/12, 15 March 2011, at 67.

a common understanding, the considerable importance attached by Parties to these issues, and the limited time available.[649] The CMP requested the secretariat

> to prepare a technical paper outlining the procedural requirements and the scope and content of applicable law for the consideration of appeals under decision 27/CMP.1 and other relevant CMP decisions, as well as the approach taken by bodies constituted under other multilateral environmental agreements and other international bodies in relation to provisions for the consideration of denial of due process.[650]

COP 17/CMP 7 is scheduled for November/December 2011 in Durban, South Africa. It remains to be seen how the CMP further handles its first appeal.

E. *Evaluation*

The compliance procedure established under the Kyoto Protocol has several features that make it a unique example of a compliance procedure under an MEA with a universal scope. Such featuresinter alia, include the division into a facilitative and an enforcement branch, a non-state trigger, transparency of the procedure and decisions, and NGO participation as amici curiae. Not all of these tools have been used in practice as yet. For example, the facilitative branch has so far only dealt with one case, which it deemed inadmissible. Furthermore, there has been no NGO participation so far. The Kyoto compliance mechanism is a rather young institution and, thus, the following evaluation is based on only a short period of practical experience.

1. *Function and Scope of Review*

The Kyoto compliance mechanism is designed to ensure the functioning and the credibility of the Kyoto Protocol and, more specifically, its three core instruments: emissions trading, joint implementation, and the clean development mechanism. There is no formal rule contained in the Kyoto mechanism that regulates whether and how the branches should apply other international law. All of the cases the enforcement branch has dealt with so far have been triggered through the ERT, which identified shortcomings in the national implementation procedures in reviewing the initial country reports. All of these questions of implementation were highly technical and Kyoto specific. They did not involve actual clashes with other national legislation or with competing international legal regimes. In the case regarding Croatia, the question arose as to whether a decision taken under the UNFCCC regime is binding under the Kyoto regime but the final decision in this regard is pending on appeal before the CMP. It remains to be seen how this issue is resolved and especially how the Vienna Convention can contribute to the basis for the decision.

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649 *Ibid.*
650 *Ibid.* at 68.

A noteworthy characteristic of the compliance mechanism is that the Kyoto compliance committee decides itself on the compliance or non-compliance of a party. This is a significant strength compared to, for example, the scope of power of the compliance committee established under the Aarhus Convention, which only makes recommendations to the MOP, and where the MOP finally decides on a party's state of compliance.[651] This uniquely broad scope of the decision-making power of the Kyoto compliance committee was made possible because of the specific Kyoto obligations. Only Annex-I parties made emission reduction commitments and only they can be exposed to a compliance procedure before the enforcement branch. If the final decision on compliance were in the hands of the CMP, non-Annex I parties could significantly control compliance decisions, although they would not be subject to the same obligations. This was not acceptable for many Annex I parties and thus the compromise was that the EB may take final decisions on compliance with a double majority requirement of both Annex I and non-Annex I members.[652]

The range and kind of "consequences" the Compliance Committee shall apply are unprecedented among compliance mechanisms established under universal international MEAs.[653] It is important to stress that the "consequences" the EB shall apply are not of a punitive nature but aim to ensure environmental integrity through restoration of compliance and to give an incentive to comply.[654] In particular the power of the EB to order that a number of tonnes equal to 1.3 times the amount in tonnes of excess emissions may be deducted from a party's assigned amount for the second commitment period seems to be a strong incentive to ensure that emission reduction targets are actually reached. One has to bear in mind, though, that this tool can only be effective if there is a second commitment period and parties are in a position to calculate their new emission reduction targets including this extra reduction.[655]

A related shortcoming of the compliance procedure is that the emission reduction obligations under Article 3(1) KP will only be subject to compliance review with effect from the second half of 2015. Consequently, neither branch could be activated to review Canada's compliance, although it declared early on that it is not planning to meet its emission reduction targets.[656] To be able to act against this kind of breach of the Kyoto obligations is vital for the functioning and the credibility of the Kyoto regime.

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[651] See also Brunnée, "The Kyoto Protocol: Testing Ground for Compliance Theories?" (2003) 63 *ZaöRV*, 255, 275 et seq.; Oberthür/Lefeber, "Holding Countries to Account: The Kyoto Protocol's Compliance System Revisited after four Years of Experience" (2010) 1 *Climate Law*, 133, 140.

[652] See Brunnée, *ibid.* at 276.

[653] See *ibid.* at 273 et seq.

[654] Compliance Procedures at V(6); see also Brunnée, "The Kyoto Protocol: Testing Ground for Compliance Theories?" (2003) 63 *ZaöRV*, 255, 274.

[655] See Doelle, "Early Experience with the Kyoto Compliance System: Possible Lessons for MEA Compliance System Design" (2010) 1 *Climate Law*, 237, 239.

[656] *Ibid.* at 255.

2. *Institutional Arrangements*

The work of the ERT has so far proven crucial for the Kyoto compliance mechanism. The ERT reviews national reports in a very detailed manner and is transparent in giving reasons for its decision to refer a question of implementation to the compliance committee. All reports are publicly available and can be scrutinized by other countries and the interested public. The fact that the ERT actually did trigger the non-compliance procedure on six occasions may have a deterrent effect on other countries. In fact, research into the ERT process showed that parties generally tried hard to resolve questions of implementation already during the ERT review procedure.[657]

The facilitative branch is not functioning in the manner originally envisaged. This is also due to the rather late entry into force of the Kyoto Protocol in 2005 and consequently the late start to the Committee's work. By the time it began work in 2006, there were only two years left before the start of the first commitment period and thus not much time to assist parties in implementing their obligations under the Kyoto Protocol.[658] Furthermore, much of the facilitative work is already done during the ERT review procedure.[659] It remains to be seen if states adopt a post-Kyoto Protocol at all and if in such a second period of obligations the facilitative branch can contribute more effectively to ensuring compliance.

The work of the enforcement branch is at the heart of the Kyoto compliance mechanism. So far the enforcement branch has dealt with six questions of implementation, three of which are still pending. It dealt with all questions of implementation in a well-reasoned and timely manner. In each case it invited several experts, including two from the ERT that referred the case to the compliance committee. Hearings were held in public and the core documents of the procedure, including preliminary findings, and final decisions are publicly available on the website of the Kyoto Protocol. The EB made use of its tools to bring parties back into compliance and decided by consensus all but one decision to date. Furthermore, all questions of implementation were dealt with within the strict timelines of the expedited procedure.

As regards the members of the Compliance Committee, two crucial theoretical characteristics may be highlighted: their independence and fair composition. Members of the Compliance Committee are elected by the CMP, have to prove their expertise in Kyoto-relevant subjects, and shall serve in their personal capacity and thus independent of their nationalities. This is underlined through an oath that each member of the Compliance Committee has to take. In practice, however, members of the Compliance Committee of the Kyoto Protocol are actually not as indepen-

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657 Oberthür/Lefeber, "Holding Countries to Account: The Kyoto Protocol's Compliance System Revisited after four Years of Experience" (2010) 1 *Climate Law*, 133, 155.

658 Doelle, "Early Experience with the Kyoto Compliance System: Possible Lessons for MEA Compliance System Design" (2010) 1 *Climate Law*, 237, 238.

659 See Doelle, *ibid.* at 241.

dent as, for example, members of the compliance committee established under the Aarhus Convention. Parties nominated and the CMP elected several members who are still in the service of governments. Some of the members of the Committee are even former or current members of delegations to the meetings of the CMP.[660] In contrast to the practice at the Aarhus Compliance Committee, there is also no equal and neutral reimbursement of travelling and subsistence costs for the members of the Kyoto Compliance Committee. For example, members from Annex I countries are reimbursed for their travel expenses by their respective governments, even if they are not working for the government, or bear their own costs.[661] This means that the Committee is not yet actually independent of the CMP and it might be difficult for civil servants, for example, to actually serve the Committee in their personal capacity. According to *Lefeber*, this is reflected in the politicized nature of crucial parts of the deliberations.[662]

At the same time it is ensured that the Committee is composed equally of members from northern/southern, developing/developed countries. The election of alternate members ensures the functionality of the Compliance Committee, especially considering the tight time limits for the procedure and the high quorum required for decision-making. *Lefeber* assesses the role of alternate members in the Committee positively so far but also highlights that the large number of participants in the debates poses a challenge.[663]

3. *Access*

The ERT trigger is vital for the functioning of the compliance mechanism. So far no other trigger (self trigger or state-to-state trigger) has been successfully used to start the compliance control procedure. The self trigger has not been used at all and the state-to-state trigger was used once before the FB, but the question of implementation was found inadmissible. On the other hand it is important to note that the ERT has never triggered a procedure before the FB, although there has been evidence of many concerns within the jurisdiction of the FB.[664]

Although NGOs have access to the hearings and an official amici curiae status, as yet they have neither directly participated in a hearing before the enforcement branch, nor submitted an amicus curiae statement. However, they might have

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[660] Lefeber, "The Practice of the Compliance Committee under the Kyoto Protocol to the United Nations Framework Convention on Climate Change (2006–2007)" in Treves/Pineschi et al. (eds.), *Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements* (2009), 303, 306.

[661] *Ibid.* at 307. *Lefeber* discusses the enjoyment of privileges and immunities as another unresolved problem related to the independence of the members of the CC under the Kyoto Protocol. *Ibid.*

[662] *Ibid.* at 306, 316.

[663] *Ibid.* at 306.

[664] Doelle, "Early Experience with the Kyoto Compliance System: Possible Lessons for MEA Compliance System Design" (2010) 1 *Climate Law*, 237, 255.

followed the hearings through the webcast and not deemed it necessary to submit additional information.

To date, the EB has sought expert advice in all cases, including from members of the ERTs which brought the cases before the Committee.[665] Other experts were drawn from the UNFCCC's roster of experts.[666] It seems reasonable to also hear experts from the ERT to ensure that the question of implementation is actually tackled at its core as identified by the ERT.

Doelle, who followed the hearings of the enforcement branch in Bonn as well as through the webcast, notes that it is difficult to follow the discussions through the webcast without the actual documents that are the subject of the debate.[667] *Lefeber* highlights the value of the advanced transparency that the webcast brings, especially bearing in mind the politicized character of a significant part of the deliberations in the Committee and its branches.[668]

Both *Doelle* and *Lefeber*, the latter is currently a member of the enforcement branch, state that the advanced transparency of the procedures before the branches might be negatively affected through the use of electronic means for the elaboration and adoption of decisions.[669] Considering the time limitations on the procedures, it seems inevitable that electronic deliberations should replace face-to-face deliberations to a certain degree.[670] Nevertheless, the advantages of face-to-face deliberations for an in-depth exchange of arguments in a direct manner and the related quality of the decision-making process should be borne in mind. *Oberthür* and *Lefeber*, both currently members of the enforcement branch, highlight the fact that the substantial parts of a decision have generally been drafted and discussed in face-to-face meetings.[671]

4. *Questions of Implementation*

All six questions of implementation dealt with by the enforcement branch to date are documented in a transparent manner on the website of the Kyoto Protocol. The procedures against Greece and Bulgaria can be considered as blueprint procedures.

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[665] See also Oberthür/Lefeber, "Holding Countries to Account: The Kyoto Protocol's Compliance System Revisited after four Years of Experience" (2010) 1 *Climate Law*, 133, 144.

[666] *Ibid*. at 153.

[667] Doelle, "Early Experience with the Kyoto Compliance System: Possible Lessons for MEA Compliance System Design" (2010) 1 *Climate Law*, 237, 258.

[668] Lefeber, "The Practice of the Compliance Committee under the Kyoto Protocol to the United Nations Framework Convention on Climate Change (2006–2007)" in Treves/Pineschi et al. (eds.), *Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements* (2009), 303, 305.

[669] *Ibid*. at 305; Doelle, "Early Experience with the Kyoto Compliance System: Possible Lessons for MEA Compliance System Design" (2010) 1 *Climate Law*, 237, 258.

[670] See also Oberthür/Lefeber, "Holding Countries to Account: The Kyoto Protocol's Compliance System Revisited after four Years of Experience" (2010) 1 *Climate Law*, 133, 145.

[671] *Ibid*. at 146.

The EB found both countries temporarily in non-compliance with their commitments under the Kyoto Protocol and applied the relevant consequences. After submitting (revised) compliance plans both countries came back into compliance at the end of the compliance procedure. The procedure regarding compliance of Greece only lasted from December 2007 until October 2008. The EB and Greece too acted in a timely and responsive manner throughout the procedure. All hearings were open to the public.

The compliance procedure regarding Canada focused on Canada's national registry and was pending at the EB only for three month. Before issuing a preliminary report, the EB decided not to proceed further against Canada since sufficient expert advice had shown that the national registry had in the meantime fulfilled the requirements of the Kyoto Protocol. With respect to Canada, it should be noted that this compliance procedure did not touch on the actual problem that Canada poses to the credibility of the Kyoto regime.[672] Canada declared early on that it will not meet its emission reduction targets set under the Kyoto Protocol. However, this question of implementation cannot be addressed by either branch of the Committee before 2015.

The question of implementation regarding Croatia is currently pending on appeal before the CMP. It will be interesting to see how the CMP deals with the case and how the legal issue of concurring decisions under the UNFCCC and the Kyoto Protocol will be resolved. The questions of implementation regarding Romania and Ukraine are still pending before the EB.

F. *Conclusions and Recommendations*

The compliance mechanism established under the Kyoto Protocol has several strong features that are unprecedented among compliance review procedures under universal international MEAs.[673] The compliance committee began work in 2006 and thus the period of practical experience is too short to draw reliable conclusions and make profound recommendations. Nevertheless, some strengths and weaknesses can be identified and possible improvements taken into consideration. All in all, the practical record shows a positive start to the work of the compliance committee.[674]

A core strength of the compliance mechanism is the non-state trigger of the procedure via the ERTs and the secretariat. All six questions of implementation discussed

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[672] *Ibid*. at 155.

[673] *Ibid*. at 134, 157 et seq.

[674] This view is shared, for example, by Lefeber, "The Practice of the Compliance Committee under the Kyoto Protocol to the United Nations Framework Convention on Climate Change (2006–2007)" in Treves/Pineschi et al. (eds.), *Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements* (2009), 303, 317; Doelle, "Early Experience with the Kyoto Compliance System: Possible Lessons for MEA Compliance System Design" (2010) 1 *Climate Law*, 237, 255, 259; Oberthür/Lefeber, "Holding Countries to Account: The Kyoto Protocol's Compliance System Revisited after four Years of Experience" (2010) 1 *Climate Law*, 133, 154.

on the merits were brought before the Committee through the ERT's initiative. The work of the ERTs in general is crucial for the functioning of the review mechanism especially bearing in mind the highly technical questions that arise in implementing the Kyoto obligations. The dual setup of a facilitative and an enforcement branch is another advantage of the compliance mechanism, although the facilitative branch has not yet been used as originally envisaged. However, facilitative work could be provided by the ERTs due to the deterrent effect of the EB procedure. So far the enforcement branch has dealt with all questions of implementation in a transparent, well-reasoned, and timely manner. It also seems likely that the cooperative spirit between parties concerned and the branch can largely be maintained.

The compliance procedure under the Kyoto Protocol is, after that established under the Aarhus Convention, the most transparent and publicly accessible international compliance review procedure. All core documents are available on the Kyoto Protocol's website, all hearings held so far have been public and the hearings can be followed via a webcast. Surprisingly, although environmental NGOs have access to the compliance procedure as amici curiae, no environmental NGO has as yet attended a hearing nor submitted an amicus curiae statement. However, they might have followed the webcasts and deemed it unnecessary to submit additional information to the procedure.

The main weakness of the Kyoto compliance mechanism is that the Committee has no timely way of addressing a case like the Canadian case where the Canadian government openly declared early on that it is not planning to reach its emission reduction targets under Article 3(1) of the Kyoto Protocol. The reduction targets are at the heart of the Kyoto obligations and crucial for the success of the whole legal regime established to combat climate change. Another disadvantage is that the facilitative branch has received only one case which was not dealt with on the merits. Thus, there has been opportunity ti date to make use of the special features of facilitative support that are offered by this branch.

At the time of writing it is not clear if parties to the Kyoto Protocol can agree on a post-Kyoto regime at all. The established compliance mechanism is expected to have work for another couple of years from cases arising out of the first commitment period. Furthermore, it might be useful in overseeing compliance with post-Kyoto obligations even if they do not resemble the ones agreed upon under the Kyoto Protocol. First experience with the Kyoto regime has shown that the combination of emission reduction targets and flexibility mechanisms can be a good mixture of instruments for significantly reducing greenhouse gas emissions, if the reduction targets are actually meaningful and if they are complied with. The following recommendations are based on the past experience and deemed worth considering for a post-Kyoto compliance mechanism, ideally responsible for reviewing compliance with Kyoto-like but strengthened obligations. Even if the post-Kyoto regime differs significantly from the Kyoto Protocol's obligations, the compliance committee should

continue to review compliance with the new obligations and the following recommendations might equally be instructive for improving the compliance procedure.

The role of environmental NGOs should be further strengthened. It might be worthwhile considering a public trigger similar to the one established under the Aarhus Convention. Alternatively, a trigger function could be given to a certain number of accredited environmental NGOs.[675] Experience with the Kyoto compliance mechanism, as well as with other judicial or quasi-judicial procedures responsible for enforcement of international environmental law, has shown that the self-trigger and the party-to-party trigger are hardly ever used. The ERT as a non-state actor can and does, through the secretariat, initiate compliance procedures. However, since there is evidence that not all cases in which compliance issues emerged were actually referred to the compliance committee, it is recommended that another non-state trigger for the compliance procedure is established in order to ensure that all questions of implementation can actually be addressed by the relevant branches of the Committee. This might also ensure that the facilitative branch receives more cases than previously.

Furthermore, environmental NGOs could support the reporting process and submit their own reports to the ERTs or directly to the compliance committee. Moreover, it might be an option to allow the branches or the Committee as a whole to initiate compliance procedures themselves.[676] A similar proposal is that the facilitative branch conducts periodic consultations on its own initiative.[677]

With respect to the transparency of the proceedings, consideration should be given to making e-mail communication available to the public as a substitute for face-to-face discussions that would have been accessible for the public. Furthermore, working documents crucial for following the hearings through the webcast might be made available to registered observers.[678] As regards the quality of the decisions of the compliance committee, it is important to stress that the branches should continue to provide reasons for their decisions in a transparent manner. Finally, the toolbox of consequences that can be applied by the enforcement branch could be further strengthened through financial penalties that feed into an international compliance fund.[679]

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675 See also Doelle, "Early Experience with the Kyoto Compliance System: Possible Lessons for MEA Compliance System Design" (2010) 1 *Climate Law*, 237, 256.

676 See also *ibid*.

677 *Ibid*.

678 See also *ibid*. at 258.

679 See also *ibid*. at 257; Yang, "CLI Recommendation No. 14", Weston, Burns H./Bach, Tracy (eds.) Vermont Law School; The University of Iowa, *CLI Study: Recalibrating the Law of Humans with the Laws of Nature – Climate Change, Human Rights, and Intergenerational Justice* (2009), 10.

IV. A New World Environment Court

Since the late 1980s legal scholars have discussed the idea of a new international court for the environment.[680] This subchapter first notes the current lack of political will to establish such a new adjudicative institution. Second, it briefly summarizes the main initiatives advocating a new international court for the environment. In the third part, it discusses the need for an international environmental court and some of the main arguments for and against it. Fourthly, based on the findings of this study, the core characteristics of a new international court for the environment are evaluated and the author's own suggestions developed. Conclusions and recommendations are proposed in part five.

A. *Lack of Political Will*

Currently, UN entities and states governments are preparing for the Rio+20 United Nations Conference on Sustainable Development taking place from 4–6 June 2012 in Rio de Janeiro. One of the two key themes of the conference is the institutional framework for sustainable development.[681] As a part of this theme, the strengthening of the international environmental governance system is being discussed.[682] Among the suggestions for better international environmental governance are, for example, the strengthening of the science/policy interface and encouraging synergies between compatible MEAs while accepting the autonomy of the COPs.[683]

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[680] For an overview of different proposals see Hinde, "The International Environmental Court: Its Broad Jurisdiction as a Possible Fatal Flaw" (2003) 32 *Hofstra L. Rev*., 727, 729 et seq.; McCallion, "International Environmental Justice: Rights and Remedies" (2002) 26 *Hastings Int'l & Comp. L. Rev*., 427, 436 et seq. who adds a draft of a treaty for the establishment of an international court of the environment to his article; McCallion/Sharma, "Environmental Justice Without Borders: The Need for an International Court of the Environment to Protect Fundamental Environmental Rights" (2000) 32 *George Wash J Int Law Econ*, 351, 361, 364 et seq.; Kalas, "International Environmental Dispute Resolution and the Need for Access by Non-State Entities" (2001) 12 *Colo. J. Int'l Envtl. L. & Pol.*, 191, 232 et seq., 243; Chambers/Green, "Introduction: Toward an Effective Framework for Sustainable Development" in Chambers/Green (eds.), *Reforming International Environmental Governance: From Institutional Limits to Innovative Reforms* (2005), 1, 8 et seq.; Avgerinopoulou, *The Role of the International Judiciary in the Settlement of Environmental Disputes and Alternative Proposals for Strengthening International Environmental Adjudication*, Yale Center for Environmental Law and Policy (2003), 15 et seq.; Koch/Mielke, "Globalisierung des Umweltrechts" (2009) *ZUR*, 403, 408. For an in depth discussion of the pros and cons of an international environmental court see Hey, *Reflections on an International Environmental Court* (2000); Murphy, "Does the World Need a New International Environmental Court?" (2000) 32 *George Wash J Int Law Econ*, 333.

[681] For the current state of debate see http://www.uncsd2012.org/rio20/index.php?menu=63.

[682] See, for example, the Nairobi-Helsinki Outcome issued by the Consultative Group of Ministers or High-level Representatives on International Environmental Governance, 23 November 2010; available at http://www.uncsd2012.org/rio20/content/documents/NairobiHelsinkifinaloutcome.pdf.

[683] *Ibid*. at 7.

As regards institutional reform, several ways of reforming UNEP are discussed.[684] At the second Preparatory Committee Meeting on 7 and 8 March 2011, the European Union and its Member States strongly supported the upgrading of the UNEP to a specialized UN agency with a strengthened mandate and adequate financial support, operating on an equal footing with other UN specialized agencies.[685] These proposals do not include a new international court for the adjudication of environmental matters. Adjudication of environmental matters and enhanced involvement of environmental NGOs in enforcing (international) environmental law in general are also not part of the reform debate.

The idea of establishing a new international environmental court was presented at the Rio conference in 1992 but not reflected in the outcome documents.[686] International policy statements on international adjudication in environmental matters and the role of ENGOs within such enforcement procedures have already been analyzed in Chapter 1.II. So far no official statement of political support for an international environmental court has been issued by any state or an UN entity. However, some countries expressed their general interest in the idea of an international environmental court in response to a lobbying campaign by the International Court of the Environment Foundation in 1998.[687]

B. *Initiatives for an International Environmental Court*

Several fora and organizations advocate the establishment of an international environmental court. The main initiatives are presented in brief below.[688]

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[684] See Co-Chairs' summary on Second Preparatory Committee Meeting United Nations Conference on Sustainable Development, 7–8 March 2011, Session 3, available at http://www.uncsd2012.org/rio20/content/documents/Co-Chairs%20Summary%20of%20PrepCom%202.pdf.

[685] Statement on behalf of the European Union and its Member States at Second Preparatory Committee Meeting United Nations Conference on Sustainable Development, 8 March 2011, page 3, available at http://www.uncsd2012.org/rio20/content/documents/eu-inst-frame.pdf.

[686] See Draft Statute of the International Environmental Agency and the International Court of the Environment presented at the UNCED in Rio de Janeiro, June 1992, presented by representatives of what became the ICEF shortly after the Rio Summit, see http://www.icef-court.org/site/attachments/article/50/Draft%20Statute%20of%20the%20International%20Environmental%20Agency%20and%20the%20International%20Court%20of%20the%20Environment%20p.pdf.

[687] See list of countries at http://www.icef-court.org/site/index.php?option=com_content&view=article&id=52&Itemid=95.

[688] The United Nations Compensation Commission (UNCC) has also been discussed as a model for an IEC but this idea is not further outlined here, because it appears too limited a concept to deal with environmental case law as envisaged here. For more information on the UNCC in this context see Hinde, "The International Environmental Court: Its Broad Jurisdiction as a Possible Fatal Flaw" (2003) 32 *Hofstra L. Rev.*, 727, 733 et seq.; Shelton, *Human Rights and Environment: Past, Present and Future Linkages and the Value of a Declaration*, High Level Experts Meeting on the New Future of Human Rights and the Environment: Moving the Global Agenda Forward, Nairobi, 30 Nov–1 Dec 2009, Background Paper – Draft (2009), 57; the same applies for the UN Security Council, see *ibid.* and UNU/IAS Report, *International Sustainable Development Governance*, United Nations University Institute of Advanced Studies (UNU/IAS) (ed.) Final Report (2002), 41 et seq., 47.

1. *International Court of the Environment Foundation* (*ICEF*)

In April 1989, the National Academy of Lincei, Rome, organized an international 'Congress on a More Efficient International Law on the Environment and Setting up an International Court for the Environment within the United Nations'. The congress was coordinated by the Italian judge *Amedeo Postiglione*[689] who, in 1990, published an essay on the congress and its main outcomes: participants' support for the creation of the fundamental right to a healthy environment, an international environmental agency, and an environmental court at UN level.[690]

In 1992 the International Court of the Environment Foundation (ICEF) was registered in Rome as a non-profit foundation. It is accredited with the UN ECOSOC and the United Nations Food and Agriculture Organization (FAO), as well as with the Council of Europe, and its representatives attended the 1992 UNCED and the 2002 Johannesburg Summit to advocate a new international environmental court.[691] Since 1989, the ICEF has organized a number of conferences and events to further elaborate and advocate the idea of an international environmental court. The last ICEF International Conference took place in Rome in May 2010 and focused on Global Environmental Governance.[692]

The ICEF's Draft Statute of the International Environmental Agency and the International Court of the Environment, which was also presented at the 1992 UNCED in Rio de Janeiro, envisages the establishment of an International Court of the Environment as a permanent institution.[693] It formulates several key characteristics of the court with regard to its organization, functions, procedures, standing, and remedies. The court shall be composed of 15 independent judges, elected by the UN General Assembly and serving for a period of seven years. According to Article 10 of the Draft Statute, the functions of the court shall be:

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689 Judge at the Corte Suprema di Cassazione, Rome, Italy, and professor of environmental law at La Sapienza University of Rome.

690 Postiglione, "More Efficient International Law on the Environment and Setting up an International Court for the Environment within the United Nations" (1990) 20 *Environmental Law*, 321. See also Postiglione, *The Role of the Judiciary in the Implementation and Enforcement of Environmental Law* (2008), and Postiglione, *Global Environmental Governance* (2010). For an overview on the ICEF's initiative see also Kalas, "International Environmental Dispute Resolution and the Need for Access by Non-State Entities" (2001) 12 *Colo. J. Int'l Envtl. L. & Pol.*, 191, 232 et seq.

691 Vision, history, conferences and lobbying activities of the ICEF are published on its website at http://www.icef-court.org/.

692 The final recommendations include the creation of an international court for the environment, see http://www.icef-court.org/site/attachments/article/49/Final%20Recommendations.pdf.

693 Article 10 of the Draft Statute of the International Environmental Agency and the International Court of the Environment; available at http://www.icef-court.org/. See also Kalas, "International Environmental Dispute Resolution and the Need for Access by Non-State Entities" (2001) 12 *Colo. J. Int'l Envtl. L. & Pol.*, 191, 232 et seq.

a) to protect the environment as a fundamental human right in the name of the International Community;
b) to decide any international environmental disputes involving the responsibility of States to the International Community which has not been settled through conciliation or arbitration within a period of 18 months;
c) to decide any disputes concerning environmental damage, caused by private or public parties, including the State, where it is presumed that, due to its size, characteristics and kind, this damage affects interests that are fundamental for safeguarding and protecting the human environment on earth;
d) to adopt urgent and precautionary measures when any environmental disaster concerning the International Community is involved;
e) to provide, at the request of the organs of the United Nations and other members of the International Community, advisory opinions on important questions regarding the environment on a global level;
f) to arbitrate, upon request, without prejudice to its judicial role;
g) to carry out, upon request, investigations and inspections with the assistance of independent technical and scientific bodies when there is environmental risk or damage and, ex officio, when considered necessary and urgent.[694]

The court may also issue preliminary rulings at the request of a national court. As regards the procedure, the Draft Statute provides, inter alia, for public hearings and reasoned judgments. Individuals, NGOs, states, supranational organizations, and IGOs under the UN as well as individual organs of the UN may appear before the court. Legal action by an individual or NGO presupposes prior recourse to national courts and the international importance of the question raised. As regards the human rights claim, the Draft Statute states that

> [i]ndividuals or associations may bring an action for the violation of the human right to the environment on the grounds that they have been prevented from gaining access to information, from participating in environmental decision-making processes or from taking legal action or for serious environmental risk, harm or damage of international importance caused by any party whatsoever in violation of international law.

Remedies include interlocutory or perpetual injunctions, as well as restorative or compensatory damages which may feed into a World Environment Fund. The UN Security Council shall oversee the enforcement of the judgments.

The Draft Statute was further developed into a 1999 Draft Treaty for the Establishment of an International Court for the Environment (Draft Treaty) and discussed at the George Washington University Law School Conference on International Environmental Dispute Resolution in April 1999, which was sponsored by the ICEF.[695]

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694 Draft Statute, *ibid*.

695 Kalas, "International Environmental Dispute Resolution and the Need for Access by Non-State Entities" (2001) 12 *Colo. J. Int'l Envtl. L. & Pol.*, 191, 234 et seq. For a summary report of the conference see George Washington University Law School, "Conference on International Environmental Dispute Resolutions" (1999–2000) *George Wash J Int Law Econ*, 325.

At the ICEF conference, there was also considerable support for the idea of establishing the PCA as an (interim) forum for international environmental disputes.[696]

2. *International Court for the Environment (ICE) Coalition*

The ICE Coalition is a UK-based initiative advocating an international court for the environment led by *Stephen Hockman QC*, who has issued several policy statements in the name of the ICE Coalition.[697] The core elements of an international environmental court as advocated by the ICE Coalition are: an international convention on the right to a healthy environment; direct access by NGOs, private parties, and states; transparency in proceedings; a scientific body to assess technical issues; and a mechanism to avoid forum shopping.[698] The ICE Coalition explicitly refers to the similar proposal made by the ICEF.

3. *UNU/IAS Report on International Sustainable Development Governance*

The 2002 final UNU/IAS Report on International Sustainable Development Governance prepared for the Johannesburg World Summit on Sustainable Development discusses the proposal for a World Environment Court (WEC) as a compulsory dispute resolution mechanism. As a key argument in favor of a WEC, the authors highlight that states might be more willing to grant compulsory jurisdiction to a specialized rather than to a universal court.[699] Furthermore, such a WEC might be more acceptable as a judicial branch of a new World Environment Organization, similar to the WTO institutional setup. The political body of the new WEO could exercise control over the WEC, as the WTO dispute settlement body does with regard to the WTO panels and Appellate Body. Alternatively, a new WEC could be part of any other structure coordinating the existing MEAs.[700]

Among the characteristics of a new WEC, the authors highlight independence, expertise, and balanced geographic representation of its members, enhanced legitimacy through the access of non-state actors, judicial inter-institutional dialogue, maybe including the right of national courts to request preliminary rulings, legally binding effects of WEC judgments (either directly or through a WEO dispute

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[696] Kalas, *ibid*. at 235. See also Rest, "The Indispensability of an International Environmental Court" (1998) 7 *RECIEL*, 63; Rest, "Enhanced Implementation of the Biological Diversity Convention by Judicial Control" (1999) 29 *Environ Pol Law*, 32; Vespa, "An Alternative to an International Environmental Court?" (2003) 2 *Law & Prac. Int'l Cts. & Tribunals*, 295, 331. The PCA has been discussed in more detail above in Chapter 4.II.A. Another initiative for international environmental dispute resolution based on arbitration and conciliation is the ICEAC which described in brief in Chapter 4.II.C.

[697] See the ICE Coalition's website at http://www.environmentcourt.com/.

[698] Statement by ICE Coalition / Stephen Hockman, "The Case for an International Court for the Environment", September 2010.

[699] UNU/IAS Report, *International Sustainable Development Governance*, United Nations University Institute of Advanced Studies (UNU/IAS) (ed.) Final Report (2002), 40.

[700] *Ibid.*

settlement body), and remedies such as the cessation of illegal acts and reparation for damage caused, as well as imprisonment and fines if environmental crimes were to fall under the WEC's jurisdiction.[701] Fines, for example, could be paid into a fund that finances MEA implementation measures in developing countries. A multilateral body would monitor compliance with the WEC judgments. In cases of non-compliance, the WEC could be responsible for determining countermeasures such as the suspension of voting rights or even trade sanctions in accordance with WTO law.[702] As regards access of non-state actors, the authors underline that the nature of such access needs further consideration.[703] They argue in favor of establishing some form of filter to prevent frivolous, publicity related, or politically motivated cases.[704]

The authors formulate several key issues and proposals for improving effectiveness between institutions of the three pillars of sustainable development.[705] With regard to dispute settlement and enforcement, the authors conclude that the current system of institutional monitoring has been "relatively successful in terms of achieving compliance and avoiding disputes".[706] Nevertheless, the authors highlight the danger of a two-class society of international norms: those that can be judicially enforced, such as WTO norms, and those that cannot.[707] Thus they argue in favor of a judicial branch of international environmental law that would complement existing monitoring systems. The authors of the UNU/IAS report can imagine two ways of complementing existing compliance control procedures with judicial review: either extending current compliance procedures through a second stage of third-party adjudication or establishing a distinct process of judicial settlement which comes into play when compliance procedures failed to resolve a case.[708]

4. *Climate Legacy Initiative of Vermont Law School*

The Climate Legacy Initiative (CLI) was an externally funded project conducted by the Vermont Law School's Environmental Law Center and the University of Iowa's Center for Human Rights in 2007–2009. The purpose of the project was to research and promote legal doctrines, principles, and rules to safeguard present and future generations from harms resulting from global climate change.[709] In April 2009, the CLI issued its final policy paper 'Recalibrating the Law of Humans with the Laws of Nature: Climate Change, Human Rights, and Intergenerational Justice'.[710] Appendix B

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[701] *Ibid.* at 40 et seq.
[702] *Ibid.* at 41.
[703] *Ibid.*
[704] *Ibid.*
[705] *Ibid.* at 44 et seq.
[706] *Ibid.* at 46.
[707] *Ibid.* at 47.
[708] *Ibid.*
[709] See website of the project at http://www.vermontlaw.edu/Academics/Environmental_Law_Center/Institutes_and_Initiatives/Climate_Legacy_Initiative/CLI_Home.htm.
[710] *Ibid.*

of this final paper comprises sixteen concrete recommendations. Recommendation No. 16 proposes giving the ICJ compulsory advisory jurisdiction on matters concerning climate change and the needs and interests of future generations.[711]

The author of the recommendation first highlights that it is most likely not politically viable in the foreseeable future to amend the ICJ Statute to provide universal binding jurisdiction in contentious cases. Consequently, the author suggests an alternative strategy to broaden the scope of advisory jurisdiction of the ICJ. He recommends that the General Assembly establishes a "Judicial Organ" under its powers in Article 22 of the UN Charter. Such a Judicial Organ would be structurally independent and accessible for any state that wants to file a complaint against another state. The Judicial Organ then could refer the case to the ICJ for an advisory opinion.[712] The proposal does not include concrete criteria for justiciability other than matters concerning climate change and the needs and interests of future generations.

C. *The Case for a New World Environment Court*

Opponents of a new international court for environmental matters argue that there is no prima facie need for such a new international judicial organ. This involves the argument adduced under compliance theory that international environmental obligations are mostly not infringed because of lack of will but because of lack of capacity. Furthermore, critics state that a new specialized court would further contribute to enhanced forum shopping and fragmentation of international law and thereby finally undermine the benefits of an international legal order. Another argument against the establishment of a new international court for the environment is that it would constitute yet another international organ that itself lacks democratic legitimacy and strengthens the application of international law which is less democratically justified than the national law of democratically governed countries.

1. *Need for a World Environment Court*

The study has identified three categories of cases appropriate for international judicial control.[713] Those three categories encompass cases arising from (1) activities of states or non-state actors that cause or contribute to regional or global environmental problems such as, for example, global warming or ozone depletion, (2) activities of states or non-state actors that cause or contribute to local transboundary harm, and (3) activities of states or non-state actors that have a purely local detrimental effect on the environment but cannot be effectively tackled within national jurisdictions such as, for example, illegal resource exploitation or pollution caused by

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[711] Andrew L. Strauss, "CLI Recommendation No. 16", available at http://www.vermontlaw.edu/Documents/CLI%20Policy%20Paper/Rec_16%20-%20%28ICJ_Advisory_Jurisdiction%29.pdf.

[712] *Ibid*. at 3.

[713] See Chapter 2.IV.A.

transnational corporations,[714] presupposing that such activities potentially violate environmental treaty or customary international law. The central task of a new international court for environmental matters would be to adjudicate in cases that fall into one of those three categories on the basis of international environmental law. The interpretation of international environmental treaty and customary law and its application to concrete cases would be at the heart of the court's work.

None of the existing international judicial, arbitral, or compliance control procedures can fulfill this task. The review of regional and international judicial and quasi-judicial bodies revealed that the majority of the cases that fall through the cracks in national and European judicial control cannot be dealt with by the existing international judicial and quasi-judicial bodies.[715] The regional human rights courts and the compliance committees established under MEAs mainly hear cases that are initiated on the basis of an environmental protection interest. However, access to human rights courts requires a human rights violation, which is not a given in many cases in which international environmental law has been infringed. Access to compliance control procedures under MEAs is often limited as well, and consequences often differ significantly from those available through judicial organs. The Aarhus and Kyoto compliance committees are notable exceptions. However, even these compliance committees do not substitute for a world environment court but would rather complement it.[716]

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[714] *Ebbesson* establishes similar categories in the context of international environmental justice, Ebbesson, "Piercing the State Veil in Pursuit of Environmental Justice" in Ebbesson/Okowa (eds.), *Environmental Law and Justice in Context* (2009), 270, 270. For an overview of cases in which international corporations caused severe health and environmental damage see Greenpeace International, *Corporate Crimes*, Greenpeace International (ed.) (June 2002); see also Kalas, "International Environmental Dispute Resolution and the Need for Access by Non-State Entities" (2001) 12 *Colo. J. Int'l Envtl. L. & Pol.*, 191, 193 et seq. A case study on mining activities in Sierra Leone is provided by Schwartz, "Corporate Activities and Environmental Justice: Perspectives on Sierra Leone's Mining" in Ebbesson/Okowa (eds.), *Environmental Law and Justice in Context* (2009), 429. There is already an international arbitral procedure in place for the protection of foreign investment, see Chapter 4.II.B on the role of ICSID. However, it is also necessary to hold TNCs accountable for their obligations under international environmental law. *Oeter* highlights important criticism of international judicial, arbitral, and compliance review procedures with a view to states with a precary statehood; especially if – as in the case of ICSID – national administration and courts are completely bypassed by the international review body, Oeter, "Prekäre Staatlichkeit und die Grenzen internationaler Verrechtlichung" in Kreide/Niederberger (eds.), *Transnationale Verrechtlichung* (2008), 90, 103 et seq. His view that national administrations and courts should be primarily responsible for the enforcement of environmental law is shared here. Only if they are not able to appropriately protect the people and environment affected should there be access to the international review procedure in an international environmental court.

[715] See also Gillroy, "Adjudication Norms, Dispute Settlement Regimes and International Tribunals: The Status of Environmental Sustainability in International Jurisprudence" (2006) 42 *Stan. J. Int'l L.*, 1, 52; Kalas, "International Environmental Dispute Resolution and the Need for Access by Non-State Entities" (2001) 12 *Colo. J. Int'l Envtl. L. & Pol.*, 191, 207 et seq.

[716] See below at Chapter 4.IV.D.2.e. See also Ebbesson, "Piercing the State Veil in Pursuit of Environmental Justice" in Ebbesson/Okowa (eds.), *Environmental Law and Justice in Context* (2009), 270, 283.

Arbitration procedures have been found to be inadequate for dealing with public interests. The ICJ has jurisdiction over international environmental law, but it adjudicates only cases between states, and states hardly ever institute judicial proceedings against another state on the basis of an environmental protection interest. This finding is underlined by the fact that the environmental chamber of the ICJ has not dealt with a single case. The same applies to the ITLOS; environmental protection interests have mostly been invoked from the defendants' side and had little bearing on the decisions of the ITLOS. The scope of jurisdiction of the ITLOS is also limited to UNCLOS and the related instruments. The cases dealt with by the WTO dispute settlement bodies are based on alleged violations of WTO law. Environmental law only comes into play as a defense argument.

Thus, there are several groups of cases in which international environmental law is violated but which cannot be scrutinized by a judicial body at the national, European, or international level, due to mostly constraints in jurisdiction and access provisions.

Finally, opponents of an international environmental court argue that there is no need for such an institution because, as compliance theory has shown,[717] international environmental law is usually not breached because of lack of will but because of lack of capacity. Consequently, opponents argue, judicial control is unable to address the actual root of the problem and therefore ineffective in achieving compliance with international environmental law. However, the case law analyzed, including the questions of implementation dealt with by compliance committees under MEAs, has shown a variety of different reasons for non-compliance with international environmental law. Lack of capacity to properly comply with international environmental law only gave rise to some questions of implementation. Frequently, lack of (political) will or differing legal opinions on the exact content of an obligation under international environmental law result in a (potential) breach of international environmental law. For those instances, judicial control that is accessible for public interests is needed as a counterweight to the judicial protection of economic interests in a system of international governance for sustainable development. A WEC would not substitute for compliance committees but complement them by addressing those cases that cannot be appropriately dealt with within a compliance review procedure. Furthermore, like the compliance committees, the WEC should also be equipped with tools that enable it to appropriately respond to breaches of international environmental law based on lack of capacity.[718]

[717] See Chapter 2.IV.B.3.

[718] For concrete suggestions see below at Chapter 4.IV.C.5.

2. *Forum Shopping and Fragmentation*

Critics of an international environmental court argue that another specialized international court would lead to even more forum shopping and a weakening of the international legal order through further fragmentation of international law.[719] The review of international environmental case law has shown some examples of alleged "forum shopping". For example, the MOX plant case between Ireland and the UK was submitted to the ITLOS, an arbitral tribunal under UNCLOS, an arbitral tribunal under OSPAR, and the ECJ. The swordfish case between Chile and the European Union was submitted to the WTO by the EU and to the ITLOS by Chile, based on their respective trade and marine environmental protection interests.

The same factual event can result in the applicability of different regimes of international law. This is basically the same at the national level. It is a matter of attentive law-making and law application to ensure that a decision in a concrete case appropriately reflects the applicable law. The law itself needs to be sufficiently permeable for other, including competing, interests, and judges actually have to take into account such other interests in their decision-making. Scholars have argued that international regimes have underlying biases.[720] For example, they have argued that the WTO regime is trade biased. This is not unique to the international level; at the national level, different sectors of law also follow different underlying rationales. It is the central task of a judge to appropriately balance all legally protected interests applicable to a case in her decision-making.

The decisive difference is that WTO law can be enforced through the WTO dispute settlement system and that international environmental law cannot be enforced through a dispute settlement system. Trade interests are better protected than environmental interests. This is not in accordance with a system of global governance for sustainable development.

Forum shopping in a negative sense can be avoided through procedural rules that help in allocating a case to the appropriate judicial branch. Fragmentation is a result of specialized law-making and not as such negative. It seems possible that, for example hypothetically in the swordfish case already settled, the WTO dispute settlement bodies could render a decision based on WTO law, including Article XX GATT, and the ITLOS could decide the case based on UNCLOS, including its norms that protect economic interests, and both decisions could be compatible with each other. Judges at the WTO dispute settlement bodies and the ITLOS should communicate with each other and, insofar as the Vienna Convention does not provide

[719] Hey, *Reflections on an International Environmental Court* (2000), 9 et seq.

[720] Koskenniemi/Leino, "Fragmentation of International Law? Postmodern Anxieties" (2002) 15 *LJIL*, 553, 573, see also Shany, "No Longer a Weak Department of Power? Reflections on the Emergence of a New International Judiciary" (2009) 20 *EJIL*, 73, 81.

guidance on how to solve a conflict, develop methods and principles for generating coherent law application and law-making.

This presupposes that environmental protection interests safeguarded in international law have the same access to justice as trade liberalization interests protected in international law. Denying environmental interests the same quality of judicial protection as trade interests is not compatible with a vision of sustainable development. Fragmentation only becomes a problem if it is accompanied by different standards of protection and lack of cooperation between international courts.[721]

3. *Legitimacy*

Along the lines of the criticism relating to the lack of legitimacy of the WTO dispute settlement system,[722] it can be argued that a new international court for the environment would constitute yet another international organ that itself lacks democratic legitimacy and strengthens the application of international law which is less democratically justified than the national law of democratically governed countries. The suggestions for achieving enhanced legitimacy of the WTO dispute settlement system would equally apply to a new international environmental court and the body of law at the center of its jurisdiction.[723]

The participation of environmental NGOs would contribute positively to the legitimacy of an international environmental court.[724] It is also important, that the judges serving at the court are elected by a representative organ such as the group of all states forming the World Environment Organization or the UN General Assembly, and that they are actually independent of any government's influence. The expertise and fair geographical representation of judges should also be safeguarded. Furthermore, the principle of subsidiarity and relevant rules of procedure should ensure that conflicts are as far as possible solved within the national judiciaries.

D. *Evaluation and the Author's Own Proposals*

Based on the overall findings of this study, this subchapter discusses the benefits of and constraints on the core characteristics of a new international environmental court as proposed in the initiatives described, such as jurisdiction and applicable law, institutional arrangements, access, remedies, and control of compliance with judgments. The author's own proposals are drafted with regard to each of these elements.

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721 See Koskenniemi/Leino, *ibid.* at 574 on the importance of a non-economic counterweight to the WTO. See also Petersmann, "Constitutionalism and International Adjudication" (1999) *N.Y.U. J. Int'l L. & Pol.*, 753, 785 et seq. highlighting the importance of cooperation among international and national courts.

722 Chapter 4.I.B.5.a.

723 See Chapter 4.I.B.6.a.

724 See Chapter 1.IV.

1. *Jurisdiction and Applicable Law*

Members of the ICEF propose a rather broad scope of contentious as well as advisory jurisdiction. Contentious jurisdiction shall encompass the protection of "the environment as a fundamental human right in the name of the International Community", "any international environmental disputes involving the responsibility of States to the International Community" and, furthermore, "any disputes concerning environmental damage, caused by private or public parties, including the State, where [...] this damage affects interests that are fundamental for safeguarding and protecting the human environment on earth."[725] Organs of the United Nations and other members of the International Community may request advisory opinions on important questions regarding the environment on a global level. According to the proposal of the ICEF an ICE may also issue preliminary rulings at the request of a national court. The ICE Coalition also supports the human rights approach and argues in favor of establishing a justiciable right to a healthy environment. It seems to share the ideas of the proposal of the ICEF with regard to its jurisdiction. Authors of the UNU/IAS report argue in favor of a WEC with compulsory jurisdiction but limited to the field of international environmental law. A preliminary ruling procedure is also considered in this proposal. The vision of the CLI differs significantly from these suggestions; it advocates a compulsory advisory jurisdiction for the ICJ in matters concerning climate change and the needs and interests of future generations.

Taking into consideration the growth in various sectors of international law and their institutionalization, especially the WTO, these is a convincing argument for complementing this framework with a World Environment Organization and an associated World Environment Court under the auspices of the United Nations, as suggested by the authors of the UNU/IAS Report on International Sustainable Development Governance. Consequently, the jurisdiction of the WEC should be limited to international environmental law, thus mainly MEAs and customary international environmental law. Such a limited jurisdiction also makes it more likely that states would support the establishment of a WEC. As regards the application of other international law, the WEC could follow the approach developed in the *Reforumlated Gasoline* case at the WTO and as applied in the *Shrimp-Turtle* case by the Appellate Body. As proposed by the ICEF and the ICE Coalition, such a new court could hear contentious as well as advisory cases.

The analysis of ECJ enforcement of international environmental law has shown several strengths of the ECJ's jurisdiction that would also be appropriate for a WEC.[726] Accordingly, a WEC could encompass a procedure for direct actions, an infringement procedure, a preliminary ruling procedure, and a special enforcement procedure to

[725] Article 10 of the Draft Statute of the International Environmental Agency and the International Court of the Environment; available at http://www.icef-court.org/.

[726] See Chapter 2.III.

safeguard compliance with its judgments. Possible parties to a dispute before the WEC within those procedures are discussed in more detail under "Access" below.[727]

Some jurisdictional aspects of the proposals made by the ICEF and ICE Coalition are not convincing. The human rights approach as advocated by the ICEF and the ICE Coalition is a possible option but it also has limitations. Not all types of disputes that should be dealt with by a WEC as outlined above can be or should be framed as human rights cases.[728] Rather it is recommended here that states ratify the Aarhus Convention or a similar regional Convention on a global scale. The ICEF proposal defines the scope of jurisdiction using terms such as "international environmental dispute" and "environmental damage" of a certain scale. Such terms should be avoided because they are very vague and not necessary to define the scope of jurisdiction. Opponents of an international environmental court have argued that there is no such thing as an "environmental dispute". Equally, one can argue that there is no such thing as a "trade dispute" or an "investment dispute" or even a "law of the sea" dispute. Nevertheless, there are judicial organs adjudicating in such kinds of disputes. A case falls within the jurisdiction of a court if it is compatible with its geographical, personal, and subject-matter jurisdiction. The subject-matter jurisdiction of a WEC is sufficiently described by disputes arising under an MEA or customary international environmental law.

Finally, the decisions of a WEC should be legally binding, either directly, like those of the ICJ, or via a WEO dispute settlement body in an opt-out procedure similar to the one established under the WTO dispute settlement system.[729]

2. *Institutional Arrangements*

This subchapter discusses several alternative institutional solutions for an international environmental court.

a. *PCA and ICEAC*

The ICEF and ICE Coalition support, at least as an interim solution, the idea that the PCA should function as an international environmental court. The ICEAC has been established based on a similar idea. Both fora have been analyzed above and, despite some positive features the study came to the overall conclusion that arbitration (and conciliation) are not appropriate procedures to deal with public interests.[730] The WEC is envisaged here as an international judicial body that fulfills most of the conditions as defined by the PICT project.[731] Accordingly, it would be a permanent

[727] At section D.3.
[728] With regard to the concrete limits see Chapter 3.I.E.
[729] See Chapter 4.I.B.
[730] See Chapter 4.II.A and C.
[731] See Chapter 2.IV.B.1.

institution, composed of independent judges, working on the basis of predetermined rules of procedure, and rendering decisions that are binding.

b. *Environmental Chamber of the ICJ*

Several arguments can be made in favor of setting up a new international environmental court closely connected to an existing institution: organizational infrastructures are in place, the organ has experience and expertise, and a reputation that could be built upon. In all probability based on these arguments, following the 1992 UNCED, the ICJ set up a Chamber for Environmental Matters in 1993. Unfortunately, it has never been used. One of the main reasons for this might be that the access rules for this chamber are the same as the ICJ's general access rules and states have never consensually submitted a case to the environmental chamber.

The CLI study proposes a new compulsory advisory jurisdiction of the ICJ in matters concerning climate change and the needs and interests of future generations. It thus builds on the existing institution of the ICJ and tries to circumvent the limited access through the establishment of a new advisory opinion procedure open for states and filtered through a "Judicial Organ" established by the UN General Assembly.

This proposal is not convincing. First of all, it is questionable why the scope of such advisory opinions should be limited to matters concerning climate change and the needs and interests of future generations, especially considering other international environmental law and the public interest nature of it. Climate change might be the most urgent global environmental concern of the moment, but from a structural point of view it is unclear why the body of international environmental law should only partly be subject to judicial oversight, especially with a view to the overall goal of sustainable development. Furthermore, under the CLI proposal, only states could trigger the advisory opinion procedure filtered through a "judicial organ". Experience with the ICJ Environmental Chamber has shown that states are very reluctant to institute proceedings against another state and, although here they would trigger an advisory and not a contentious procedure, it seems unlikely that the ICJ could contribute to the enforcement of international climate change law in a meaningful way through such a new procedure.

Although not suggested in either of the initiatives presented above, an international environmental court could also be established at the ICJ. For example, the dormant Environmental Chamber could be reformed and reopened. The new Environmental Chamber would have jurisdiction over all disputes arising under an MEA or customary international environmental law. Owing to the special nature of environmental law, procedures before the Environmental Chamber would need not only a state but also some form of a public trigger.[732] Although such a new Environmental Chamber is a potential alternative to a WEC established separately from the

[732] See below at Chapter 4.IV.D.3 for more details on access provisions for an international environmental court.

ICJ, it has some disadvantages. Politically, it seems almost impossible to amend the ICJ Statute in this way, especially when it comes to access for non-state actors. Furthermore, there is a high value in the ICJ's traditional role of peacefully solving mainly cross-border conflicts between states. Also given the other existing regime courts, it seems somewhat unbalanced to allocate the enforcement of international environmental law to the ICJ.

c. *International Court for the Environment*

The proposals of the ICEF and the ICE Coalition did not suggest an institutional link for the new International Court for the Environment. Thus, it is understood here that the court is set up as a new international institution under the auspices of the United Nations based on an international treaty, somewhat similar to the way that the ICC has been established. As argued above, there is a case for building on existing institutional infrastructures, experience, expertise, and reputation. Therefore a new international environmental court should rather be part of an existing international institution as proposed below.

d. *World Environment Organization and World Environment Court*

The core UN entity dealing with international environmental politics is UNEP. Part of the current reform debate centres on how UNEP can be strengthened. Proposals range from establishing an overarching, centralized World Environment Organization to a better streamlined current decentralized MEA structure.[733] A noteworthy proposal for UNEP reform was developed by the German Advisory Council for Global Change for the 2002 Rio plus 10 conference in Johannesburg. The Advisory Council suggested a so-called Earth Alliance consisting of three main pillars: earth organization (built on UNEP and the existing MEAs), earth assessment (comprising expert panels such as the IPCC), and earth funding (encompassing public and private funds such as the GEF).[734] Currently, the European Union and its member states advocate upgrading UNEP into a specialized UN agency with a strengthened mandate and adequate financial support. An international environmental court is not part of such proposals. Authors of the UNU/IAS Report on International Sustainable Development Governance contemplate that a new WEC could be the judicial branch of a new World Environment Organization built on UNEP or, alternatively, part of another kind of organizational structure coordinating the existing MEAs.[735]

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[733] UNU/IAS Report, *International Sustainable Development Governance*, United Nations University Institute of Advanced Studies (UNU/IAS) (ed.) Final Report (2002), 10 et seq.

[734] WBGU, *Neue Strukturen globaler Umweltpolitik*, Springer, Berlin, Welt im Wandel (2000), 178 et seq.

[735] UNU/IAS Report, *International Sustainable Development Governance*, United Nations University Institute of Advanced Studies (UNU/IAS) (ed.) Final Report (2002), 40; see also Koch/Mielke, "Globalisierung des Umweltrechts" (2009) *ZUR*, 403, 408; McCallion/Sharma, "Environmental Justice Without Borders: The Need for an International Court of the Environment to Protect Fundamental Environmental Rights" (2000) 32 *George Wash J Int Law Econ*, 351, 361.

The view of the authors of the UNU/IAS Report is shared here. It is not within the scope of this study to take a firm position on the various proposals for UNEP reform. However, it is argued here that a new World Environment Court would best be assigned institutionally to a World Environment Organization or a UN Environmental Organization built on UNEP. Such an organization would not necessarily function in a centralized manner but could maintain much of the independence of structures established under the different MEAs. It has been suggested above that a new World Environment Court would be accessible via four procedures: a procedure for direct actions, an infringement procedure, a preliminary ruling procedure, and a special enforcement procedure to safeguard compliance with its judgments.[736] Through these procedures the WEC would be intertwined with existing national and international institutions dealing with enforcement of international environmental law, while taking into account the special aspects of international environmental law enforcement.[737] For example, compliance committees under MEAs would be connected with the WEC via the infringement procedure, national courts via the preliminary ruling procedure, and penalties paid under the enforcement procedure might feed into a compliance fund accessible for MEA compliance committees and also the WEC itself to fund measures of implementation aid. Furthermore, other existing international environmental funding mechanisms such as the GEF might support implementation aid measures ordered by a compliance committee or the WEC. Capacity building experts from UN entities or environmental NGOs could help in putting those implementation aid measures into practice. Experts needed during the trial could be drawn from the compliance committees and scientific panels such as the IPCC.

e. *Role of Compliance Committees under MEAs*

A new World Environment Court should not substitute for existing compliance committees under MEAs but complement their work where needed. Compliance mechanisms are a key achievement of international environmental law enforcement, tailored to the special needs of enforcement and compliance review as identified by compliance theory. Therefore, they should continue to play a central role in enforcement of the respective MEAs and be further developed as recommended here along the lines of the Aarhus and Kyoto compliance committees. The preliminary ruling procedure suggested here for the WEC might also be a procedure worth considering as part of a compliance mechanism under an MEA. If a question of interpretation arises for a national judge, that is limited to the interpretation of a specific MEA, the judge could ask the relevant compliance committee for legal advice or a preliminary ruling.

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[736] See Chapter 4.IV.D.2.
[737] See Chapter 2.IV.B.3.

Thus, if a compliance issue arises under an MEA, it should be primarily the responsibility of the compliance committee under this MEA to bring a party back into compliance. However, there might be compliance issues that cannot be successfully resolved by a compliance committee under an MEA. For example, if a state does not comply with the decision of a compliance committee, the committee could refer the case to the WEC through an infringement procedure. Furthermore, disputes may arise under several MEAs or under MEAs and other international law. In such cases a new WEC is better prepared to resolve the dispute. Finally, it is important to note that many cases appropriate for an international environmental court as outlined above would not be admissible before a compliance committee, or the compliance committee would not be in a position to order all necessary remedies.[738]

As regards the debate on synergies between MEAs and the related suggestion of establishing compliance committees responsible for compliance the review of several or all MEAs, it has been argued above that the specialization and plurality of compliance review procedures is best suited to achieving a high degree of compliance with the relevant MEAs and therefore should be maintained.[739]

3. *Access*

Under the ICEF proposal, individuals, NGOs, states, supranational organizations, and entities of the UN would have access to an international environmental court. As regards legal actions brought by individuals and NGOs, the ICEF recommends prior recourse to national courts and proof of the international importance of the question raised. Under the ICEF proposal, claims by individuals and maybe also NGOs are envisaged as human rights claims under a right to a healthy environment, fleshed out similarly to the rights established under the Aarhus Convention, such as access to environmental information, participation in environmental decision-making processes and access to justice. The authors of the UNU/IAS Report on International Sustainable Development Governance also recommend a WEC with access for non-state actors. However, they highlight that the nature of such access needs further consideration. Some form of filter should be put in place to prevent abuse.

The view of the ICEF and the authors of the UNU/IAS Report that non-state actors should have access to the WEC is shared here.[740] Throughout this study, it has become clear that states rarely institute proceedings against another state based on an environmental protection interest. For example, only those compliance committees with a non-state trigger get to decide on issues of non-compliance. If a WEC is to contribute to the enforcement of international law in a meaningful way,

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[738] With regard to the limited availability of remedies, see for example Ebbesson, "Piercing the State Veil in Pursuit of Environmental Justice" in Ebbesson/Okowa (eds.), *Environmental Law and Justice in Context* (2009), 270, 283.

[739] See Chapter 3.III.E.3.

[740] See also Hey, *Reflections on an International Environmental Court* (2000), 14 et seq.

non-state actors have to be in a position to initiate procedures against states and maybe even against private actors. It has been recommended above that a new WEC ideally should hear advisory and contentious cases.[741] Four procedures have been identified as worth considering for contentious proceedings: a procedure for direct actions, an infringement procedure, a preliminary ruling procedure, and a special enforcement procedure to safeguard compliance with the court's judgments.

As underlined by the authors of the UNU/IAS Report, access for non-state actors needs careful consideration and a filter mechanism. In the following, based on the overall findings of this study, ideas are proposed as to how advisory and contentious proceedings could be triggered.

a. *Advisory Opinions*

States, supranational organizations, or entities of the UN, including UNEP, might request advisory opinions from the WEC on questions arising under MEAs or customary international environmental law. Giving non-state actors access to advisory procedures as well might overstretch the capacity of the WEC. Environmental NGOs have the option to convince UNEP or another UN entity or a state government to request an advisory opinion.

b. *Direct Actions*

States, environmental NGOs, and individuals should be in a position to initiate direct actions against states and private actors.[742] The role of individuals and environmental NGOs is envisaged here as a role of stakeholders in environmental interests, based on the idea of a 'private attorney general' as underlies the concept of citizen suits in U.S. environmental legislation, such as the Clean Air Act. Different options exist to limit standing of individuals and environmental NGOs and to prevent abusive claims. It is up to the negotiators of a new WEC which kind of stakeholder trigger they want to set up. Limiting the trigger function to accredited environmental NGOs, similar, for example, to the German national model or the international example of ECOSOC accreditation under UN Resolution 1996/31, would be one option.[743] Following the example of the national U.S. model of citizen suits or the international Aarhus Compliance Committee is another.

According to citizen suit provisions under U.S. environmental legislation such as the Clean Air Act, any person may commence a civil action against any person,

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[741] See the section on jurisdiction in Chapter 4.IV.D.1.

[742] For an overview of cases in which international corporations caused severe health and environmental damage see Greenpeace International, *Corporate Crimes*, Greenpeace International (ed.) (June 2002). For a concrete case study on mining activities in Sierra Leone see Schwartz, "Corporate Activities and Environmental Justice: Perspectives on Sierra Leone's Mining" in Ebbesson/Okowa (eds.), *Environmental Law and Justice in Context* (2009), 429; in general underlining the importance of access to international court by non-state actors Petersmann, "Constitutionalism and International Adjudication" (1999) *N.Y.U. J. Int'l L. & Pol.*, 753, 783 et seq.

[743] With regard to the accreditation conditions under UN Resolution 1996/31 see Chapter 1.III.B.

including the U.S. or a governmental agency, or against the administration to enforce compliance with, for example, emission standards and administrative orders.[744] Standing requires a so-called 'injury in fact' and is subject to other requirements that might also be instructive for limiting standing for individuals and environmental NGOs before a WEC.[745] In Germany, the stakeholder enforcement provisions are desgined differently. Only certified environmental NGOs can bring actions before administrative courts against certain administrative acts, allegedly violating environmental law. If and which further standing criteria have to be met is currently under review, owing to the finding of a recent ECJ decision that German legislation was not in compliance in this respect with EU law implementing the Aarhus Convention.[746] The Aarhus Convention follows a broad stakeholder access approach. According to Article 9(2) of the Aarhus Convention, members of the public concerned, including individuals and environmental NGOs, having a sufficient interest or maintaining the impairment of a right shall have access to a judicial review procedure. Parallel to these requirements for access to national judicial review procedures, access to the international compliance review procedure under the Aarhus Convention is also open to individuals and NGOs.[747]

There is no legal barrier to conferring standing rights on environmental NGOs; providing environmental NGOs with a trigger function at a WEC is a question of political will.[748] Furthermore, it is not new to international law that non-state actors can initiate proceedings against states. This study has shown several examples of international judicial and arbitral fora where this can happen.[749] Examples are the three regional human rights courts based on the respective regional human rights conventions, arbitration fora such as PCA and ICSID based on the ICSID Convention and bi- or multilateral investment treaties, as well as the seabed disputes chamber of the ITLOS based on UNCLOS. In all of these cases, states found that effective implementation of the substantive rules they put in place through treaty law requires that non-state actors are given access to an international judicial or arbitral review procedure to enforce international law that aims to protect their interests. All these access provisions for non-state actors are tailored to the specific requirements of the legal regime they aim to protect. The same applies to the international environmental regime. Consequently, the WEC should be equipped with access provisions tailored to the special needs of effective environmental law enforcement, as experienced in

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744 For the Clean Air Act see 42 USC § 7604. Similar provisions are contained in other environmental laws.

745 Fundamentally, U.S. Supreme Court decision *Sierra Club vs. Morton*, 405 U.S. 727, 1972; see also Zengerling, *Citizen Suits – Comparison between models in the U.S., UNECE, EC, and Germany* (2006), 19 et seq., 42 et seq.

746 ECJ decision C-115/09, *Trianel Kohlekraftwerk Lünen* case.

747 See Chapter 3.III.C.

748 See Chapter 1.III.C.

749 See also Shany, "No Longer a Weak Department of Power? Reflections on the Emergence of a New International Judiciary" (2009) 20 *EJIL*, 73, 79.

national and international environmental enforcement procedures outlined above and with a view to the three categories of cases identified as cases for a WEC.[750]

State sovereignty is, of course, an important concern in this respect, but sovereignty interests can be accommodated, for example, through procedures and rules reflecting the subsidiarity principle. For example, to prevent national jurisdictions being bypassed completely, as in the case of ICSID criticized above,[751] unsuccessful recourse to national courts should be a prerequisite of the admissibility of direct actions before the WEC. As regards the relationship between states and international courts in general, it can be noted that the tasks of international courts are expanding. While the ICJ was and is mainly concerned with war prevention, the work of other international courts, arbitral tribunals and compliance committees focuses more on norm advancement and regime maintenance.[752] This development has to be welcomed because it contributes to strengthening the rule of law rather than power politics.[753] A new WEC would ensure that the regime of international environmental law put in place by states governments is maintained and further developed in an equivalent way to other international regimes.

c. *Infringement, Preliminary Ruling, and Enforcement Procedure*

Infringement procedures could be triggered by the compliance committees established under the various MEAs, if states do not comply with their decisions. In addition, consideration could be given to establishing a World Environment Commission that oversees compliance with MEAs and can trigger proceedings at the compliance committee of an MEA or directly at the WEC. Environmental NGOs could function as watchdogs and bring possible cases of non-compliance to the attention of the World Environment Commission.

National courts should have the right to request a preliminary ruling at the WEC. Such a preliminary ruling procedure enhances the proper application of international environmental law by national judiciaries.[754] Judges formulate concrete questions and the final decision in a case remains in their responsibility. Especially when value judgments have to be made and to appropriately reflect constitutional balances, a national judge is in a better position to render a judgment than an international judge. Such a procedure also follows the principle of subsidiarity. It would be the task of the WEC to answer the questions but leave as much room as possible for the final decision of the national judge. An alternative to a binding

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[750] See Chapter 2.IV.A and Chapter 4.IV.C.1.

[751] See Chapter 4.II.B.5.

[752] Shany, "No Longer a Weak Department of Power? Reflections on the Emergence of a New International Judiciary" (2009) 20 *EJIL*, 73, 80.

[753] See also, especially with regard to access for non-state actors to international courts Petersmann, "Constitutionalism and International Adjudication" (1999) *N.Y.U. J. Int'l L. & Pol.*, 753, 783 et seq.

[754] See also in general on the importance of "vertical" cooperation among courts Petersmann, *ibid.* at 785 et seq.

preliminary ruling procedure would be a non-binding advisory procedure triggered by national judges.

Due to the positive experience with the enforcement procedure at the ECJ, it seems advisable to establish a similar procedure at the WEC. If a World Environment Commission were to be established, it could also be responsible for overseeing compliance with WEC judgments and triggering the enforcement procedure in the event of failure to comply with a judgment. Penalties paid by the non-complying state could feed into a compliance fund and finance implementation aid measures inter alia. Without a World Environment Commission, some other existing or newly to establish organ would have to be in charge of controlling compliance with WEC judgments.

d. *Amici Curiae, Experts, and Transparency*

The rules of procedure of the WEC should provide for amici curiae participation of environmental NGOs and other potential amici. Experts could be drawn from the MEA compliance committees or the scientific panels.

Procedures before a WEC should be as transparent as possible. Pleadings should be publicly accessible insofar as they do not contain confidential information. Hearings should also be open to the public and ideally webcast. Decisions of the WEC should also be publicly available. As regards the quality of the decision, they should be well-reasoned and transparently reflect which laws and facts have been taken into account and how the law has been applied in reaching a concrete decision.

4. *Consequences and Remedies*

The consequences and remedies available to a WEC should also be tailored to the specific needs of environmental law enforcement. They should comprise "carrots" as well as "sticks" to put the court in a position to react appropriately to the actual cause of non-compliance. Measures applicable by compliance committees under MEAs as well as remedies available at the ICJ and ITLOS may be instructive for negotiators establishing a WEC.

Among the remedies available in direct actions should be injunctive relief as well as restorative or compensatory damages. In infringement and enforcement procedures, the WEC should also be able to order penalty payments. These latter payments should feed into a compliance fund at the WEC from which the court and compliance committees under MEAs could finance supportive, for example capacity building, measures.

E. *Conclusions*

A new World Environment Court would be beneficial for the enforcement of international environmental law, treaty law as well as international customary law. Since the late 1980s, legal scholars have developed several proposals as to how such a new

court could be constituted. Some of those were presented to the Rio and Rio plus 10 conferences but were not taken up by states and are not reflected in the outcomes of the earth summits. To date, there has been a lack of political support for the plan to establish an international court focused on environmental law enforcement. One of the two key themes of the 2012 Rio plus 20 Summit is the evaluation and reform of international institutions for sustainable development, including for example discussion of how UNEP can be further strengthened. However, the establishment of a new international environmental court is not on the agenda.

Despite states' reluctance to address this issue and criticism, including enhanced forum shopping, fragmentation, lack of legitimacy, and incompatibility with state sovereignty, this study recommends the establishment of a new international environmental court. It has shown that there is a need for such a new institution. Three categories of environmental cases in which international treaty law or customary international law is potentially violated are insufficiently dealt with by national judiciaries and require an international enforcement backup, other than the compliance committees already established: Firstly, cases arising from activities of states or non-state actors that cause or contribute to regional or global environmental problems, such as, for example, climate change, transboundary movement and disposal of hazardous wastes, loss of biodiversity, or pollution and exploitation of the world's seas. Secondly, cases arising from activities of states or non-state actors that cause or contribute to local transboundary harm, such as industrial activities causing transboundary air or water pollution. Thirdly, cases arising from activities of states or non-state actors that have a purely local detrimental effect on the environment but cannot be effectively tackled within national jurisdictions, such as illegal resource exploitation or pollution caused by transnational corporations.[755]

As regards the concrete features of a new World Environment Court and institutional relationship, several proposals have been developed. The WEC as envisaged here is a specialized court; its scope of jurisdiction should encompass international environmental treaty law as well as customary law. Institutionally, it should be bundled to a World Environment Organization built on UNEP. A WEC should be accessible via five types of procedures, namely advisory procedures, direct actions, and infringement, preliminary ruling, and enforcement procedures. States, supranational organizations, and UN entities should be able to request advisory opinions. Direct actions should be triggered by states, environmental NGOs, and individuals. Infringement procedures should be triggered by compliance committees or a World Environment Commission. Environmental NGOs could inform such a Commission or compliance committees about possible cases for an infringement procedure. Judges of the national judiciaries could request preliminary rulings or non-binding advisory opinions regarding a concrete case. If judgments of the WEC are not complied with,

[755] See Chapter 2.IV.A and Chapter 4.IV.C.1.

an enforcement procedure could be triggered, for example, by a World Environment Commission. Proceedings before the WEC should be open to amicus curiae participation, take advantage of expert advice; they should be characterized by a transparent procedure and well-reasoned decision-making. The consequences and remedies available to the WEC should comprise "carrots" and "sticks" including capacity building measures, injunctive relief, compensatory damages, and penalty payments. Penalties should be paid to a compliance fund to finance supportive measures.

V. Conclusions

Several universal international judicial and quasi-judicial bodies, their contributions to accountable decision-making for sustainable development, and, more concretely, environmental law enforcement, and openness for environmental NGOs have been examined in Chapter 4.[756] Among the judicial dispute settlement bodies, the International Court of Justice, the WTO dispute settlement system, and the International Tribunal for the Law of the Sea were analyzed. The Permanent Court of Arbitration, the International Center for Settlement of Investment Disputes, and the International Court of Environmental Arbitration and Conciliation were the arbitral fora selected for consideration. As a universal compliance committee, the one established under the Kyoto Protocol was examined. Finally, the ideas on the establishment of a new international environmental court were discussed and the autthor's own proposals were developed. Several conclusions can be drawn.

Universal international judicial and arbitral bodies do not yet appropriately contribute to democratic global governance for sustainable development. Three main deficits with regard to the enforcement of international environmental law can be identified: lack of plaintiffs, lack of expertise, and lack of transparency.

Firstly, many cases in which international environmental law is infringed do not reach universal judicial and arbitral bodies because the people affected or stakeholders in affected interests may not initiate review procedures. Usually only states may trigger procedures and they rarely do so in the context of an environmental protection interest. Environmental NGOs cannot trigger judicial review procedures before any of the universal international judicial and quasi-judicial bodies. The only exception is the International Court of Environmental Arbitration and Conciliation but this "court" is a private organization not based on an international treaty and not recognized by states. Procedures before the Seabed Disputes Chamber of ITLOS, the PCA, ICSID, and the Kyoto Compliance Committee, however, can be initiated by non-state actors. Those non-state actors are the International Seabed Authority, the Enterprise, or state sponsored and controlled natural or juridical persons engaged in

[756] A synthesis chart with the key characteristics of the international judicial and quasi-judicial bodies analyzed can be found in the appendix.

exploration or exploitation activities in the Area (Seabed Disputes Chamber), private companies and investors (PCA and ICSID), and Expert Review Teams (established under the Kyoto regime).

Secondly, if violation of international environmental law gives rise to an international trial, international environmental law and affected environmental interests are not appropriately dealt with in most decision-making processes. Environmental issues are often highly scientific and technical and the decision-making bodies do not draw sufficiently on amicus curiae support from environmental NGOs or the expertise of independent experts to appropriately identify and consider environmental interests in their decision-making. Nevertheless, there is a tendency towards more official and unofficial recognition of submissions from environmental NGOs in procedures before universal international judicial and quasi-judicial bodies in cases that involve environmental interests. Rules of the Kyoto Compliance Committee, ICSID (since 2006), and the ICJ with regard to advisory proceedings (since 2004), explicitly provide for submissions from non-state actors. In practice, there have been no NGO submissions as yet to a procedure before any of the branches of the Kyoto Compliance Committee. An ICSID Tribunal has already received an NGO submission, termed it an amicus brief and explicitly deemed it helpful for its decision-making. According to ICSID rules, an arbitral tribunal has discretion as to whether to accept submissions from "non-disputing parties". The ICJ practice direction explicitly mentions INGOs with regard to advisory opinions but does not confer a special amicus status on them; submissions from INGOs are published at the Peace Palace and treated in the same way as any other publicly available information. According to a decision of the WTO Appellate Body in 1998, the panels and the Appellate Body have discretion as to whether to consider amicus curiae submissions. In practice, they have not explicitly done so as yet. The rules of the ITLOS do not explicitly provide for non-party submissions but in 2010, in case no. 17, the first advisory opinion dealt with by the Seabed Disputes Chamber, a joint NGO statement was published on the ITLOS's website and transmitted to states parties and IGOs which also had submitted statements. The Chamber highlighted, however, that the NGO submission is not part of the case file. Nevertheless, here for the first time an NGO statement has been published on the case website of a universal judicial or quasi-judicial body.

Thirdly, there is a lack of transparency in arbitral proceedings and proceedings before the WTO dispute settlement bodies. As already concluded in chapter 3, the analysis in chapter 4 underlined that there are significant differences with regard to transparency between the different types of judicial, arbitral, and compliance control procedures. Arbitral procedures are not approriate for dealing with cases which involve environmental protection and thus public interests. Despite public interests being affected, there is no public access to documents and hearings, or – in most arbitral proceedings – even to the arbitral award. Equally, in general, proceedings before the WTO panels and Appellate Body are confidential, which is not appropriate as far as public interests are concerned.

Finally, this research concludes that there is a need for a new World Environment Court. It should function as a specialized court with jurisdiction focused on MEAs and customary international environmental law, be part of a World Environment Organization, transparent in its proceedings, accessible via five procedures such as advisory proceedings, direct actions, infringement, preliminary ruling, and enforcement procedures and, depending on the specific procedure, open for states, supranational organizations, UN entities, environmental NGOs and individuals.

Chapter 5

Conclusions and Theses

This study scrutinized how environmental NGOs and international judicial and quasi-judicial bodies do currently (de lege lata) interact and should (de lege ferenda) interact to appropriately contribute to the implementation and enforcement of national and international environmental law within a broader concept of global democratic governance for sustainable development.

Four intersecting themes were outlined in the introduction and are reflected in the research approach: the enforcement deficit in environmental law; global environmental governance and sustainable development; the proliferation of international courts, tribunals, and compliance committees; and deliberation and democratic global governance. Chapter 1 sketched the role of environmental NGOs as actors in environment-related law-making and law enforcement on the international level. Firstly, it briefly described how NGOs were and are involved in detecting and tackling environmental problems. Secondly, the main political commitments to enhancing the role of NGOs on the international level were scrutinized as to their scope and limits. The third part of chapter 1 examined the relevance, definition, and legal status of NGOs under international law. Finally, the meaning and relevance of legitimacy and accountability in the context of this study were outlined.

Chapter 2 scrutinized the enforcement of international environmental law on the national and European Union level, with a view to identifying whether there is a need for international judicial and quasi-judicial enforcement of international environmental law. To show that international environmental law is justiciable, first, its main sources, addressees, and contents were summarized. In the second and third part of chapter 2 the contribution of the national courts in Germany and the United States as well as the European Court of Justice to the enforcement of international environmental law was examined. Several opportunities as well as constraints in national and European enforcement procedures and also several types of cases that are falling through the cracks in these procedures could be identified. Furthermore, the question was asked, what lessons for international environmental law enforcement could be learned from the ECJ as a supranational judicial body. Laying the basis for the structure of the analysis in chapters 3 and 4, the fourth part of chapter 2 carved out the main differences between judicial dispute settlement, arbitration, and compliance control, the latter being specifically relevant for dealing with cases of non-compliance with MEAs.

Cathrin Zengerling, Greening International Jurisprudence, pp. 327–349.

Chapters 3 and 4 formed the core of this study.[1] A total of eleven international judicial and quasi-judicial bodies were analyzed in depth and another three presented in brief; each with a special relevance for the implementation and enforcement of international environmental law. Chapter 3 focused on judicial and quasi-judicial bodies that operate within a regional international scope; chapter 4 dealt with those of a universal international scope. Both, chapters 3 and 4 differentiated between judicial dispute settlement, arbitration, and non-compliance procedures since these forms of adjudication and compliance control vary significantly in their roles, structures, competences, institutional arrangements, procedures, access rules, and outcomes. This horizontal and vertical systematization allowed for a differentiated view on the selected bodies and is also mirrored in the conclusions and recommendations.

The eleven bodies that were analyzed in depth were described and evaluated with regard to their scope of jurisdiction, applicable law, institutional arrangements, access, and environmental case law. In particular, the section on institutional arrangements included information on the transparency of the proceedings and outcomes. The section on access addressed access for potential participants as parties, amici curiae, and experts. As regards the role of ENGOs as parties, ENGOs were envisaged as potential applicants, and thus initiators or triggers of a judicial or quasi-judicial procedure, similar to citizen suits or 'Verbandsklagen' at the national level. This was based on the assumption that conferring the right to initiate judicial and quasi-judicial review procedures on NGOs helps to ensure that breaches of international environmental law are brought to the attention of the judiciary in the first place. As amici curiae, environmental NGOs function as "friends of the court" providing factual or legal information on environmental matters relevant for the case at issue. The section on environmental case law scrutinized how environmental interests safeguarded in international environmental law are dealt with in the decision-making process and reflected in the decision of the court, arbitral tribunal or compliance committee in question.

The criteria for the evaluation and the target course for the development of conclusions and recommendations were derived from the four pillars of context as outlined in the introduction. The overall question therefore was: Does the body in question appropriately contribute to the realization of democratic regional or global governance for sustainable development? In particular: Are the procedures and, to a certain degree, also the substantive applicable law appropriately accessible and permeable for interests protected in (international) environmental law? Do those environmental interests appropriately enter the decision-making process of the body in question? Are environmental interests transparently, comprehensively, and appropriately weighed and balanced against other relevant interests? Are the judi-

[1] A synthesis chart with the key characteristics of the international judicial and quasi-judicial bodies analyzed can be found in the appendix.

cial and quasi-judicial procedures that involve environmental interests and their outcomes transparent, i.e. open to the public? Following the evaluation, with respect to each body, a concluding subchapter summarized main strengths and weaknesses and made concrete recommendations for further improvements.

The core findings of this study are summarized below in the form of theses in a roughly chronological order. This summary covers only core aspects of the conclusions and recommendations developed with regard to the international judicial and quasi-judicial bodies analyzed. Detailed conclusions and recommendations can be found at the end of the analysis of each judicial and quasi-judicial body in chapters 3 and 4.

I. Environmental NGOs as High Potentials

ENGOs are competent stakeholders of environmental interests and their participation in international law enforcement procedures enhances the relevant body's accountability towards a global demos.
(Chapter 1.I, III.A and IV)

A review of examples of ENGOs' contributions to international environmental regimes with references to in-depth studies showed that ENGOs are actively involved at all stages of the policy cycle in the main international environmental regimes tackling global and regional environmental problems, such as transboundary air pollution, destruction of the stratospheric ozone layer, transboundary movements of hazardous wastes, loss of biodiversity, pollution and exploitation of the world's seas, and global warming. They have shown commitment and expertise in agenda setting, negotiation, and implementation. The analysis also revealed that the institutional framework of MEAs, set up as such by states, formally and informally acknowledges ENGOs as important partners in coping with global environmental concerns. For example, NGOs have an observer status under all major MEAs in the areas listed above such as, for example, the 1973 CITES, 1992 CBD, 1992 UNFCCC, and 1995 Basel Convention. All of these MEAs have an almost global membership. The role of ENGOs, however, is not limited to this observer status.

There are very different kinds of NGOs with diverse characteristics and focuses, but all in all the main strengths of ENGOs are their ability to gather knowledge on environmental problems and possible solutions, their function as a communication channel between local citizens and international institutions, their potential to enhance the transparency of international decision-making processes, and their role as multiplier of knowledge and capacity. Through their commitment to contributing to solving global environmental problems, they gather competence and resources and are potentially qualified to act as stakeholders of environmental interests in international judicial and quasi-judicial compliance control and enforcement procedures.

The actual qualification can be safeguarded through an accreditation process ensuring that access to law enforcement procedures is only afforded to NGOs that are characterized by the abovementioned strengths. However, it should be noted that, for example, citizen suit provisions under U.S. environmental laws and access rules under the human rights courts' provisions or the compliance mechanism of the Aarhus Convention do not set up such accreditation requirements and this does not seem to result in any disadvantages for the procedure.

NGOs do not have to prove any legitimacy before standing to sue or participatory rights are conferred to them, because democracy only requires the legitimacy of organs that exercise public authority. According to the concept of deliberative polyarchy, democratic legitimacy derives from responsiveness and accountability, including transparency, reason giving, and standing of those affected. The study revealed significant shortcomings in international law enforcement procedures with regard to these elements of deliberation and democratic global governance. Most importantly, affected environmental interests protected in international environmental law do not appropriately enter the decision-making processes of any of the international law enforcement procedures analyzed with an exception of the Aarhus and to a certain degree the Kyoto Compliance Committee. Appropriate reasoning presupposes that affected environmental interests enter the decision-making process. Even insofar as affected environmental interest did enter the judicial and quasi-judicial decision-making processes, the study identified significant shortcomings in the quality of judicial reasoning of decisions that affect environmental interests protected in environmental law in all international law enforcement procedures analyzed with an exception of the Aarhus and the Kyoto Compliance Committee. The reasoning of the WTO dispute settlement bodies in this regard is comparatively well advanced. There is a tendency towards an improved quality of reasoning in decisions regarding affected environmental interests protected in environmental law at the ICJ and ITLOS. Finally, there is also a lack of transparency in procedures before arbitral tribunals and the WTO.

Access for ENGOs to international law enforcement procedures means that affected environmental interests would get a say, the procedure would become more transparent, and the decision-makers would be induced to better reason their handling of affected environmental interests. Consequently, broadly following the concept of deliberative polyarchy, access for ENGOs to bodies of international law enforcement positively contributes to the latter's accountability towards a global demos. Thereby it is important to emsure that NGOs from all regions, and not only from Western or Northern countries, have actual equal access to international judicial and quasi-judicial bodies.

II. Need for Clear Political Commitment

There is little political support for strengthening the role of ENGOs in international law enforcement procedures. A Rio+20 Declaration or a similar political declaration should incorporate a clear statement that ENGOs shall be given effective access to international law enforcement procedures that affect environmental concerns which are protected in international environmental law.
(Chapter 1.II)

A specific political mandate to enhance the role of ENGOs in international judicial and quasi-judicial compliance control and enforcement procedures is still lacking. The clearest political support can be seen in the Aarhus Convention itself for the UNECE region. As far as the implementation and enforcement of the Aarhus Convention is concerned, parties set up a Compliance Committee with wide access for ENGOs and individuals. However, even the parties to the Aarhus Convention were very cautious in addressing wider access of NGOs to international review procedures in their Almaty Guidelines. The least common denominator between the parties to the Aarhus Convention in the Almaty Guidelines was that they agreed to "encourage the consideration" of measures to facilitate public access to international review procedures in international fora. Neither the Rio Declaration, nor Agenda 21, nor the UNEP Montevideo Programmes contain a clear political commitment to a stronger role for NGOs before international judicial and quasi-judicial institutions. However, in the Rio Declaration and Agenda 21, states recognized the importance of citizen and NGO participation in international decision-making processes, generally agreed to strengthen their role, and also underlined that they are aware of shortcomings in compliance with international environmental law.

In the spirit of further developing Principle 10 of the Rio Declaration, a political statement to back up and encourage change in existing and the development of new provisions on access to international law enforcement procedures towards broader access for ENGOs could be part of the outcome of the Rio+20 United Nations Conference on Sustainable Development in 2012 or a later summit. The language of the draft Almaty Guidelines as originally proposed by the expert group could be a blueprint for such a declaration. For example, para 54 of this draft states as follows:

> [Public involvement in international implementation review [and] [compliance] [and dispute settlement] mechanisms could help to ensure the accountability within such mechanisms and contribute to monitoring the implementation of rules related to environmental issues. It could also strengthen the quality of the representation of public interests. The modalities of public involvement may vary depending on the rules and procedures of the international forums but could include, in the case of compliance mechanisms, providing for participation of the public in the development of such mechanisms and [in the process of appointing the members of the relevant bodies (e.g. by providing an entitlement to nominate members), as well as] providing for the mechanism to be triggered by submission of petitions or

communications, including amicus curiae briefs by the public. Parties should consider and, where appropriate, promote such methods of involving the public in international implementation review [and] [compliance] [and dispute settlement] mechanisms.]

III. No Legal Constraints

There are no legal constraints on conferring rights and duties on NGOs in international law enforcement procedures. Whether and what kind of standing or participatory rights are vested in ENGOs is a question of political will.
(Chapter 1.III.B and C)

The search for possible constraints in international law to strengthen the role of ENGOs before international judicial and quasi-judicial bodies did not identify significant barriers. INGOs have a long tradition as actors in international politics and today, according to the UIA, environmental protection is their second most important field of activity. Neither the difficulty of exactly defining "NGO" nor the fact that NGOs gain their legal personality under national rather than international law prevent NGOs from being recognized and addressed as actors with rights and duties under international law. States have in fact frequently conferred rights and duties on NGOs in international legal regimes. For example, Article 71 of the 1945 Charter of the United Nations and, more concretely, UN ECOSOC Resolution 1996/31 confer a consultative status to NGOs, if they fulfill certain requirements.

On several occasions, states have already conferred standing on non-state actors in all three types of international law enforcement procedures: dispute settlement, arbitration, and compliance control. All three regional human rights conventions discussed above provide for direct or indirect access for individuals and NGOs to the human rights courts, in case of the Inter-American Human Rights Court only via the Commission. In several hundred bi- and multilateral investment treaties, states conferred standing rights on private investors who can initiate arbitral proceedings against states in various fora for arbitration such as, for example, ICSID. The compliance mechanism under the Aarhus Convention, established through an MOP decision, puts all 'members of the public' comprising natural and legal persons, as well as their associations, organizations or groups, including environmental NGOs, in the position to trigger a compliance review procedure. Furthermore, NGOs may participate as amici curiae in some international judicial and quasi-judicial enforcement procedures such as, for example, before the ECtHR, IACtHR, ICJ (advisory proceedings), ICSID, NAFTA, and CAFTA-DR.

In drafting similar access rights for NGOs to other international law enforcement bodies, states can draw on these existing examples from the international level or on various models already implemented at national levels. Substantive criteria and an accreditation process can ensure that certain rights and duties are only conferred

on those ENGOs that fulfill certain conditions deemed necessary for being appropriate stakeholders of environmental interests.

IV. International Environmental Law Is Justiciable

Multilateral environmental agreements as well as customary international environmental law contain substantive as well as procedural obligations that are appropriate for judicial review.
(Chapter 2.I)

The central sources of international environmental law are multilateral environmental agreements. Customary international environmental law also plays an important role. Not legally binding but still of special relevance is international environmental soft law. The main addressees of international environmental law are states. MEAs and customary international environmental law contain substantive as well as procedural obligations. An MEA regime usually starts with a framework convention and is fleshed out by subsequent protocols that contain concrete substantive provisions on, for example, emission reduction goals, bans on certain substances or activities, use of certain technologies, or obligations to set up protection areas or management schemes. Examples of procedural obligations include duties to conduct environmental impact assessments or certain reporting or notification procedures. Such legal obligations are sufficiently concrete to be justiciable.

V. Further Regionalize or Globalize Aarhus

The Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters should evolve from a regional to a global multilateral environmental agreement. Alternatively, other regions should consider adopting and ratifying a similar MEA.
(Chapters 2.II and 3.III)

National administrative and judicial review procedures play a key role in the implementation and enforcement of (international) environmental law. Depending on a state's transformation provisions, international environmental law is directly applicable or becomes legally binding through a transformation act and implementing legislation. In addition, or arguably even prior to strengthening international law enforcement procedures, national administrative and judicial procedures have to be empowered to appropriately cope with environmental interests. Irrespective of whether environmental problems have a local, regional, or global scope, the implementation of solutions to these problems takes place at national level first.

Proper implementation of the Aarhus Convention on a global scale, and here the current German law is not understood as a proper implementation of the altruistic dimension of the Convention, empowers local NGOs to feed in and control local decision-making processes that affect environmental interests.

If environmental problems have a regional or global dimension, they can only be effectively tackled through respectively regional or global international environmental agreements. In these cases, compliance control procedures have to ensure that those agreements are appropriately implemented because otherwise the free rider problem emerges again at the implementation stage and prevents the system established from being effective.

One core principle of environmental law is the precautionary principle. Prevention of environmental harm is crucial for effectively dealing with environmental challenges. For example, permit procedures for industrial activities that have harmful effects on human health and the environment are a core instrument of coping with those harmful effects. Providing citizens and NGOs with access to environmental information, participatory rights in decision-making processes, and access to administrative and judicial review procedures at the national level have proven to be decisive factors in the proper implementation of environmental laws and prevention of environmental harms. If the scope of the environmental or health risk of a certain activity is transboundary, at least all potentially affected citizens and NGOs should enjoy the abovementioned Aarhus rights. In addition, the UNECE Espoo Convention on Environmental Impact Assessment in a Transboundary Context and the UNECE Convention on the Transboundary Effects of Industrial Accidents provide relevant international environmental law in this regard, which it might also be important to adopt in other regions or on a global scale.

Once damage has occurred, claims for redress also appear to be best settled by national courts. In a transboundary context, international agreements should ensure that affected citizens have access to local court procedures and that their decisions can be enforced effectively.

VI. Gaps in National Judicial Review

National judicial review procedures should be complemented with international judicial and quasi-judicial review procedures to ensure appropriate enforcement of international environmental law.
(Chapter 2.II)

The review of the enforcement of international environmental law in national courts in Germany and the United States identified several opportunities and constraints. While the analysis could generally support the thesis that national courts fulfill an international function in enforcing international environmental law, the review of

empirical studies indicated that in practice national courts are rather reluctant in this regard. This is also true for cases that were brought under the potentially interesting U.S. instrument for cases with an international scope against private polluters, the Alien Tort Claims Act (ATCA). It gives U.S. federal courts jurisdiction over claims by aliens for "torts committed in violation of the law of nations". However, although ATCA has successfully been used in the field of human rights violations, it has been invoked only on a few occasions to enforce international environmental law in U.S. courts and all of these cases were ultimately rejected.

A systematic analysis came to the conclusion that national courts are primarily responsible for adjudicating disputes, if international environmental law is appropriately implemented by the legislature and applied by the administration. However, this is not always the case and in addition there are several gaps in judicial control. Thus, empirical findings as well as the systematic analysis suggest that there are significant gaps in national judicial control that should be complemented by international judicial and quasi-judicial control procedures to safeguard the enforcement of international environmental law.

VII. Constraints on and Opportunities for the ECJ

Environmental NGOs should have standing at the ECJ to institute cases in the public interest. Lessons can be learned from the ECJ about access procedures, communication and coordination in a multi-level and internationally fragmented judiciary.
(Chapter 2.III)

The ECJ plays a significant role in the multilevel enforcement of environmental law. Due to the high number of mixed multilateral environmental agreements, the ECJ has jurisdiction over a significant body of MEA-implementing EU legislation. One significant constraint on the ECJ is that NGOs do not have standing to bring cases before it in relation to an environmental protection interest. In a recent decision, the Compliance Committee of the Aarhus Convention found that continued limited standing for NGOs might be incompatible with the obligations of the EU under the Aarhus Convention. It remains to be seen if the ECJ law on standing changes in the future.

Despite this constraint, many environmental cases reach the ECJ via the preliminary ruling or the Commission initiated infringement procedure. The infringement procedure is interesting from the point of view of other international law enforcement procedures, because it starts with a non-confrontational communication with the party concerned and only if this is not successful is the case brought to the ECJ. The preliminary ruling procedure provides an example of communication between two levels of judiciaries following the subsidiarity principle. Both initiation of the procedure and the final decision on the case remain in the hands of national judges and thus at a local level that might be most appropriate, especially when value

judgments are to be made. Furthermore, the procedure to enforce judgments of the ECJ proved to be necessary and effective in some environmental cases.

A review of environmental case law showed that the ECJ significantly contributes to the enforcement of international environmental law mostly through enforcing MEA implementing legislation of the EU in cases of mixed MEAs. In several decisions, the ECJ also directly applied international environmental law to its cases. On a few occasions, the ECJ has already decided on issues of competing jurisdictions.

Although the European Union is a special regional economic integration organization and its goals are different from those of the global legal order, it is still a vital example of the necessity and success of administrative and judicial law enforcement procedures on a supra-state level, if supra-state law is actually to be implemented. It has to be noted though that the strict law enforcement regime of the EU is complemented by immense funding programs under the EU's regional policy aimed at further territorial cohesion.

Multi-level legal regimes require communication and coordination between the different levels to ensure that each level fulfills its level-specific function. The same is true for the horizontal plane, i.e. in the case of fragmented international regimes. More research needs to be done on what exactly the level- and fragment-specific contributions should be and how, consequently, jurisdictions, competences, applicable law and procedures are designed. The EU provides a valuable case study.

VIII. Cases for the International Level

Three categories of environmental cases are appropriate for international judicial and quasi-judicial review.
(Chapters 1 and 2 in general, Chapter 2.IV)

International enforcement procedures are beneficial in three categories of cases: Firstly, cases arising from activities of states or non-state actors that cause or contribute to regional or global environmental problems, such as, for example, climate change, transboundary movement and disposal of hazardous wastes, loss of biodiversity, or pollution and exploitation of the world's seas. Secondly, cases arising from activities of states or non-state actors that cause or contribute to local transboundary harm, such as industrial activities causing transboundary air or water pollution. Thirdly, cases arising from activities of states or non-state actors that have a purely local detrimental effect on the environment but cannot be effectively tackled within national jurisdictions, such as illegal resource exploitation or pollution caused by transnational corporations. In all of these cases, such activities must potentially violate international environmental treaty or customary law.

As regards the first category, the analysis highlighted several areas, in which incomplete implementation of MEAs is falling through the cracks in national control

procedures. In the case of the second category, the analysis identified several deficits such as the limited jurisdiction of national courts that render an international backup procedure necessary to provide effective legal protection for affected interests. Conflicts between states or non-state actors over shared natural resources also fall within this category. The third category of cases requires international judicial review because the transnational corporate structure of many companies nowadays prevents effective legal proceedings against these companies in the state of harm and, for example, the home state of the parent company.

Many cases reach international judicial and quasi-judicial bodies, for example the ICJ, WTO, ITLOS, or arbitral tribunals, not as environmental cases but still with a factual background that includes environmental interests. In these international procedures, it is important that affected environmental interests also enter the judicial and quasi-judicial decision-making process and are appropriately treated in compliance with applicable environmental law.

IX. Differentiated View on International Law Enforcement Procedures

It is crucial to differentiate between the types of international law enforcement procedures in order to develop type-specific solutions as to how they should deal with environmental interests.
(Chapters 2.IV, 3 and 4)

Judicial dispute settlement bodies, arbitral tribunals, and non-compliance procedures are inherently different. Their competences and procedures vary greatly and they serve different interests. Whereas the main task of adjudicative bodies and arbitral tribunals today is still arguably the peaceful settlement of disputes between states, adjudicative bodies as standing bodies of international law enforcement are responsible towards the community of their members and for the coherent development of an international legal order. Arbitral procedures are far more flexible and tailored by the parties to the dispute according to their case specific interests. Compliance mechanisms are of a non- or quasi-judicial, non-confrontational, and cooperative nature; they do not settle disputes but control compliance with a specific multilateral environmental agreement. Since resolving international environmental problems is dependent on joint efforts and cooperation, they have been developed as and proven to be more appropriate procedures for the enforcement of international environmental law than purely judicial and confrontational means.

There is no clearly defined relationship as yet between dispute settlement and compliance control. In MEAs both procedures are provided for in parallel and without prejudice to each other. Nevertheless, it is also important to note, that there is no clear-cut difference between dispute settlement and compliance control as dispute settlement can always also be seen as a form of compliance control. Furthermore,

an international court, such as the ECJ for example, can be set up to fulfill both tasks, peaceful dispute settlement and compliance control. Disputes are always created through law by conferring certain rights and obligations on actors. However, as regards the existing bodies of international law enforcement examined here, the following theses show that each of these three types of international law enforcement has its own opportunities and constraints in dealing with environmental interests safeguarded in international environmental law and suggestions for further development have to be tailored accordingly.

X. Regional versus Universal

Regional international law enforcement bodies of all three types outlined above do contribute better to democratic governance for sustainable development than their universal counterparts. Nevertheless, they also still have significant deficits in appropriately accommodating environmental protection interests.
(Chapters 3 and 4)

With respect to the criteria focused on in this study, namely accessibility and fair balancing of affected environmental interests as well as transparency of procedures and reasoning of decisions, regional bodies of international law enforcement have a better record than universal ones. It seems to be easier to agree on progressive international law enforcement mechanisms in terms of transparency and proper dealing with environmental interests within a more homogenous community of states. Nevertheless, with the exception of the Aarhus compliance mechanism, significant shortcomings can be identified in all regional law enforcement procedures examined in this study. In general, it can be said that all international judicial and arbitral bodies with the exception of the human rights courts, mainly serve the protection of economic and resource exploitation interests.

XI. More Communication to Further Coherence of the International Legal Order

There should be more vertical and horizontal communication between judicial, arbitral, and compliance review bodies to further develop a coherent international legal order.
(Chapter 2.IV.E)

As regards interaction in a multi-level system of dispute settlement and compliance review, two thoughts might be worth considering. If national or regional courts have to apply international environmental law or law that derives from a multilateral environmental agreement, they may look to decisions of compliance committees for guidance or even contact a compliance committee with a specific question. If cases

reach the international level, the body in charge should consider deciding only the international legal question at issue and defer as much competence as appropriate to the national courts to have the final say on the case, given that the national court is in a better position to accommodate local interests in a manner consistent with international (environmental) law. In addition, "horizontal" communication, thus communication between international judicial, arbitral, and compliance review bodies, might assist the development of a coherent international legal order and overcome, to some extent, certain difficulties that accompany the fragmentation of international regimes. More research needs to be done to further explore these questions and make concrete proposals for procedural rules safeguarding such communication if deemed necessary.

XII. Human Rights Courts and Environmental Protection

Human rights courts are not environmental courts. They should continue to focus on the enforcement of human rights and protect environmental interests insofar as this overlaps with human rights protection.
(Chapter 3.I)

Human rights courts are both powerful and limited when it comes to the protection of environmental interests. They are powerful because individuals, groups of individuals, and NGOs can institute proceedings against states – in case of the IACtHR only through the Commission – procedures are transparent and open for amici curiae submissions, the courts issue legally binding decisions, and the ECtHR in particular has a good record as regards the implementation of its judgments. The IACtHR and the AfCtHPR are also accessible for indigenous people to enforce collective rights regarding the protection and management of their natural resources. All three regional human rights courts have dealt with cases related to environmental protection. Although this is not their main focus of work but rather a side-effect of human rights protection, the review of the environmental case law has shown that they have issued some landmark decisions in international environmental law.

However, it is important to bear in mind that in all environmental cases before the human rights bodies, environmental protection overlapped with human rights protection. The courts and commissions did not directly apply and enforce international environmental law but the relevant human rights convention. The IACtHR/IAComHR usually applied the right to property or the right to life in environment-related cases. The ECtHR found a violation of Article 8 of the ECHR (right to respect for private and family life) in all industrial pollution cases. The overlap is potentially broader if a human rights convention provides for a human right to a healthy environment. The Protocol of San Salvador to the ACHR and the African Charter explicitly provide for such a right to a healthy or generally satisfactory environment

but neither the IACtHR nor the AfCtHPR have so far directly applied these standards in their decisions. Only the AfComHPR has applied the peoples' right to a satisfactory environment safeguarded in the African Charter in the *Ogoniland* case.

There are some further crucial constraints on human rights courts with regard to the enforcement of international environmental law. Firstly, mere environmental degradation or pollution without a direct effect on human beings or without sufficiently severe effects to qualify as a human rights infringement is not at issue before human rights courts. Since most of the violations of international environmental law do not amount to a human rights violation, the human rights courts can contribute to the (indirect) enforcement of international environmental law only to a very limited degree. Secondly, only the AfCtHPR allows citizens and NGOs to initiate cases in the public interest, and only two African countries have recognized this procedure to date. The ECtHR and the IACtHR require that an individual right of the plaintiff has been violated and that he has suffered damage. Thus ENGOs cannot institute cases in the public interest before the IACtHR and the ECtHR. They may have standing if they were deprived of their own participatory rights and this is what their case is based upon, but they do not have standing solely in the interests of environmental protection, for example, to mitigate climate change. Thirdly, human rights courts provide for legal protection only after damage has already occurred. Through their mere existence, they also have a deterrent effect but there are no procedures to enforce precautionary measures or to prevent an activity from putting the environment at disproportionate risk.

The following recommendations may be considered in order to strengthen the role of the three regional human rights courts in contributing to the enforcement of environmental law. Firstly, the group of potential plaintiffs should be significantly widened at the IACtHR and the AfCtHPR. Individuals and NGOs should have direct access not only to the IAComHR but also to the IACtHR. With respect to the AfCtHPR, it is crucial that more African states ratify the Protocol to the African Charter and make a declaration accepting the competence of the court to receive cases initiated by NGOs to actually make use of the most advanced procedural and substantive law provided for under the African human rights regime. Secondly, with respect to damage the European and the Inter-American human rights court should consider the possibility of ordering a comprehensive cleanup as done by the AfComHPR in the *Ogoniland* decision. Thirdly, following the example of many national constitutions and the African human rights regime, the inclusion of a substantive right to environment in combination with an actio popularis should be considered by all regional human rights systems. Fourthly, the establishment of human rights courts in other regions of the world should be considered.

Although these recommendations are intended to strengthen human rights courts in dealing with environmental protection interests, the human rights courts should not become the future international environmental courts. They should contribute

to the protection of environmental interests insofar as this overlaps with human rights protection. However, there are many breaches of international environmental law that do not involve such severe damages that they qualify as human rights violations. It cannot and should not be the task of human rights courts to ensure judicial review in these cases.

XIII. NGOs versus Private Companies under the OECD Guidelines

The review procedure established under the OECD Guidelines for Multinational Enterprises has significant shortcomings and should be strengthened. In particular, NGOs should be able to appeal decisions of the national contact points to the OECD Investment Committee.
(Chapter 3.IV.A)

The control mechanism established under the OECD Guidelines for Multinational Enterprises was significantly improved in 2000. Since then, NGOs can directly initiate proceedings against companies in alleged violation of the OECD Guidelines before national contact points. However, despite a number of cases filed by NGOs since then, not a single case could be identified as a best practice example. Lack of transparency and inconsistency in decision-making by national contact points are among the main deficits in the procedure. Furthermore, there is not yet sufficient incentive for companies to engage in a meaningful dialogue on the case at issue or to implement the recommendations issued by the national contact point.

Therefore, procedures before the national contact points should become more transparent. The decisions of the national contact points should include detailed reasons and NGOs should be given a right to appeal those decisions to the OECD Investment Committee in order to further the development of a more coherent system of implementation control and give companies more incentives to cooperate in an appropriate manner.

Especially when compared to the rights conferred on private investors under international investment agreements, it becomes clear that states are far more willing to safeguard investment interests than environmental protection interests. This should be changed and safeguards should be more balanced. Countries that signed up to the OECD Guidelines for Multinational Enterprises and those struggling with the negative consequences of foreign investments should accede to the Aarhus Convention. Member states of the OECD Guidelines have gone already half way. The implementation of the Aarhus Convention will strengthen local groups, administrations, and courts to appropriately deal with (foreign) investors and companies and ensure that they truly contribute to sustainable development in the region in question.

XIV. Deficits in Universal International Judicial Dispute Settlement Bodies

None of the universal international judicial dispute settlement bodies as yet adequately contributes to the enforcement of (international) environmental law.
(Chapter 4.I and V)

All universal international dispute settlement bodies have dealt with cases that affected environmental interests; none of them has done so in an adequate manner. These bodies do not yet appropriately contribute to democratic global governance for sustainable development. The analysis of institutional arrangements, access rules, transparency of the procedures, and integration of (international) environmental law into the judgments identified three main deficits: lack of plaintiffs, lack of quality of reasoning and expertise, and lack of transparency.

Firstly, many cases in which international environmental law is infringed do not reach universal judicial and arbitral bodies because the people affected or stakeholders in affected interests may not initiate review procedures. Usually only states may trigger procedures and they rarely do so in the context of an environmental protection interest. Environmental NGOs cannot trigger judicial review procedures before any of the universal international judicial and quasi-judicial bodies. Procedures before the Seabed Disputes Chamber of ITLOS, the PCA, ICSID, and the Kyoto Compliance Committee, however, can be initiated by non-state actors. Among the non-state actors are the International Seabed Authority, the Enterprise, state sponsored and controlled natural or juridical persons engaged in exploration or exploitation activities in the Area (Seabed Disputes Chamber), private companies and investors (PCA and ICSID), and Expert Review Teams (established under the Kyoto regime).

Secondly, if a violation of international environmental law gives rise to an international trial, international environmental law and affected environmental interests are not appropriately dealt with in most decision-making processes. Environmental issues are often highly scientific and technical and the decision-making bodies do not draw sufficiently on amicus curiae support from environmental NGOs or the expertise of independent experts to appropriately identify and consider environmental interests in their decision-making. However, there is a tendency towards more official and unofficial recognition of submissions from environmental NGOs in procedures before universal international judicial and arbitral bodies such as the ICJ (with regard to advisory opinions), ITLOS (with regard to advisory opinions before the Seabed Disputes Chamber) and ICSID.

Thirdly, there is a lack of transparency in arbitral proceedings and proceedings before the WTO dispute settlement bodies. Arbitral procedures are not appropriate to deal with cases which involve environmental protection and thus public interests. Despite public interests being affected, there is no public access to documents and hearings, or – in most arbitral proceedings – even to the arbitral award. Equally, in general, proceedings before the WTO panels and Appellate Body are confidential, which is not appropriate as far as public interests are concerned.

XV. ICJ—Limited Chances and Missed Opportunities

The International Court of Justice does not yet contribute appropriately to the enforcement of international environmental law.
(Chapter 4.I.A)

The ICJ, although the central judicial organ of the United Nations, equipped with broad jurisdiction and even, temporarily, with a special chamber for environmental disputes, has not yet been able to contribute appropriately to the realization of democratic global governance for sustainable development and, more specifically, to the application and development of international environmental law. Its main deficits are the limited accessibility in terms of parties, its very cautious practice in making use of amici curiae and expert advice, and its rather reluctant approach to dealing in an appropriate depth with factual and legal environmental issues relevant to its cases.

The following recommendations may be considered: Firstly, the ICJ should apply more substantive international environmental law to cases that involve environmental protection interests and deal with the legal and factual environmental issues in appropriate depth. It should also contribute to the further interpretation and development of international environmental law. Secondly, the ICJ should include more expertise in its decision-making processes in order to deal with the scientific and technical aspects of affected environmental interests in appropriate depth. It should, therefore, allow environmental NGOs, as key stakeholders in environmental interests, to participate in contentious and advisory proceedings as amici curiae and hear more experts and IOs.

The establishment of a new world environment court is favored over putting in place a new strengthened environmental chamber at the ICJ. However, if states agree that more environmental cases are to reach the ICJ, stakeholders in environmental protection interests should have the right to trigger advisory and maybe even contentious proceedings under clearly defined conditions. As a first step, for example, UNEP and the CSD could have the right to invoke environmental community obligations before the ICJ.

XVI. WTO—The In-Built Bias, Lack of Transparency and Access

The WTO dispute settlement mechanism needs to become more transparent and more accessible to environmental interests.
(Chapter 4.I.B)

The core deficits in WTO proceedings from this research's perspective are that they are mainly confidential, that they can only be triggered by states, and that the status of ENGOs as amicus curiae is not formally recognized. Furthermore, despite

some reasonably positive efforts of the Appellate Body in the *Asbestos* and *Shrimp-Turtle* cases, environmental protection arguments, including those adduced by amici statements in the past, are not considered transparently and weighed against other interests in the WTO judgments.

Consequently, proceedings before the WTO dispute settlement bodies that affect environmental protection interests should be open to the public, including all relevant documents and hearings. ENGOs should be given a right to initiate a WTO dispute settlement in cases where trade liberalization and environmental protection coincide, e.g. regarding the enforcement of rules aimed at the elimination of environment-degrading subsidies. Since states have activated non-state actors to enforce international law elsewhere, especially in the field of investment protection, they may consider giving environmental NGOs limited standing before the WTO dispute settlement bodies or a procedural right to notify the WTO secretariat of possible breaches of such rules by WTO members.

ENGOs should also be formally recognized as amici curiae. It has been argued that enhanced participation by environmental NGOs in the WTO dispute settlement mechanism does add some accountability to its influence, because it makes the procedures more transparent and more open for environmental and social arguments. At the same time, it contributes to ensuring a proper informative basis with regard to factual and legal environmental aspects relevant to the case at issue. Meaningful amicus curiae participation by environmental NGOs, however, presupposes that they have access to the hearings and the submissions of the parties in WTO cases that affect environmental interests. Only then they are able to address crucial factual and legal environmental issues relating to the cases in their amicus briefs. The rules developed by the WTO Appellate Body in the *Asbestos* case can be drawn on in relation to the procedure for amicus curiae participation.

If a dispute is originally more an environmental than an economic dispute, the WTO dispute settlement system is not the appropriate forum. If an economic dispute involves environmental interests, the WTO dispute settlement bodies should build on the decisions in *Asbestos* and *Shrimp-Turtle* and further develop transparent reasoning of its judgments. When they have to balance trade and environmental protection interests as they have to do, for example, in applying Article XX GATT and its chapeau, they may consider the use of a three-stage balancing test, including suitability, necessity, and proportionality.

XVII. ITLOS—Prompt Release of IUU Fishing Fleets and Lack of Access

The jurisprudence of ITLOS does not yet appropriately safeguard the marine environmental and fisheries protection provisions of UNCLOS and related instruments.
(Chapter 4.I.C)

On the one hand, ITLOS can build on a number of features that put it, theoretically, in a good position to safeguard marine environmental and fisheries protection interests. Firstly, UNCLOS and its related instruments provide for a rather holistic regime much oriented at what is now called sustainable development. Thus, the core law applicable to ITLOS cases encompasses many substantive laws aimed at the protection of the marine environment. Secondly, a Chamber for Marine Environment Disputes and a Chamber for Fisheries Disputes have been established to ensure specialized decision-making. Thirdly, the majority of the cases ITLOS has dealt with so far directly or indirectly concerned fisheries and the marine environment. Fourthly, proceedings at ITLOS are transparent. Pleadings, orders, judgments and other relevant documents are publicly available on the ITLOS website. Hearings are also open to the public and have already been transmitted live via a webcast.

On the other hand, the Tribunal does not yet sufficiently safeguard the provisions aimed at the protection of the marine environment and fisheries in its decisions. None of the specialized chambers has been used to date. The most popular ITLOS procedure, the prompt release procedure, has severe flaws from an environmental protection perspective. Environmental NGOs can neither initiate cases, nor contribute to the proceedings as amici curiae. In its recent first advisory opinion, however, the Seabed Disputes Chamber accepted an amicus brief filed by two NGOs and published it on its website with the explicit note that it is not part of the case file.

The prompt release procedure is the procedure most often invoked before the ITLOS because it can be triggered by one state alone. The procedure mainly enables states and currently private companies engaged in IUU fishing to reach a fast and cheap release of their vessels and crews. Damage done to the marine environment cannot be appropriately addressed in this procedure, nor does it have a sufficiently deterrent effect. This procedure should therefore be redesigned to include more environmental protection interests. Also, the ITLOS should make better use of its interpretative space and, for example, accept a vessel monitoring system as part of a bond. Consideration might also be given to establishing an ENGO trigger for judicial review procedures before the marine environment and the fisheries dispute chamber of the ITLOS. These procedures could be considered as a testing ground. For example, if ENGOs detect IUU fishing activities, they could bring such a case to the attention of the fisheries dispute chamber.

Ad hoc arbitrations under UNCLOS have not so far been able to contribute to the enforcement of international environmental law. Rather they pose a challenge to the coherence of international law. Proceedings before the ITLOS are significantly more transparent and thus more appropriate for dealing with public interests such as protection of the marine environment and fair and equitable use of marine resources. 30 states have already accepted the jurisdiction of the ITLOS; more states should consider doing so. This would also safeguard a more coherent development of international law.

XVIII. Limit the Influence of International Arbitral Tribunals

International arbitral procedures are not appropriate for dealing with environmental protection interests. Their influence on cases that affect the environment needs to be limited.
(Chapters 3.II and 4.II)

Historically, arbitration is at the root of international dispute settlement. The number of international arbitral proceedings far exceeds the number of cases under judicial dispute settlement and the case load is still rising. Due to its inherent characteristics such as the influence of the parties on the process and applicable law, confidentiality, and the ad hoc nature and composition of the tribunal and its decisions, arbitration is the wrong procedure to deal with public interests in general and environmental protection interests in particular. Therefore, its influence in environmental matters should be limited and not broadened as has been suggested by some scholars.

In the field of international investment law, states have agreed to confer rights on private investors to bring cases against states before arbitral tribunals, such as those under ICSID. Thus, states have shown that they are able to give rights to non-state actors to safeguard the enforcement of international law in quasi-judicial proceedings in the field of investment protection. If there is sufficient political will, they could also do so to protect environmental interests. In practice, investment arbitration poses an additional challenge to national administrations and courts in enforcing environmental law. More and more, investors use those arbitral proceedings to claim that environmental protection measures ordered under national procedures amount to expropriation and unfair treatment. Either through changes in admissibility rules or substantive rulings of arbitral tribunals, these cases have to be removed from the tribunal's dockets. They abuse the system put in place and do not further sustainable development. Arbitral tribunals are not in a position to appropriately deal with public, including environmental, interests.

Under several fora for investor-state disputes such as NAFTA, CAFTA-DR, and also ICSID, notable efforts have been undertaken to allow for amicus curiae participation and, with respect to CAFTA-DR, also making documents and hearings public. These are important steps that must be welcomed. However, the ultimate goal should be to remove cases in which local administrative or judicial bodies properly enforced environmental law against investors from the sphere of influence of international arbitral tribunals.

XIX. Strengthen Compliance Committees under MEAs

Compliance committees under MEAs can play a crucial role in safeguarding compliance with international environmental law. They should be further strengthened and

developed following the example of the compliance mechanism established under the Aarhus Convention.
(Chapters 3.III and 4.III)

Compliance control procedures have been developed under several MEAs with a view to the special aspects of the implementation and enforcement of international environmental law revealed in the research on compliance theory. The two main assumptions in this context are that the effectiveness of an international environmental regime requires cooperation of the highest possible number of states and that the reason why many states do not appropriately implement international environmental law is not lack of will but lack of resources. Consequently, an effective compliance review mechanism needs to be non-confrontational, enhance the cooperation of the party concerned at all stages, reveal the origins of non-compliance, and address them with measures of both "carrots" and "sticks" as deemed appropriate for the case at issue.

The compliance mechanism established under the Aarhus Convention is the most active and, in terms of democratic governance for sustainable development, especially as regards accessibility, participation, and transparency, the furthest developed international compliance review procedure. Citizens and NGOs can file communications directly with the compliance committee. The whole procedure is public and well documented online. Members of the compliance committee are independent and serve in their personal capacity. Decisions of the compliance committee highlighted and addressed specific cases of non-compliance and made recommendations on coming into compliance, without interfering too much with national decision-making powers. Both carrots and sticks have been used to hold parties concerned responsible in cases of non-compliance, at the same time pointing out ways to gain financial and capacity building support in order to tackle the shortcomings identified.

Two characteristics of the compliance mechanism established under the Kyoto Protocol are innovative when it comes to the implementation and enforcement of international environmental law: the non-state trigger of the compliance review procedure via ERTs and the differentiation between a facilitative and an enforcement branch. All six questions of implementation considered on the merits so far have been brought before the Committee via the ERTs. Expert advice also played an important role during the procedures before the enforcement branch since questions of implementation arising under the Kyoto Protocol are highly technical. The facilitative branch has not yet been used as originally envisaged, but facilitative measures have been undertaken by the ERTs. The enforcement branch has dealt with all questions of implementation in a transparent, well-reasoned, and timely manner. Core documents are available on the Kyoto Protocol's website. Hearings are public and can be followed via a webcast. The main weakness of the Kyoto compliance mechanism is that the Committee has no timely way of addressing a case like the

Canadian case where the Canadian government openly declared early on that it is not planning to reach its emission reduction targets.

All MEAs should follow the example of the Aarhus compliance mechanism and establish compliance procedures that are equally widely accessible for citizens and NGOs, transparent with regard to documents and hearings, and independent as regards the members of the compliance committee. To further enhance the incentive of the parties concerned to cooperate and actually solve cases of non-compliance, if these are based on lack of resources, the supportive measures that can be ordered by a compliance committee and endorsed by the MOP could be linked to funds established under the relevant MEA, UNEP, the GEF, or regional development banks, to further the goals of the Convention in question or environmental protection in general. An action plan developed by the party concerned, tailored to its specific needs and approved by the compliance committee and the MOP, could determine which concrete measures should be financed at a local level through those funds in order to come into compliance with the convention.

XX. A New World Environment Court

A new World Environment Court is a crucial institutional cornerstone of democratic global governance for sustainable development.
(Chapter 4.IV)

If states are to take their obligations under existing multilateral environmental agreements and customary international environmental law seriously, they urgently need to create an international judicial institution that oversees and supports the implementation of and compliance with those laws. The study has identified several gaps and deficits in national adjudication and international compliance review mechanisms with regard to the enforcement of international environmental law and thus the need for international judicial control with respect to three categories of environmental cases as outlined in thesis VIII.

A concrete proposal for a new World Environment Court (WEC) has been developed. The proposal covers the institutional setting of a WEC and several concrete features responding to the special characteristics of international environmental law and its implementation and enforcement. The WEC is envisaged as a specialized court, focused on the implementation and enforcement of international environmental treaty law as well as customary law, and linked to a World Environment Organization built on UNEP. It should be accessible via five types of procedures: advisory procedures, direct actions, and infringement, preliminary ruling, and enforcement procedures. States, supranational organizations, and UN entities should be able to request advisory opinions. Direct actions should be triggered by states, ENGOs, and individuals. Infringement procedures should be triggered by compliance

committees or a World Environment Commission. Environmental NGOs could inform such a Commission or compliance committees about possible cases for an infringement procedure. Judges of the national judiciaries could request preliminary rulings or non-binding advisory opinions regarding a concrete case. If judgments of the WEC are not complied with, an enforcement procedure could be triggered, for example, by a World Environment Commission. Proceedings before the WEC should be open for amicus curiae participation and take advantage of expert advice; they should be characterized by a transparent procedure and well-reasoned decision-making. The consequences and remedies applicable by the WEC should comprise "carrots" and "sticks", including capacity building measures, injunctive relief, compensatory damages, and penalty payments. Penalties should be paid to a compliance fund to finance supportive measures.

None of the features listed above is new in international law enforcement. It is a combination of instruments and measures which already exist at the European Court of Justice, regional human rights courts, and compliance committees under MEAs tailored to the specific needs of dealing with the enforcement of international environmental law. A WEC protecting the enforcement of international environmental law is an urgently needed counterweight to existing international judicial and arbitral bodies that mostly protect economic interests. Such a judicial institution would not block development and industrial activities but ensure that development is sustainable and actually serves everyone's interests.

Appendix

Synthesis Chart: Key Characteristics of Analyzed International Judicial and Quasi-Judicial Bodies

	General Inf		Jurisdiction		Inst Arr	Access					Transparency		
	establ/ created	cases	gen/ spec	comp/ opt		P/D	3rd party	amici curiae rules	amici curiae case law	exp	hearings	docs	web
Courts													
ICJ	1945/1946	121 cont 26 ad[i]	g	opt comp[ii]	*Env Ch*[iii]	S S, UN org[iv]	S S, UN org	IGO *INGO*[v]	–	x	x	x	x
WTO	1994/1995	423[vi]	s	comp	AB	S	S	–	*NGO*[vii]	x	–	–	–
ITLOS	1994/1996	18 cont 1 ad[viii]	s	opt comp[ix]	*2 sp Ch*[x] SeabDCh	S,[xi] *ISA, non-S*[xii] S, *ISA, non-S*	S S, ISA, non-S	IGO IGO	 *NGO*	x	x	x	x
ECtHR	1953/1959	>12.000	s	comp	–	I, S	I, S	–	x	x	x	x	x
IACtHR	1979/1979	120[xiii]	s	comp	–	IAComHR,[xiv] S	S	x	x	x	x	x	–
AfCtHPR	2004/2006	1 cont 0 ad	s	comp	–	I, NGO,[xv] peopl, S, IGO, AfComHPR[xvi] AU, AU org, Af orgz[xvii]	I, peopl, S	x[xviii]	–	x	x	x[xix]	–
Arbitral Tribunals													
PCA	1899	57[xx]	g/agr	opt	Env Rules	S, IO, priv p	agr	–	–	agr	–[xxi]	–	–
ICSID	1966	331[xxii]	s	comp/opt	–	S, priv inv	agr	x[xxiii]	x	agr	–[xxiv]	–	–
ICEAC[xxv]	1994	13	g/agr	opt	–	I, NGO, S, gov, . . .	agr	–	-	agr	–	–	–
NAFTA	1994	42	g/agr	opt	–	S, priv inv	agr	x	x	agr	–	–	–
DR-CAFTA	2006	4	g/agr	opt	–	S, priv inv	agr	x	x	agr	x	x	x
Compliance Committees													
Kyoto CC	2005/2006	7	s	*comp*	–	S, ERT	–	x	–	x	x	x	x
Aarhus CC	2002/2003	59[xxvi]	s	*comp*	–	I, NGO, S	–	–	–	x	x	x	x
WEC													
WEC	–	–	s	comp/opt	cont ad	S, I, NGO, CC, WECom S, UN org	S S, UN org	x	x	x	x	x	x

Appendix (*cont.*)

Abbreviations

ad = advisory	gen/g = general	opt = optional	priv inv = private investors
agr = agreement	gov = governmental bodies	org = organ	priv p = private parties
cont = contentious	I = individual	orgz = organization	S = state
D = defendant	Inf = Information	P = plaintiff	spec/s = special
establ = established	Inst Arr = Institutional Arrangements	peopl = peoples	WECom = World Env Commission

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[i] As of July 2010.

[ii] So far 66 states committed to the compulsory jurisdiction of the ICJ as provided for under Article 36(2), mostly with restricting conditions.

[iii] Established in 1993, never used, not reconstituted since 2006.

[iv] General Assembly, Security Council, other organs of the United Nations and special agencies authorized by the General Assembly, Article 65 ICJ Statute.

[v] With respect to advisory proceedings, INGOs are explicitly mentioned since 2004 in Practice Direction XII(2) and (3); however these rules do not confer an amici curiae status on them.

[vi] As of March 2011.

[vii] But so far WTO AB or panel have never actually considered any unsolicited submission.

[viii] As of September 2011.

[ix] As of September 2011, 30 out of 162 parties to UNCLOS had chosen the ITLOS as a possible forum for the settlement of disputes, often with restricting conditions.

[x] ITLOS formed the Chamber for Marine Environment Disputes and the Chamber for Fisheries Disputes in 1997, none of them has been used so far.

[xi] Some openness for non-state entities according to Article 20(2) of the ITLOS Statute, but requires further agreement.

[xii] Only before the Seabed Disputes Chamber.

[xiii] Until 2009.

[xiv] Individuals, groups of individuals, and NGOs may directly approach the IAComHR.

[xv] NGOs and individuals may take contentious cases to court only if they fulfill the conditions of Articles 5(3) and 34(6) of the Protocol to the African Charter.

[xvi] Rules of AfComHPR allow for an actio popularis.

[xvii] If recognized by the AU.

[xviii] Explicitly only with regard to the AfComHPR, participants in procedures before the AfComHPR may be participants before the AfCtHPR as well when the case is referred from the Commission to the Court.

[xix] So far only case summaries are available at the website.

[xx] According to 109th Annual Report of 2009.

[xxi] In two recent cases hearings were held in public.

[xxii] Registered cases by the end of 2010. Significantly rising case load since 1997.

[xxiii] At the discretion of the respective ICSID Tribunal.

[xxiv] Tribunal may allow other persons to attend all or part of the hearings after consultation with the Secretary-General, unless either party objects, Rule 32(2) of the Arbitration Rules.

[xxv] Non-governmental court, issued six consultative opinions and no arbitral award yet.

[xxvi] As of May 2011.

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